

## **INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS IN THE CONTEXT OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW**

**Lawyer lecturer Valentin-Stelian BĂDESCU\***, Ph.D.

Bucharest Bar

Romanian-German University, Sibiu

**Lawyer Cosmin IORDACHE\*\***

Bucharest Bar

*The 1<sup>st</sup> and 2<sup>nd</sup> Additional Protocols introduced a new rule which prohibits attacks against works and installations containing dangerous forces, even if they represent military objectives, because those dangerous forces could have a negative impact on civilians. It is not very sure that these rules became a part of the customary law, but practice shows that states are aware of the considerable risks which would emerge. As a consequence, states recognize that, in any armed conflict, it is necessary to take special precautions in order to avoid releasing these dangerous forces and not cause any threats among civilians. According to the two protocols, this requirement of taking precautions is applicable to any kind of armed conflict.*

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### **International armed conflicts**

The 1<sup>st</sup> Additional Protocol encoded pre-existing rules of customary international law, but it has also build the foundation for a new customary rule. The collected practices prove the profound impact created by the 1<sup>st</sup> Additional Protocol, not only regarding international armed conflicts, but also concerning non-international armed conflicts.

The fundamental principles of the 1<sup>st</sup> Additional Protocol are widely accepted, even more than the number of ratifications suggested and it has become clear that, due to practice, there are numerous customary rules

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\* e-mail: [valentinbadescu@yahoo.com](mailto:valentinbadescu@yahoo.com)

\*\* e-mail: [jordache\\_constantin@yahoo.com](mailto:jordache_constantin@yahoo.com)

identical or similar with rules from treaties. As an example, we can point the principle of differentiation between civilians and combatants or between civilian goods and military objectives; the interdiction of non discriminatory attacks; the obligation to take all precaution measures before an attack; the obligation to protect the personnel and goods related to humanitarian assistance; prohibition to attack unprotected localities and demilitarized zones; prohibition of starvation; prohibition to attack the civilians goods which are necessary for survival, prohibiting misuse of the emblems and the prohibition of perfidy; obligation to respect the fundamental guarantees enjoyed by civilians; the obligation to search for missing persons and the obligation to offer specific protection measures for women and children.

### **Non-international armed conflicts**

In recent decades, there has been significant development of a practice regarding the protection granted by the international humanitarian law. This ensemble of practices has influenced in a decisive way the forming of customary rules applicable in non-international armed conflicts. Like the 1<sup>st</sup> Additional Protocol, the 2<sup>nd</sup> Additional Protocol had a significant effect over this practice, and that is why some of its provisions are considered to be a part of the customary international law.

As an example of rules whose customary character was established and which have a correspondent in the 2<sup>nd</sup> Additional Protocol's provisions: prohibiting attacks against civilians; the obligation to respect and protect medical and religious personnel, medical units and transport, prohibition of attacking civilian goods necessary for survival; the obligation to respect the fundamental guarantees enjoyed by civilians; the duty to seek, to respect and protect the sick, wounded and shipwrecked; the duty to seek and to protect the dead; the obligation to offer specific protection measures for women and children.

However, the most important contribution of customary international humanitarian law in regulating armed conflicts resides in the fact that this law goes even further than the provisions of the 2<sup>nd</sup> Additional Protocol. Actually, the practice has instituted an important number of customary rules which are even more detailed than the provisions from the 2<sup>nd</sup> Protocol. In addition, customary rules cover important gaps in conventional rules on internal conflicts. Thus, the 2<sup>nd</sup> Protocol contains only summary provisions regarding the management of hostilities. Article 13 states that: "the civilian population, as well as civilians, will not form the target of attacks (...), unless they participate directly to hostilities and the attacks will be conducted only during their participation". The 2<sup>nd</sup> Protocol does not contain any rule or specific definition referring to the principle of differentiation or proportionality.

The gaps in the regulations on management of hostilities were still largely covered by state practice, which has led to the creation of parallel rules with those from the 1<sup>st</sup> Additional Protocol, but applicable as customary rules in non-international armed conflicts. These rules cover the basic principles of hostilities management and include rules regarding the protected goods and persons, as well as rules over the specific methods of war.

Similarly, the 2<sup>nd</sup> Additional Protocol contains only one very general provision regarding humanitarian assistance destined for civil population. Article 18, par. 2, states: "when the civil population is affected by deprivation due to the lack of those supplies which are indispensable for survival, (...) actions of assistance must be taken in favor of the civil population". Unlike the 1<sup>st</sup> Additional Protocol, the 2<sup>nd</sup> Protocol does not contain special provisions to impose the protection of the personnel and goods destined towards humanitarian assistance, and not even an obligation to facilitate conditions to assure the free movement of personnel and goods in order to provide a proper humanitarian assistance. These requirements are crystallized in the customary international law applicable to international and non-international conflicts, based on practice. It has to be underlined that the Additional Protocols requires the necessity for consent from the parts in order to deploy operations of assistance, but the great majority of practices do not mention this, although it is obvious that a humanitarian organization cannot act without the consent of the interested part.

If it is established that if the civil population is threatened by starvation and a humanitarian organization fulfills the impartiality and non-discriminatory conditions, the part cannot refuse the assistance. The consent cannot be refused over arbitrary reasons, but the practice recognizes that the part can exert a control over the operations of humanitarian assistance, and the personnel has to respect the internal legislation, especially regarding territory access and safety rules.

### **Some conceptual clarification**

Because practice and doctrine are ambiguous, there is a need for a terminological clarification for the notions of „combatant” and „civilian”, especially in non-international armed conflicts. Regarding the management of hostilities, the members of opposing armed groups are considered either members of armed forces, or civilians. It is not clear if the members of opposing armed groups are civilians who lose their protection against attacks because they participate directly to hostilities or if they can be attacked directly because of their quality. This lack of clarity is reflected in the conventional law. For example, the 2<sup>nd</sup> Additional Protocol does not contain

the definitions of civilians and civilian population, although these notions appear in many provisions. The subsequent treaties applicable in non-international armed conflicts appeal in the same way to these notions, without offering any definition.

Another domain of uncertainties regarding international and non-international armed conflicts is created by the lack of definition for „direct participation in hostilities”. The loss of protection against attacks is evident in case a civilian uses weapons or other methods to commit acts of violence. On the other hand, a significant part of the states’ practice does not provide enough information regarding how „direct participation” should be interpreted, showing that the evaluation will be made from case to case and that the direct participation of a civilian in hostilities has the consequence of losing protection against attacks.

*A few aspects regarding hostilities management*

The 1<sup>st</sup> and 2<sup>nd</sup> Additional Protocols introduced a new rule which prohibits attacks against works and installations containing dangerous forces, even if they represent military objectives, because those dangerous forces could have a negative impact among civilians. It is not very sure that these rules became a part of the customary law, but practice shows that states are aware of the considerable risks which would emerge. As a consequence, states recognize that, in any armed conflict, it is necessary to take special precautions in order to avoid releasing these dangerous forces and not cause any threats among civilians. According to the two protocols, this requirement of taking precautions is applicable to any kind of armed conflict.

Another rule introduced by the 2<sup>nd</sup> Additional Protocol – the interdiction of war means and methods which can affect the environment in a serious and lengthy way. From the adoption of the I-st Protocol, this prohibition has enjoyed a wide support in the practice of states, going all the way to becoming a customary rule, although certain states sustain that this prohibition does not apply to nuclear weaponry. It is considered that not event one environment component should be the target of attacks, except in case of a military objective; also, it is prohibited to attack a military objective if, by that, and serious damages towards the environment can emerge. Thus, the International Court of Justice established through its consultative opinion – „The legality of nuclear use or nuclear threat „ – that „today, states have to take into account the ecological reasons when they decide what is necessary and proportional in pursuing military objectives”. Also, in managing hostilities, the parts to a conflict have to take all possible measures to avoid or to reduce to a minimum the incidental damages brought upon the environment”.

The lack of scientific certainty over the effects of military operations does not suppress a part's obligation to take such safety precautions. Besides, there are several problems which are not tackled by the Additional Protocols. Thus, the Protocols do not contain any specific provision over the protection of personnel or materials within a peace-keeping mission. However, in practice, all the personnel and materials destined for peace-keeping operations benefit from protection against attacks, therefore a rule of customary law emerged. This rule was included in the Statute of the International Criminal Court and it is applicable in any kind of armed conflict. Some of the problems related to hostilities management are dealt with in the Hague Regulations. For a long time, this Regulation has been considered as being a part of the customary law applicable to international armed conflicts. However, it is widely accepted that some of its rules have a customary law character in non-international armed conflicts too. We can give as an example some of the customary international law rules which prohibit: (1) the destruction or theft of the enemy's belongings, except the cases where military necessity is imperative and (2) robbery. These rules apply in non-international armed conflicts too.

According to customary international law, commanders can initiate non-hostile contacts, using any means of communication, but these contacts have to be based on good faith. The practice shows that this kind of communication can be realized through intermediaries, also known as „parliamentary”, but also through other methods, such as phone or radio. The parliamentary is a person who belongs to a part in conflict and has the authorization to contact the other side in conflict and, based on this, he benefits of immunity.

Studies have demonstrated that the traditional method of showing the quality of a parliamentary (messenger) remains the white flag. Also, there is a known practice according to which, to facilitate communication, the sides in conflict can make use of a third party, for example a protective power or humanitarian organization, unbalanced and neutral.

The rules regarding parliamentary started once with the Hague Regulation and are considered to be of a customary nature. Based on practice, we can assert that these rules are applicable to international armed conflicts, as well as non-international armed conflicts.

The practice allows the identification of two legal regimes applicable in the domain of cultural goods. The first emerges from the Hague Regulation and imposes the obligation to take special measures to avoid damages to structures of a cultural, artistic, scientific value, as well as historical monuments, except the case in which these are considered military objectives. Also, appropriation, destruction or willful damage is prohibited. These rules are applicable to non-international armed conflicts too.

A second legal regime emerges from the specific provisions of the Hague Convention -1954-, regarding the protection of cultural goods, protecting "goods which have a high degree of importance for the cultural heritage of a nation". It also introduces a distinctive sign to identify these goods. The Convention prohibits any kind of appropriation (theft), robbery or willful damage targeted against these goods. The prohibitions match the Hague Convention's provisions and they are the proof of the influence that the Convention had over the practice of states

### *Weapons*

The general principles which prohibit the use of weaponry, that produce useless suffering and of weaponry which target and hit without discrimination, are of a customary nature.

Also, due to these principles, the states' practice prohibited, as customary international law, the use of certain means: poison or poisonous weapons; biological weapons; control agents for public revolts in order to create war; bullets which expand or flatten easily when they hit their target; antipersonnel bullets which explode inside the human body; blindness inducing laser weapons etc.

Some of the weapons which are not prohibited by the customary law are subjected to certain restrictions. For example, land mines and incendiary weapons. Special measures have to be taken so that the non-discriminatory effects of landmines can be reduced to a minimum. Also, after the hostilities have ceased, the side that used landmines has to remove or neutralize them in order to protect civilians.

Because, until now, the Ottawa Convention was ratified by more than 140 states, and other ratifications are in progress, the majority of states are obliged by this treaty to stop using, production and transferring antipersonnel mines. This prohibition is not part of the customary law, because many countries have a contrary practice in this area and are not parts of the Ottawa Convention. However, almost all the states- including those that are not parts of the Ottawa Convention- recognized the need to take actions towards the elimination of antipersonnel mines.

The use of incendiary weapons against people is prohibited, except the cases in which, to eliminate a combatant from a fight, the only way is to use this kind of weaponry. Also, when using incendiary weapons, certain precaution measures have to be taken to avoid or reduce to a minimum the loss of human lives among civilians or damages towards civilian goods. Most of these rules match the conventional provisions which will be applied for non-international armed conflicts too.

### *Fundamental guarantees*

Fundamental guarantees apply to all civilians who are under the power of a side in conflict, and who do not participate or have ceased to participate in hostilities. All these guarantees are firmly anchored in the international humanitarian law applicable in international and non-international armed conflicts.

Most of these fundamental guarantees are stated through international humanitarian law rules, because they reflect the essence of a large array of detailed provisions regarding a certain subject; this is especially the case of rules which prohibit forced or abusive labor, arbitrary detention etc. The reason is that international human rights law continues to apply during armed conflicts, as it is stated in human rights treaties, even if, in exceptional cases, there are a few derogatory situations. The fact that human rights continue to be applied during an armed conflict was repeatedly confirmed by states' practice, by the organizations which ensure that human rights are respected and by the international Court of Justice. More recently, in its consultative opinion, the Court stated that „the protection offered by conventions regarding human rights does not stop in case of an armed conflict” and that, while some rights are exclusively the object of international humanitarian law or exclusively the object of human rights, there are still rights which form the object of both branches of international law.

### *Implementation*

Some of the rules regarding the implementation of international humanitarian law are the object of customary international law.

Each side in conflict has to respect and assure that the international humanitarian law is respected by its armed forces and by other groups or persons who act under its instructions, command or control. From this rules, it emerges an obligation of each side in conflict, including the armed opposing groups, to assure a proper instructions in the international humanitarian law field. Besides this general obligation, it is less clear if for the armed opposing groups the same mechanisms are to be applied as to states. For example, international law provides for the states the obligation to assure instructions regarding the application of international humanitarian law, but it does not provide this obligation for armed opposing groups. Similarly, states have the obligation to assure legal counselors to give advices to commanders, but there is no such obligation for the armed opposing groups.

A state answers for the violations of international humanitarian law and has the obligation to fully repair the damages brought as a consequence of these violations. It is not fully clear if armed opposing groups have an

equivalent liability. We can say that armed opposing groups have a liability that refers to its members, but we don't have a clear picture of the consequences of this liability.

Regarding individual liability, customary international humanitarian law assigns a criminal liability to all individuals who commit, order or are held responsible for war crimes. Another obligation of states is to apply the regime of war crimes, an obligation which can be fulfilled by creating, in this purpose, international or mixed criminal courts.

The principles and rules of conventional law have been widely accepted in practice and they have a strong influence in creating rules of customary international law. Many of these rules and principles are now a part of the customary international law. Having this quality, they are mandatory for all states, regardless of any ratification of a treaty, and they are also mandatory for armed opposing groups. This is the case for non-international armed conflicts too. The regulation of the way hostilities are carried and the treatment of the persons engaged in internal armed conflicts are much more detailed in comparison to conventional law in this matter.

As is the case for treaties, an efficient implementation of customary international humanitarian law rules requires efforts towards communicating and instructing all the levels engaged in a conflict. These rules have to be included in military manuals, as well as in the internal legislation.

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