

THE LEGITIMACY OF U.S.-LED INTERVENTION AGAINST ISIL*

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Abstract

Since the significant rise of the Islamic State of Iraq and the Levant (ISIL) in 2014, the extremist group has disrupted the regional stability within Middle Eastern countries. Indeed, the organization posed threat towards international peace and security regionally and internationally. Ever since its emergence, the U.S. has played an important role in leading the military intervention towards the terrorist group. However, such intervention is not being legally justified because there is no particular United Nations Security Council (UNSC) resolution that was passed regarding the intervention. This research provides an analysis of the logic in justifying the intervention based on the current international legal frameworks and norms. The overall argument is that U.S. action in conducting intervention is illegal yet it is legitimate because it runs under the framework of the international law as well as the international norms.

Intisari

Sejak naiknya Negara Islam Irak dan Syam secara signifikan pada tahun 2014, grup ekstremis tersebut telah mengacaukan stabilitas regional Timur Tengah. Tidak dapat disangkal bahwa organisasi tersebut merupakan sebuah ancaman perdamaian dan kedamaian internasional dan regional. Sejak munculnya Negara Islam Irak dan Syam, Amerika Serikat telah memegang peranan penting dalam menjalankan intervensi militer terhadap grup terorisme tersebut. Akan tetapi, intervensi tersebut tidak dapat dibenarkan secara hukum karena tidak adanya resolusi Dewan Keamanan PBB yang menyetujui intervensi tersebut. Riset ini menganalisis logika-logika dalam membenarkan intervensi tersebut berdasarkan kerangka-kerangka hukum dan norma internasional. Secara keseluruhannya, tindakan Amerika Serikat dalam melakukan intervensi dapat dianggap ilegal, tetapi dapat dibenarkan karena tindakan tersebut dijalankan berdasarkan kerangka-kerangka hukum dan norma internasional.

Keywords: international law, military intervention, United Nations, Security Council, terrorism, anti-terrorism.

Kata Kunci: hukum internasional, intervensi militer, Perserikatan Bangsa-Bangsa, Dewan Keamanan, terorisme, anti-terorisme.

* Preferred Citation Format: Tobing, D. H. (2015). The Legitimacy of U.S.-Led Intervention Against ISIL. *J.G.L.R.*, 3(1), 36-44.

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A. Introduction

The rise of ISIL in Iraq and Syria can be traced back into the year of 2004 when they significantly emerged as an umbrella network for several jihadi organizations that continued waging a terrorist-guerilla campaign against the United States, its allies and the Shi'ite population in the region (ITIC, 2014). The establishment of ISIL was actually originated from the branch of Al-Qaeda in Iraq, led by Abu Musab al-Zarqawi by calling their group as the Al-Qaeda in Mesopotamia (Malm, 2015). ISIL is the richest terrorists group ever formed with total more than \$1 billion assets. Its financial revenue mainly comes from black market oil trading, illegal drugs, and taxes (RT, 2014). In this research, I indicate that the military intervention done by the U.S. government is legitimate due to that fact that it mostly upholds the value of the UN charter. Nonetheless, international humanitarian law is fully applicable in this matter because the war against ISIL, which occurred in Iraq and Syria, may be categorized as International Armed Conflict (IAC), which involves two different ownership of sovereign territory. Furthermore, this armed conflict also involves the U.S. government, on how U.S. is trying to take into force its order of War on Terrorism, by strongly condemning the act of terrorism and conducting intervention against ISIL in the middle east. In order to support the research's stance in this paper, the research adds two additional supporting arguments. Firstly, this research argues that the intervention made by the U.S. is legitimate because apart from the intervention itself upholds the value of UN charter recognizing and upholding the value of human rights, the U.S. acts beneath the International Humanitarian Law's moral obligation of R2P. And secondly, this research argues that U.S.

intervention is legitimately justified because it has fully implemented the key provision of the International Humanitarian Law, based on the Geneva Conventions.

B. The Evolving Concept of Legitimacy

The word "Legitimacy" has a very broad context in international community of whether or not some actions that might be considered as legitimate or not. Currently, there are two perspectives of the word "legitimacy", domestic and international legitimacy. At one point, domestic legitimacy comes from the idea that its legitimacy comes from the acknowledgement of its people towards the government product of both national and foreign policy (Clark, 2005:185). Yet, the international legitimacy, see that there should be a consensus within the international community to conduct such action or produce such policy. It is impossible for us to "mix match" these two understandings of legitimacy, and of course there was a huge debate between these two contexts of legitimacy. A huge debate arrived when military intervention can only be done if there is a resolution coming from the United Nations Security Council (UNSC), as only Security Council was the only body that could provide the unique legitimacy that one needs to act over Iraq (Annan, 2002:1) similar idea also applies in the case of U.S. intervention against ISIL. Kofi Annan mentioned about "unique legitimacy", but it is unclear about what a unique legitimacy is. Question may rise that, "is unique legitimacy is a form of legitimacy coming from the support only of Permanent-5 UNSC members and a little of 'rotating' representation of the non-permanent members of UNSC?" Even currently there is a big debate whether or not the UNSC should be reformed due to its small number of representations if we would like to recognize of what so called

consensus building on international legitimacy.

In the case of U.S. military intervention, such action that has been done by the government of U.S. cannot be perceived from the perspective of pure international legitimate consensus building. As we see that there is only a little possibility to hold an international legitimacy, even the UNSC cannot make this dream come true. U.S. military intervention is a combination of domestic legitimacy, that American people that legitimize and consent U.S.' action and international legitimacy where U.S.-led coalition also supported U.S.' action in leading the intervention and as they have been doing similar actions. The concept of international legitimacy argues that such military action might enjoy its legitimacy, if supported by a democratic coalition of the willing, even though it has been authorized by the UNSC or not (Clark, 2005:187). Furthermore, if a humanitarian crisis creates *consequences significantly disruptive of international order* that would likely soon create an *imminent threat* to the acting nations then states are most likely rising to an urgent need to act in individual and collective self-defense (Koh, 2013:1). In this case, US-led coalition military intervention against ISIL is not launching pre-emptive attack, but self-defense.

There is only one problem pointing out towards the government of U.S. when there is no resolution produced by the UNSC regarding its authorization of military intervention against ISIL and that has been a long problem even since U.S. intervention in Kosovo. But let us think realistically, even if there is a proposal to the UNSC regarding the military intervention, most likely the proposal would be vetoed by China and Russia, learning from the experience that Russia was supporting Al-Assad's regime. Yet, are we

going to wait for an impossible or most likely to be vetoed resolution of the UNSC regarding the authorization of military intervention for a legal intervention and how many more lives of innocent civilians are going to be sacrificed? If the UNSC fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, it is unrealistic to expect concerned states may rule out other means to meet the gravity and urgency of that situation (ICISS, 2001: XIII).

C. The Responsibility to Protect and Intervention

The doctrine of Responsibility to Protect (R2P) has brought a new perspective in current international order. Dilemma has risen between state sovereignty and human rights value. The current global order has recognized that R2P can be applied in the conditions where state is unwilling or unable to protect its citizens from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing', the principle of non-intervention in the internal affairs of other states yields to the international R2P (Massingham, 2009:804). Based on this condition in most cases where the R2P is applied, it is on the condition where state is unwilling or failing to fulfill its human rights provision towards the population and there for international intervention under the R2P came to replace or assist the role of the state. In this sense in ISIL case study, the usage of R2P is differently perceived because ISIL is not a state and it is an outer organization that poses a threat towards state. In this condition, this research brings a new concept where U.S.-led coalition military intervention against ISIL is another form of R2P, yet, with a different concept.

Furthermore, there is a gap between military intervention and the norm of R2P.

Many arguments address that military intervention cannot be justified under R2P because it is not being covered under the framework. Military intervention is argued as biased towards political will and interest of any particular country; yet, the doctrine of R2P is an obligation of the international community. R2P in post-2015 is more about good governance rather than military intervention (Chandler, 2009:35). What good governance means is that the purpose of R2P is to assist state to achieve the standard of good governance with purpose that if state is failing to protect its people, the international community must be prepared to take collective action to assist state to protect the populations (Old concept of R2P). However, this argument is not always rights. The International Commission on Intervention and State Sovereignty allowed a broader spectrum of actions that will permit military intervention such as serious and irreparable harm related to human beings, or imminently likely to occur, and large scale loss of life or large scale of ethnic cleansing (McCormick, 2011: 571). And in 2005, the World Summit has approved military intervention in limited circumstances of genocide, war crimes, ethnic cleansing and crimes against humanity and as it has been stated before, ISIS posed a threat against humanity and also has been accused of crimes against humanity.

In this matter the R2P is certainly applicable, because the government of Syria can be defined as a 'failed state' with the fact that Syrian government has failed to maintain its responsibility and obligation towards its citizen in security matter. A question might be raised after the assumption in defining how and why simply the matter of security of a country can create a view over a state as a failed state. Currently, ISIS is making full use of

the civil war in Syria to search for support of its emergence. Borrowing the realist's perspective in international relations, on how security of a state is paramount, this leads to the perception that state acknowledged the behavior of 'self-help', defined as a state's dependency on its own capacities and resources rather than external support, in order to ensure security and survival (Heywood, 2011:60). In this case, Syrian government has failed to maintain one most crucial part of statecraft, and this is why it can be argued that, to some extent, it may be considered as a failed state. As the New York Times argues, failed states might that have lost chunks of territory to warlords, and that can no longer track or control their borders send an invitation to terrorists (NY Times, 2005) Moreover, what justified American airstrikes in Syria might relate to Ambassador Samantha Power's letter to Ban Ki-moon in regards to the Article 51 of UN Charter (Lederman, 2014). As she emphasized;

"States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."

With this letter being sent to the UN Secretary-General, he replied with no opposing statement at all. Ban Ki-Moon responded to this letter by replying that;

"I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government."

Seeing that that Syria is not fully aware upon the rise and effort in fighting ISIL and departing from the fact that Syrian government has met its failure to maintain domestic peace and security towards its citizen, it is different in comparison towards Iraq case, which called for the troops to help them in fighting ISIL (Botelho et al., 2014). When an official party of state declared consent upon intervention, there is no problem with legality or legitimacy of intervention. As noted by the International Court of Justice in the case of Nicaragua (ICJ, 1986), that emphasized;

'would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State - supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.'

However, when there is a state that does not call for intervention or allow or oppose intervention, then the status of intervention is being questioned.

In the case of Syria, the responsibility of protecting Syrian citizens has moved away one step further, which now, international community may do actions based on moral responsibility of the

people, and in this case, the U.S. government has upheld the value of moral responsibility by taking into implementation the UN charter, under the preamble, article 1 verse 3, and article 55 (c). By recognizing and upholding the value of the UN stated under its charter, the U.S.-led intervention cannot be easily justified illegitimate and a violation towards international law. Other than that, the action of humanitarian intervention, which taken by the U.S. government is also hardly concluded as baseless action because in 2005, the United Nations Security Council has adopted a resolution 1618, with emphasis on (1) condemning without any reservation and in the strongest terms the terrorist attacks taking place in Iraq, and regards any act of terrorism as a threat to peace and security, (2) preventing the transit of terrorist group to and from Iraq, arms for terrorists, and financial support to terrorists, and (3) strengthening regional cooperation of regional countries in preventing the act of terrorism (Khatteeb, 2014). In this sense, based on the resolution, the action taken by the government of the U.S. is fully justified and in line with the resolution made by the UN Security Council. Apart from the resolution of 1618, the UN Security Council has also adopted resolution in 2014, which directly emphasizing to the case of ISIL emergence in Iraq and Syria. Focusing on clause 1 and 5 of UN Security Council resolution 2170, it states on clause 1 that they strongly condemn the act of terrorism by ISIL and its violent extremist ideology, as well as, its abuses and violation towards human rights and international humanitarian law, and clause 5, the clause emphasizes on seeking cooperation among all member countries to fight against ISIL (United Nations, 2014).

In UN charter article 2(7), it seems that it referred to the authorization of UN

Security Council as the only legal institution that gives legitimation on the launch of humanitarian intervention. However, referring to UN charter article 51, which emphasizes on the possibility of individual or collective self-defense, arguably in the book of Public International Law by Tim Hillier, it is stated that a third state may lawfully come to the aid of an authenticated victim of armed attack provided that the requirements of a declaration of attack and a request for assistance are complied with (Hillier, 1998). In the case of Syria where the government does not request or stay unwilling to cooperate in destroying ISIL, it can be argued that U.S. intervention against ISIL in Syria is based upon the request of self-defense by Iraqi government, because the consequence of ISIL emergence in Iraq and its spread in Syria has posed a threat towards Iraqi government and disrupt the stability of Iraq.

In order to justify the intervention against ISIL in Syria, it is important to take upon the concept of acquiescence. In this case there is no clear opposing statement or clear stance upon the intervention in Syria, therefore the customary international law on acquiescence can be applied in this matter. It is because in the international politics, states might admit that their action is unlawful but justify this on the grounds that it is the only means to prevent or end genocide, mass murder and ethnic cleansing, therefore the test of collective legitimation would be how far such actions were approved or acquiesced in by wider international society (Wheeler, 2000). On a report by Danish institute of International Affairs on Humanitarian Intervention: Legal and Political Aspects commissioned by the Danish Government recommended the adoption of the policy in which in extreme cases, humanitarian intervention might be

necessary and justified on moral and political grounds even if there is a lack of UN Security Council authorization. In the intervention against ISIL, U.S. does not act unilaterally as it did aftermath the War on Terror foreign policy was megaphoned. In this case, U.S. acts multilaterally that involved the presence of other military participation from United Kingdom, Australia, etc.

Moreover, elaborating on the fact that the action that has been taken by the U.S. government is protected under the provision of international humanitarian law's R2P, it is regulated under the first pillar of the principle that explains, the activation of R2P when there are genocide, war crimes, crimes against humanity and ethnic cleansing. In the case of ISIL emergence in Iraq and Syria, the act of terrorism cannot be categorized as genocide, war crimes, or ethnic cleansing. However, the UN Security Council has declared a statement that said (MacDiarmid & Park, 2014), "Widespread or systematic attacks directed against any civilian populations because of their ethnic background, religious beliefs or faith may constitute a crime against humanity." And by this it is arguable that ISIL act of terrorism in Iraq can be categorized as crimes against humanity, and thus U.S. intervention can be legitimized under the principle of R2P due to the reality that ISIL issue is under the condition of overwhelming humanitarian necessity.

Based on the elaboration of facts explained above, it is also to conclude that U.S.-led intervention in the Middle East is far away defined as military aggression. It is because aggression in the international law is defined as the use of force by one state against another, not justified by self-defense or other legally recognized exceptions (Ratner, 1999). This is also to

say that even until today there is no claim of against the intervention towards ISIL. Moreover, as it has been explored before, U.S. intervention follows the rule of collective self-defense justification. Basically, the intervention is not merely an initiative of U.S. in order to fulfill its strategic interests; yet, it has come to a necessity to eliminate the crimes against humanity action by ISIL. U.S. action is not only an individual action, but it is a form of multilateral action, it also meant that it gains support from the international community. As the definition of aggression is state conduct that either initiates war against another state or brings about a situation in which the victim is (or may be) driven to war, then U.S. action does not falls under this category (Dinstein, 2012).

D. Concluding Remarks

As a conclusion, this research justifies the act of humanitarian intervention by the government of U.S.-led coalition against ISIL in Iraq by saying that that it is morally responsible and legitimate due to the fact that it is upholding the values and principles of the Norm of R2P, UN charter, as well as, UN Security Council resolution. However, not to mention whether or not the action is illegal or legal, the author sees that by the existence of UN charter article 51 and the unwillingness of the Syrian government to deal with the emergence ISIL, this opens a possibility of the international community to build their own legitimacy in responding towards this issue. Collective self-defense is also taken into the main justification in this sense due to the request of the Iraqi government for intervention because they have been firstly targeted by the ISIL. Plus, additionally in this case of intervention against ISIL, U.S. are not deploying troops to direct attack the ISIL group, however, they focused on an offshore balancing strategy in which

U.S. should primarily transfer its responsibility of regional security to its allies in the Middle East and persuades them to balance the Islamic hostile forces, as it would be helpful to avoid the Islamic sentiments (Bo, 2013:82-83). Lastly, as it does not involve in direct combat troops against ISIL, U.S. only focus on arming or giving assistance towards the Middle Eastern troops in combatting ISIL, airstrikes, and naval power.

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