CONSIDERATIONS REGARDING THE APPLICATION AND CONFORMATION TO THE CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY ARMED CONFLICTS

Lawyer lecturer Valentin-Stelian BĂDESCU[*], Ph.D.
Bucharest Bar
Romanian-German University, Sibiu
Lawyer Cosmin IORDACHE[**]
Bucharest Bar

The revolution in military affairs- caused by the implication of private companies in military operations, a phenomenon known as „the privatization of war"- is a reason for controversy in scientific literature, as well as in the process of creating military and political strategies. The privatization of armies has generated divergence regarding the legal status applicable, especially the legality of the existence of such military forces and the rules of engagement for these structures and the conformation to the rules of international humanitarian common law.

Keywords: international common law; International Court of Justice; International Criminal Court.

Argumentum

The revolution in military affairs- caused by the implication of private companies in military operations, a phenomenon known as „the privatization of war"- is a reason for controversy in scientific literature, as well as in the process of creating the military and political strategies. The privatization of armies has generated divergence regarding the legal status applicable, especially the legality of the existence of such military forces and the rules of engagement for these structures and the conformation to the rules of international humanitarian common law.

This article briefly analyzes the phenomenon and tries to propose solutions. It is a difficult mission, mainly because the application and

[*] e-mail: *valentinbadescu@yahoo.com*
[**] e-mail: *jordache_constantin*@yahoo.com

conformation to the international humanitarian law enters into collision with the interests of political decision makers.

In more than 50 years from the adoption of the Geneva Conventions – 1949, humankind has confronted with an increasing and alarming number of armed conflicts, which have affected almost every continent. At the same time, the four Geneva Conventions and the Additional Protocols – 1977 – offered legal protection to those who did not participate or ceased to participate directly in the hostilities (civilians, injured, sick and stranded, people deprived of freedom for reasons related to an armed conflict). Even in these conditions, the treaties have suffered numerous violations, with severe consequences. According to the general opinion, the violations of international humanitarian law are not due to the inadequacy of its norms.

Most of these times, these violations are based on the lack of will to follow the rules, the uncertainty related to the application of these norms and the lack of knowledge of political leaders, commanders, combatants and the general public. The main problem is to surpass certain aspects regarding the application of international humanitarian law. The treaty law is well developed and covers numerous aspects related to armed conflicts, offering protection to different categories of individuals and it also limits the means and methods permitted during a war. The Geneva Conventions and the Additional Protocols stipulate an extensive regime of protection for the individuals who do not participate or ceased to participate directly in the hostilities. The regulation of war means and methods through treaty laws started with the Sankt Petersburg Declaration, in 1868, and continued with the Hague Rules, in 1899 and 1907, the Geneva Protocol, in 1925, and the more recent Geneva Convention – 1972 – regarding biological weapons; the Additional Protocols form 1977; the 1980 Convention regarding certain categories of classic weapons; the 1993 Convention regarding chemical weaponry and the Ottawa Convention from 1977, regarding the interdiction of landmines.

The Hague Convention, 1954, and its two protocols regulate the protection of cultural goods in case of an armed conflict. The 1988 Statute of the International Criminal Court includes a list of war crimes which fall into its jurisdiction. However, there are two major obstacles against the application of the treaties. First of all, the treaties have effects only between the signatory states. This means that in armed conflicts there are several treaties which are applied differently and have different signatory states. While the four Geneva Conventions from 1949 enjoy a universal ratification, this is not applicable for other treaties, such as, for example, the Additional Protocols. Although the 1st Additional Protocol has over 160 signatory states, its efficiency is limited, because some of the states involved in armed conflicts did not take part in signing.

Many times, in non-international armed conflicts, the only applicable rule from the international humanitarian law is article 3 from the four Geneva Conventions. That is why the main objective of this study is to determine which of the rules from the international humanitarian law are part of the international common law, therefore being applicable to all the parts engaged in a conflict, regardless any ratification of treaties.

The conventional international humanitarian law does not contain sufficient regulations regarding the present armed conflicts, respectively non-international armed conflicts. Only a limited number of treaties apply in such cases of non-international armed conflicts: the Convention regarding classic weaponry; the Statute of the International Criminal Court; the Ottawa Convention regarding the interdiction of landmines; the Convention regarding chemical weapons; the Hague Convention regarding cultural goods, the 2nd Additional Protocol; article 3, common in all the four Geneva Conventions. Article 3 has a fundamental importance, although it offers only a rudimentary frame of minimal standards. The 2nd Additional Protocol completes in a useful way the common article 3, but it does not offer more details than the Geneva Conventions and the 1st Additional Protocol, which govern international armed conflicts. The 2nd Additional Protocol contains only 15 significant articles in this area, while the 1st Additional Protocol contains over 80 articles.

Brief History

The monopole of the state in taking measures of legal physical restraint emerged along with the beginning of this social and political structure, even though only in 1919 Max Webers stated that the right to resort to physical constraint can be assigned to individuals or non-statal unions only if the state assigns it, thus the state is the only source for the right to take measures of physical constraints.

In the absence of an authority higher than the state in international relations, this monopole manifests itself through the right of a state to create a legitimate war, creating the „public war". Thus it was that in the 14th century, besides the public war between England and France (the Hundred Years' War), there were many private wars, conducted by private military companies, created more from bandits, rather than mercenaries. It is considered that these personal wars of feudal lords were the curse of Europe.

Theorizing on the art of war, Machiavelli thought in 1512 that war as a profession can never be well practiced by private individuals, and it had within the area of governments, republics or kingdom; evoking the Rome traditions, he highlights that a well established state cannot allow its citizens to conduct personal wars, and any citizen who has a different purpose than his state during a war should be considered a threat for the state.

Similarly, Hugo Grotius, in 1625, considered that only public wars were legitimate and that personal wars did not carry the will of God, but the human wickedness, which made them illegitimate.

Such interpretations over the nature of war- public and private- influenced the modern writings on war. For example, Clausewitz, in 1830, made the famous statement according to which war is a continuation of politics by other means, and that war was the expression of governmental authorities and shouldn't be considered a right for the individuals.

Thus it has been stated in the present political science the valid theory that, in our days, war and military affairs belong only to the public sector. This generalized view over the nature of military affairs will be decisive over military science, thus the management of human, material and financial resources is an attribute of the state.

From a legal point of view, there is unanimity of views in that the military personnel are merely agents of the state, invested with public authority to exert armed force. Therefore, military missions are regulated by the public law, only few of the rules of private law are applicable, most of the times only through analogy; it is the case to indicate that the profoundly different vision over the military and the civil sectors has influenced values such as "civil rights", "civil society", or "civil liability", but also the administrative law, regarding the statute of public officials, and military pensions and salaries.

So it is that the legal doctrines are in overwhelmingly agreement over the existence of public and administrative military law, criminal military law, international military collaboration law, armed conflicts law and the protection of military information law. The thinking after which military affairs are legitimately mostly public did not modify when the monopole over the use of armed force in international relations passed from the state into the competence of an emerging supranational government, after the UN Charter. Until the UN Charter, in 1945 states were allowed to use their armies to defend themselves from external threats only under the condition of leading a "just war", according to the III-rd Hague Convention, 1907.

Passing over this brief trip to history, we will analyze the legal frame applicable to such entities, from the perspective of international common law, as it was arranged by the Statute of the International Court of Justice.

The Statute of the International Court of Justice and the international common law

The Statute of the International Court of Justice defines, through article 38 (1) (b), the international common law as being „the evidence of a general practice accepted as rule of law". It is generally accepted that the existence of an international common law rule requires two elements,

respectively the practice of states (*usus*) and the conviction that such a practice is required, prohibited or allowed –according to the rule's nature- (*opinio juris sive necessitatis*).

As established by the International Court of Justice, regarding the continental shelf: "It is obvious, of course, that the substance of customary international law must be sought, primarily, in the actual practice and *opinio juri*s of States". The exact meaning of these two elements has been an object to numerous academic works, using the classical approach to determine the existence of a general customary international law rule, respectively the approach set out by the International Court of Justice, especially in the cases of the Northern Sea continental shelf.

According to this view, it comes to knowing which are the practices that contribute to the creation of international customary law rules, and secondly, it has to be determined the extent to which these practices give rise to a rule of customary international law. Thus, the material and verbal acts of a state are practice which contributes to the creation of rules of customary international law. Material acts include, for example, the behavior on battlefield, the use of certain weapons or the treatment accorded to certain categories of persons. Verbal acts include military manuals, internal legislation, national jurisprudence, instructions given to armed forces, military communications during armed conflict, diplomatic protests, opinions of official legal advisers, pleadings before international courts, statements in international fora etc. This list demonstrates that the practice of executive, legislative and judicial structures of a state can contribute in forming rules of customary international law.

Negotiation and adoption of resolutions in organizations or international conferences, in conjunction with the explanations given in the mode of voting, represent acts of those states. It is generally known that, with few exceptions, resolutions are not, normally, binding by themselves. As a consequence, the value given to a certain resolution from the perspective of forming a rule of customary international law depends on its content, the extent to which it is accepted by others and its coherence in the State's practice in this area. Although the decisions of international courts represent auxiliary sources for international law, they are not considered to be practice of the states. The reason is because, unlike the national courts, international courts are not state structures. However, the decisions of international courts have a significant importance because, if an international court establishes the existence of a rule of customary international law, this will represent a proof of the existence of the rule itself.

In addition, due to the precedent value of these decisions, international courts ca contribute to the emergence of a rule of customary international law, by influencing subsequent practice of states and international organizations.

The practice of opposed armed groups, such as codes of conduct, taking on commitments to respect certain rules of international humanitarian law or other statements, is not the practice of States as such. Although this kind of practice contains elements which prove that the acceptance of certain rules in non-international armed conflicts, their legal significance is unclear and, as a consequence, it cannot be considered as an argument to prove the existence of a rule of customary international law.

State practice must be evaluated to determine if it is sufficiently "dense" to give birth to a rule of customary international law. To create a rule of customary international law, the state practice has to be as uniform as possible, frequent and representative. It is important that other states did not adopt substantially different behavior. The jurisprudence of the International Court of Justice demonstrates that an opposed practice, which at first glance seems to affect the uniformity, does not necessarily mean it does not form a rule of customary international law. This fact is even more relevant for some of the rules of international humanitarian law, in which case there are numerous elements which demonstrate a practice regarding that certain rule, but also a number of cases of violations against the rule. In those cases of violation the rule, justifications and excuses from the other part followed right after, therefore the existence of such a rule cannot be questioned. The states which wish to change an existing rule of customary law have to change their official practice and to sustain the fact that they act according to law.

Secondly, for the emergence of a rule of customary international law, the state's practice should be frequent and representative. However, the practice doesn't have to be universal, it is sufficient a general practice. In other words, it is not as important the number of states which adopt the practice, but the quality of these states. According to the International Court of Justice, regarding the continental shelf, North Sea, it is necessary that the practice includes the states which have a special interest in the area surrounding the North Sea. In the case of international humanitarian law, it depends on the circumstances in which the states with a special interest are found. For example, in case of laser weapons which induce blindness, the states with a special interest are including the states identified as being in incipient process of developing such weaponry. Similarly, the states whose population needs humanitarian assistance have a special interest along with the states which offer such assistance.

Regarding any rule of international humanitarian law, the countries which participate in an armed conflict have a special interest in case a practice

has relevance in that armed conflict. Although in certain domains in the international humanitarian law some states have a special interest, other states, even if they do not participate in a conflict, have a legal interest in requiring compliance with international humanitarian law. As a consequence, all the states can suffer due to the use of certain war means and methods adopted by some states. Therefore, it is important to study the practice of all states, regardless if they have a special interest or not. Also, from a legal point of view, we can talk about the existence of a position of "persistent objector" against the rules of customary international humanitarian law. Although many authors consider that, in case of jus cogens rules, there is no persistent objector, there are authors who put in doubt the validity of a the notion of "persistent objector". If we accept, from a legal point of view, it is possible a position of persistent objector, the respective state has to make objections before the emergence of a new rule, during the process of creation, and subsequently to object it persistently; the position of "subsequent objector" is not possible.

Psychological element. The requirement of "opinio juris"

It is generally admitted that the simple repeating of precedents is not sufficient and that a customary rules exists only if the act is motivated through the conscience of a legal obligation. The states should have the feeling that there is a legal bound: the classic formula „*opinio juris sive necessitatis"* (the conviction of law or necessity). This is the main distinction from international courtesy.

The doctrine which invented this condition at the beginning of the XIX-th century remains divided regarding its logical necessity. It is true that, even from a proactive perspective, it can appear to be strange: not that it is very difficult to bring up evidence of a psychological conviction, but because to have relevance in law the rule has to exist, not only an incipient element of its creation. Therefore, the idea of effect of anticipation from the law subjects has to be accepted.

Ever since the „opinio juris" exigency was included in art. 38, from the Permanent Court of International Justice's Statute, and then in the International Court of Justice's statute the jurisprudence stands firmly over the matter of principle. Answering the thesis of a French governmental agent who invoked an act of abstention, the Permanent Court of International Justice did not consider this act to be a pertinent precedent because it had no real motivation. In a more systematic manner, the international Court of Justice has expressed this theory as it follows: "states must have the will to conform to what is an equivalent to a legal obligation. Frequency and a common character are not sufficient. There are a lot of international acts, for example those regarding protocol, which is invariably accomplished, but

which are motivated only by simple considerations of courtesy, opportunity or tradition, and not by the conviction of a legal obligation". This is the exact opposite of the approach international arbitrators had until the middle of the 19th century.

All law subjects can contribute to this "opinio juris", including private individuals, according to the arbitrary sentence "Aminoil", from 1982. By definition, "opinio juris" can only result from the expression of a consented free will: in the Aminoil situation, the economical pressure and the restraints suffered by oil companies will determine the arbitrator to hesitate drawing conclusions from the attitude and apparent approbation of these companies to abandon the customary rules.

Reasonable customs and aggressive customs

The doctrine uses this imaginary distinction in order to explain the hesitations against the normative practice of the contemporary international society. Accustomed to the chronological sequence in which the reasonable custom is based on „in fine" behavior, the doctrine questioned the legality of an elaboration process in which the manifestation of „opinio juris" can surpass any affective training, in which the states' behavior are considered as an expression of „opinio juris" before they are considered elements of a practice. Severely criticized by some observers, this inversion of the importance of the psychological and material elements seems to be considered legitimate by the international jurisprudence: referring to the notion of „tendency" (according to the International Court of Justice- „in the „Texaco-Calasiatic" case- 1973 and the „Aminoil" case- 1982). If the aggressive custom continues to raise problems, it is not due to inversion of the two moments of the customary process. The inversion is part of the ambiguity of the states' expression of will.

Opposability of customary rule

To what extent a law subject can refuse the opposability of a customary rule? The problem originates, firstly, from the fact that the abstention or absence of a state from the international arena –the case of newly formed states- does not always prevent the apparition of a general or particular rule.

In order to offer a precise answer for each particular case, we have to distinguish between the opposability which emerges from the rule's process of elaboration and the opposability of a rule over the passing of time. We will insist over the first aspect of the demonstration.

1. A solution appears when a state makes an objection when a customary rule is created, but without achieving to impose its point of view;

thus, the customary rule is inopposable. Of course, the principle according to which a stare cannot object to an imperative rule will be applied.

2. Can the newly formed states apply the customary rules established before they obtained their independence? In principle, no. They have to open a process of elaborating a customary or conventional law. During this transition process, the exact dimension –opposability- of a customary rule is difficult to be defined.

3. Can the states be confronted with other customary rules, created by other law subjects? The contemporary evolution of transnational contracts law – „lex mercaoria"- shows that this is possible, and that private laws can be in obvious opposition with international agreements or by the jurisprudence of national courts.

The situation is even more complicated when international organizations invoke, against member-states or third parts, customary rules which emerged from the behavior of these organizations. Therefore, international recognition plays a very important role in establishing the oppsability of such rules.

Proof of custom. Administration of the proof

In a legal dispute, the burden of proving belongs to whom invokes, at least when he invokes a regional or local customary rule. There are two main difficulties: does he have to prove the material practice, but also the „opinio juris" practice? And for each of these elements, which is the minimum grade of pertinence and precision to be achieved?

1) A part of the doctrine questions the necessity to prove „opinio juris". Admitting that it is a very difficult process, to isolate „opinio juris" from the subject's behavior, the jurisprudence refused to consecrate this thesis; although we have to admit that, in administering the proof of „opinio juris" by a judge or an arbitrator, there is a certain barometer used to demonstrate the material and psychological elements.

2) For the means of evidence, art. 15 from the Statute of UN's International Law Committee states: „we can only create the „codification" of a rule, thus stating its customary trait, if we benefit from the support of a consistent state practice, of legal precedents and converging doctrinal opinions".

The major difficulty consists in proving „opinio juris", especially when there is no way to prove it from objective factors. The next step is to search for the intentions. But on what clues? In its notice from 1969, regarding the continental shelf of the North Sea, the International Court of Justice stated: „The acts have to prove, through their own nature or the manner in which they are accomplished, the conviction that this practice is obligatory". Without admitting that repetition is sufficient, the international jurisdiction will consider that the

established solidity of the material element will lead into proving „opinio juris". Vice versa, the judge or arbitrator will not hesitate to disassociate the two elements when the intentions do not match the acts.

Against these difficulties and uncertainties, subjects of law search a better legal security in the codification of customary law. With this occasion, these subjects can approach directly the „opinio juris" issue; paradoxically, they will be capable to outline the problem in proving a frequent and homogenous practice. The „opinio juris"requirement in determining the existence of a customary international law rule refers to the judicial conviction of the states that a certain practice answers to a certain rule of law. The form in which practice and judicial conviction are expressed can vary according to the respective rule – if it contains an interdiction, an obligation or just the right to adopt a particular behavior. The strict separation of these two elements has proven to be extremely difficult and mostly theoretical. Many times, the same action reflects, simultaneously, the practice and the judicial conviction. As The International Law Association highlighted, the international Court of justice „did not clearly express over the fact that the existence of distinct elements would exclude the manifestation through an unique conduct. Actually, the separation of these two elements is difficult, almost impossible". This happens, for example, in case of verbal acts, such as military manuals, which represent practice for the states and, most of the times, they reflect the judicial conviction of those states.

When the practice isn't dense enough, it generally includes „opinio juris", and, as a consequence, there is no need to separately demonstrate the existence of „opinio juris". However, when the practice has an ambiguous character, „opinio juris" plays an important role in determining if that practice has relevance in the process of constructing a custom. Often, this is the case of omissions, when states do not react, but the reason stays unclear. In these cases, the International Court of Justice and its predecessor, The Permanent International Court of Justice, sustained the need to separately establish the existence of „opinio juris", in order to determine if these cases of ambiguous practice contribute or not in the creation of customary rules.

In international humanitarian law, where numerous rules impose to restrain from a certain conduct, omissions raise a special problem in establishing „opinio juris", because they have to demonstrate that the abstention is not pure coincidence and it is based on a legitimate waiting.

The impact of conventional law

Treaties are also very relevant in determining the existence of customary international law, because they help to clarify the mode in which states perceive certain rules of international law.For example, in the case of the continental shelf of the North Sea, the International Court of Justice stated clearly that the degree of ratification of a treaty has a very significant role in

evaluating the customary international law. The Court established that: „the number of ratifications, although important, cannot be considered to be sufficient", especially when the extra-conventional practice is contradictory. On the other side, in the Nicaragua case, in evaluating the customary character regarding the rule of noninterference, the Court granted a great importance to the fact that the UN Charter was ratified almost universally. There's also the situation in which a disposition from a treaty reflects the customary law, before the treaty enters into force, with the condition that the similar practice is widely spread, including among the states with a special interest, so that there is little or no significant opposition.

Treaties help to crystallize the judicial opinion for the international arena and have an undebatable influence over the conduct and judicial conviction of states. The International Court of Justice recognized this fact in its decision regarding the continental shelf: „multilateral conventions can play a significant role in defining rules which derive from customs...". Therefore, the Court recognized that treaties can codify preexisting customary international law rules, and can form new customary rules through the treaties' rules.

The Court went even further and stated: „it is possible (...) that a large and representative participation at a convention could be sufficient, as long as this participation contains states with a special interest". The practice of states which are not a part, but which respect a conventional rule, was considered to be very important element in proving the existence of a customary law.

The customary nature of each conventional rule has to be established and certain aspects must be analyzed in order to find out the customary international law rules which can be identified through induction.

BIBLIOGRAPHY

Badescu Valentin-Stelian, *Environmental Law. Environmental management systems*, CHBeck, Bucharest, 2011.

Clausewitz C., *On War*, Military Publishing House, Bucharest, 1982.

Dragoman Ion, *Privatization Administration of Military Affairs*, article published in a scientific session of the Institute of Administrative Sciences' Paul Negulescu "in Sibiu, May 2012.

Grotius H., *On the law of war and peace*, Scientific Publishing House, Bucharest, 1968.

Henckaerts Jean-Marie and Soswald-Beck Louise, *Customary international humanitarian law*, 2 volumes, Volume I Rules, Volume II Practice (2 parts), Cambridge University Press, 2005.

Machiavellian N., *Art of War*, Header House, 1999.

International security and armed forces, Tritionic Publishing House, Bucharest, 2004.