



"HENRI COANDA"
AIR FORCE ACADEMY
ROMANIA



GERMANY



"GENERAL M.R. STEFANIK"
ARMED FORCES ACADEMY
SLOVAK REPUBLIC

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APPLYING THE HUMANITARIAN INTERNATIONAL LAW IN DESTRUCTURED INTERNAL CONFLICTS

Dumitru TOADER

AIR FORCE ACADEMY „HENRI COANDĂ” BRASOV

ABSTRACT: *Destructured conflict represents situations in which state structures are disintegrated because of a local armed conflict in such a measure that they are unable to apply power and supply minimal public service, that is, to make sure international humanitarian law is applied. Such a situation is not stipulated by the UNO charter, so the Security Council needs to intervene for peace enforcement and has to assume functions and political, judicial, military, policing, and humanitarian authority. In such situation, humanitarian operations imply, beside humanitarian assistance, compensations for the deficiencies of the state or for the consequences of its collapse and UNO multinational armed forces have to rely on a clear mandate in order to enforce their intervention.*

Key words *Destructured internal conflict, international humanitarian law, UNO charter, Security Council, mandate, human rights.*

The UNO, its main concern being that of “relieving future generations of the scourge of war”, has created its own mechanisms and methods of action to confront an aggressor that was usually a state. The international events of the latest decades, marked by the disintegration of certain states or the exacerbation of conflicts of an ethnic or religious nature, have determined the emergence of destructured internal conflicts that have generated humanitarian catastrophes and have spread on large geographical areas from Europe, Asia and Africa, becoming trademarks of our contemporary society.

Local conflicts have accumulated a diversity of shapes in the last period of time, from internal civil wars that have expanded over the borders to internal conflicts, secession, destructured conflicts, and some over questions of identity. Though their quantity and their destructive nature, local armed conflicts dominate the international sphere expanding on all continents. Situations

of internal tension like those implying activities of public disorder, isolated acts of violence and other analogous acts are not considered as taking part of the category of local armed conflict. Internal armed conflicts become international when a third party intervenes on the side of either the government or the dissident group, like in the case of the Democratic Republic of the Congo, or when the conflict is transferred for solution to an authorized international organization, for one reason or another, usually the UNO Security Council, an agreement, or a regional organization, etc.

The conflict of Bosnia-Herzegovina, in its initial phase, was an internal conflict of the state, since each of the belligerents was supported by a state; the Christian- Orthodox Bosnian Serbs were advocated by the Yugoslav Republic, the Catholic Croatians by Croatia, and the Moslems by Turkey and Iran. Subsequently, when all state and military structures collapsed, the conflict, originally

ethnic and religious in nature, changed into a destructured internal one, similarly with the one in Rwanda.

The expression 'destructured conflict' doesn't have a precise judicial significance and does not correspond to a universally accepted definition. It reflects the mandate commissioned to the International Committee of the Red Cross (ICRC) by the XVIth International Conference of the Red Cross and Red Crescent to examine "situations in which state structures have disintegrated because of a local armed conflict", meaning that state structures are endangered to such extent that there is no authority to impose power and provide minimal public service.

Thus, 'destructured' conflicts cannot be characterized by a particular war objective, as much as through their shape, through the absence and dissolution of the whole structure (civilian, social, religious, and even military ones) within the state or belligerent factions. In reality, the goals pursued in such conflicts are not clear most of the times, just because of the absence of this structure. Sometimes we deal with pure banditry, in a fight in which the main objective becomes individual survival.

In such conflicts there can be noticed both the loss of control by the central government, which is not able to exert authority in territory and on population anymore, and the disintegration of the „chain of command” within the whole or within some factions which confront with one another. Since, generally, the internal conflict essentially implies a certain loss of control by the government on the territory and on the population, makes the weakening and the disappearance of the „chain of command” to constitute the essential characteristic of the „de-structured” conflict.

The internal de-structured conflict radically distinguishes from the non-international conflict in which there are two distinct belligerent parts – on the one hand the state authorities and the central military headquarters, and on the other hand the hostile organized insurgent forces, which are in control of a part of a territory and have at their disposal their own armed forces. In the event of a de-structured internal conflict, the

state authorities are not able to manage the situation anymore, there is chaos in the country, there are mass assassinations, genocide acts, ethnic purges, massive exodus of populations etc. This situation is not stipulated in the UN Charter, to authorize the Security Council to apply constraint measures only against a state which infringes the rules and principles of the international law by performing threats to peace, violation of peace and aggression acts. If such a state does not exist anymore, there will not be anybody to incriminate. The situation is the same in the international humanitarian law, both with regard to the norms of managing the hostilities and means and methods of war used, and to incriminating the people responsible of committing serious crimes at the Geneva Conventions and Protocols. In case of the de-structured internal conflicts, the state authorities disappear and there is no one „*to respect and make be respected*” the rules of the international humanitarian law, and practically there is not an issue of a humanitarian protection of the combatants and of the population, the civilians. To face these real humanitarian catastrophes, the Security Council, the principal authority of the United Nations had to intervene to *impose peace*, assuming political, military, police, judicial, humanitarian positions and powers. Consequently, the multinational military forces it has created were assigned the mission to solve all the problems encountered on the battlefield: to use armed force against certain belligerent factions, to defuse the antipersonnel mine fields, to arrest suspects of committing genocide and war crimes, to participate in humanitarian assistance missions, to restore democracy, to appoint public officials, etc.

The issue raised by these „de-structured” conflicts is related both the specific of the foreign intervention and the enforcement of the international humanitarian law by the intervening forces. The whole system stipulated by the Charter, regarding the UN actions in cases when peace is undermined, is based upon the idea of a dialogue with the government. The Council of Security can request provisional measure, and



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then issue sanctions which do not include use of force and, finally, to use coercive measures. The tutelage regime that we might consider for use in extreme situations is excluded by the Charter (art.78) in the case of the member states. It can be used only if, in advance, the state is excluded from the UN on account that it can no longer meet the admission requirements, especially the one stating „*to be capable to meet the provisions of the Charter and to be willing to do so*” (art.4). Exclusion seems to be linked , however, to the willingness not to respect, even though article 6 is not very clear in this regard, According to this article, a member state can be excluded only if „ *constantly violates the principles laid down in the present Charter*”. The historical background of this article, whose introduction spurred strong resistance, indeed proves that the purpose was to punish the state whose government constantly refuses the injunctions made, and not to sanction the loss of control.

The combatants enforcing the measures taken by the Council of Security are military personnel belonging to the regular armed forces of the UN member states, which are bound by the Charter to submit them to the Council of Security at their request and in accordance with any special agreements (art.43 of the UN Charter). As part of these multinational forces, both NATO and UEO military components have been included and their actions are not subject to the judicial order stipulated by the Charter. In accordance with Chapter VII of the UN Charter, the Council of Security is authorized to resort to serious infringement of the human rights, which poses a threat to international security and peace. However, the situation with the other regional organizations - NATO, UEO and UE - is not the same.

In the absence of a legal framework, and relying on ambiguous mandates and

unstable authority, the multinational armed forces that participate in de-structured conflicts, cannot control the tense situations that emerge in practice, based on the humanitarian law and by respecting the humanitarian standards of protection. They do not have any authority to ensure the returning to a normal life, as is the case of the military occupation regime, they can neither detain nor trial persons who have committed war crimes or genocide, they cannot take prisoners of war, etc. Since the Council of Security has decided to abandon the consensual judicial order, a new order has been improvised based on some of its resolutions, either by interpreting some of the provisions of the UN Charter or some of the fundamental principles of international law, such as the right to self-determination and sovereign equality, or simply by replacing the main norms of humanitarian law with ad-hoc ones.

The conventional international law as reflected in the UN Charter and the subsequent interpretations (after 1945), have given priority to the sovereignty and integrity of states over the protection of the human rights. In time, the international practice has reexamined the human rights issue and so the judicial instruments in this field have become more numerous, ranging from the Declaration in 1948 both at the United Nations (for example, the International Pact on the civilian and political rights from 1966 and the UN Convention against torture from 1984), and regional level (The European Convention of the Human Rights from 1950, The American Convention on Human Rights from 1969, The African Charter on Human and People's Rights from 1981, etc.). Principles such as the forbidding of torture or attacks to the moral and physical integrity of people, who represent the pillar at the basis of all these texts, are considered by the jurists as leading

to *erga omnes* obligations, that is obligations which states must respect under any circumstances and with no exception. This is also the case with the forbidding of the genocide, which is more serious than „the massive infringement of the human rights” – a concept that is not defined from a judicial point of view and which represents the topic of a special treaty, the Convention from 1948 on the prevention and punishment of the genocide.

The *erga omnes* character of obligations under this Convention applies, particularly in this case, also for the humanitarian international law as defined by the Geneva Conventions (1949) and their additional Protocols (1977). Article 1, common to those Conventions, not only requires states to respect the rules of humanitarian international law, but also to make them be respected. Thus, members of the OSCE by the Helsinki Declaration of 1992, agree that "the obligations assumed within the OSCE human dimension constitute the subject of direct and legitimate interest of all participating States and do not belong exclusively to the internal matters of the respective State", being therefore obvious the deviation from the sacrosanct principle of inviolability of the states sovereignty.

The second area, in which individual rights are considered to be above the sovereignty of the States, is the development of international criminal jurisdiction. Located at the intersection of international human rights law with humanitarian international law, as it refers both to the prohibition of torture and genocide, and to the concept of war crimes and crimes against humanity, international criminal jurisdiction was greatly expanded. The creation of international law courts to prosecute war crimes and crimes against humanity in former Yugoslavia (1993) and Rwanda (1994), the adoption in 1998 of the International Criminal Court statute, the imposition of criminal proceedings against the former Chilean leader Augusto Pinochet by a Spanish prosecutor and then by others, the investigation of a captain in the armed forces of Mauritania by a French court for "crimes torture" under the International

Convention against Torture of 1984, are evolutions in legal practice, sometimes based on texts (and their ratification by a growing number of states) and some other times on a new legal interpretation likely to prefer the principle of protection sovereignty of human rights.

All these texts and practices have a common characteristic that is they made possible punishment but they do not have a preventive effect. Even in the 1948 Convention on Genocide, despite its ambitious title, it is difficult to identify measures to be truly preventive, not to mention the fact that there is almost no way to implement decisions¹. However, it is obvious that preventing massive violations of human rights or humanitarian disasters has provided the basis of practice of extending humanitarian intervention in recent years. At the origin of intervention is the recognition of the fact that the population in starving danger, massacred, exterminated, deported on a large scale or subject to wide variety of serious and irreversible forms of oppression, have the right to receive assistance.

This principle, established by resolution 43/131 of 8 December 1988 of ONU General Assembly, reaffirmed and enlarged by Resolution 45/1000 of 14 November 1990, particularly in terms of *humanitarian corridors*, has been confirmed by numerous subsequent resolutions of the Security Council². Therefore, the right of populations

¹ Malcolm Shaw, *International Law*, 4th Edition, Cambridge, Cambridge University Press, 1997, p.210.

² Resolution 688 of 04.05.1991, taken immediately after the Gulf War, which authorized the operation of humanitarian assistance by invoking the threat of international peace and security under Chapter VII of the Charter; Resolution 770 of 08/13/1992 on Bosnia where it was suggested that the use of force to ease the humanitarian assistance given to the Bosnians who were at war; Resolution 794 of 12/01/1992 on Somalia, which authorized the UN Member States to use all necessary means to achieve a secure environment for humanitarian assistance operations (in practice, the military intervention materialized in Operation Restore Hope led by the U.S.) Resolution 929 of 6/22/1994, which led to Operation Turquoise for the rescue of Rwandan refugees, led by France; Resolution 940 of 7/31/1994, which allowed the U.S. to organize a multinational force to reinstate the legitimate government of Haiti, Resolution 1101 of 3/28/1997, which allowed Italy to lead an operation (called *Alba*) for the humanitarian relief to the Albanian people under military protection.



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at risk to get assistance can be considered today as an integral part of public international law.

Some of the humanitarian operations conducted after 1990, in addition to humanitarian aid, supposed also compensation for the state deficiencies or its collapse consequences, as it was the case in Haiti in 1994 or 1997 in Albania. The same concern was also marked by Resolution 1031 of 15 December 1995 which supported the deployment of IFOR forces in Bosnia and Resolution 1244 of 10 June 1999 which supported the deployment of KFOR forces in Kosovo. Although the UN actions to compensate the disintegration of some states seem to have been politically necessary, there was a consensus in this regard. Thus, China abstained from voting on Resolution 940 of 07/31/1994 regarding Haiti, on the grounds that it went too far with the support of the interference in the internal affairs of Haiti in the name restoration of the democracy³.

In conclusion, the first clarifications related to deconstructed internal conflicts refer to the *mutatis mutandis* extension of humanitarian law rules applicable in international armed conflicts as well as in the non-international ones, given that the boundaries between them tend to fade. In this context, clarifications also include determining the legal status of the deconstructed state. The deconstructed armed conflict is closer, as a form of anarchic development and not as violence intensity, to internal tensions and disturbances than to the non-international internal defined by Article 3 common to the four Geneva Conventions of 1949 and by Protocol II of 1977. Thus, the

definition of the status of the deconstructed state must include the legal basis of the presence of the UN multinational forces and their competences, as well as the role of the multinational military missions in ensuring the compliance with the international humanitarian law and, on the other hand, the humanitarian action, intended to protect and save human lives and civil goods. This should be done taking into account the fact that, although maintaining international peace and security and humanitarian action are a whole, the protagonists are different - the first UN military forces on one side, and on the other side, the neutral and impartial humanitarian organizations, such as the International Committee of the Red Cross. Each of them must have clear mandates and coordinate actions on its own criteria.

As far as the international humanitarian law is concerned, it should be adapted to include clear rules regarding the new type of de-constructed conflict, namely rules to protect children and women, the Red Cross emblem, as well as rules referring to the monitoring of humanitarian aid, hunger during armed conflict and the issues of embargoes, of safeguarding the health of the civilian population. The concept of war crimes must also be broadened, so as to also apply it in non-international armed conflicts, including the deconstructed ones.

³ Mario Betatti, *Le droit d'ingérence*, Paris, Odile Jacob, 1996, p. 257-259.

