sciendo

Scientific Bulletin
Vol. XXVII, No. 2(54), 2022

DIFFICULTIES OF DEFENDING INTERNATIONAL HUMANITARIAN LAW AT THE INTERNATIONAL LEVEL

Sabin GUȚAN
sabin_gutan@yahoo.com

"NICOLAE BĂLCESCU" LAND FORCES ACADEMY, SIBIU, ROMANIA

ABSTRACT

In an armed conflict the respect for international humanitarian law is the essential element to reduce its destructive effects. The application of international humanitarian law is, however, not always taken into account by states and members of the armed forces. When this obligation is seriously violated, the international community, through the UN, must intervene to restore international peace and security. Unfortunately, current armed conflicts have proven that this system is not effective, especially when it has to be activated against a permanent veto-wielding member of the Security Council, such as Russia. To make this system effective and to make such a state to apply correctly international humanitarian law, the UN must be reformed. But all these reform proposals do not take into account the efficiency of the measures in Chapter VII of the Charter and the strengthening of international authority.

KEYWORDS:

International humanitarian law, UN, Security Council, reform, Russia

1. Introduction

The development of international law has been accelerated by economic and technological progress. All these transformations and the multiplication of written agreements and treaties between states transposed into the field of war. With the establishment – at the initiative of Henry Dunant (1828-1910), a Swiss businessman – of the International Committee of the Red Cross (1863), international humanitarian law began to develop, through the adoption of the first treaty in 1864, *for the Amelioration of the Condition of the Wounded in Armies in the Field*, as a response to the humanitarian disaster left after the Battle of Solferino (1859), Italy. Becoming a tradition, each great peace conference brought the adoption of new treaties of international humanitarian law or the improvement of existing ones (as in 1899 and 1907, at The Hague; at the end of the two world wars, at Geneva).

Along with these transformations at the international level, the idea of the state as a distinct, sovereign entity, with its own will, separate from that of the individuals, that makes it up, was imposed. The idea was promoted by the German philosopher Georg Wilhelm Friedrich Hegel (1770-1831) and

DOI: 10.2478/bsaft-2022-0014
© 2017. This work is licensed under the Creative Commons Attribution-Non Commercial-No Derivatives 3.0 License.

led to the emergence of the public will of the state, which is superior to the will of individuals and subordinates them. In this context, two new ideological currents appeared that aimed at the development of international law: monism and dualism. Monists saw domestic law and international law as a whole subject to the same principles and rigors, promoting the *pacta sund servanda* principle. The dualists, being predominant, supported the idea of consensus in relations between states and the separation of domestic law from international law. From here also arose the idea of good faith in international relations and the need for a solution when a sovereign entity violates this good faith. Gradually, the idea of the will of the international community appeared an idea that is the basis of the functioning of the modern international system, which is based on the Charter of the United Nations (United Nations Organization, 1947).

2. The functioning of current international law

An objective and correctly functional legal system must contain three distinct elements: a legitimate body to legislate (legislative power), a system of authorities and institutions designed to implement these laws (executive power) and a system of courts with binding jurisdiction and ability to impose its decisions on disputes arising from these laws (judicial authority). It is the very foundation of the rule of law, namely the separation of powers and functions in the state. Unfortunately, international law lacks this functional structure. There is no legislative body. It could have been the UN General Assembly, consisting of representatives of all member states, but the resolutions adopted by it do not have binding legal force, but only for certain UN bodies and for certain purposes. At the international level, we do not find anybody similar to the executive. The UN Security Council is supposed to have such a role, but its activity is at the discretion of the veto power of the five permanent members, and because of this it is often prevented from acting through this procedure. Likewise, international justice is not binding and does not have the ability to enforce its decisions. The International Court of Justice could have played this role, but it can only decide in cases where both parties agree, without being able to enforce compliance with these decisions (Shaw, 2008, p. 3).

Thus, international law is only a conventional one, negotiated at the political level and assumed as such. Therefore, its greatest value is good faith, that is, the trust of the states in each other that they will willingly respect what they have assumed. Hence, the idea of reciprocity regarding the observance of the norms of international law, which also worked in the case of international humanitarian law (*si omnes* clause). Even if some norms became applicable in all circumstances, such as international humanitarian law treaties after the Second World War, this fact did not happen against the will of states.

Such a functioning system at the international level would have a much stronger effect on the realization, application and observance of international law, even in the event of armed conflict. But what are the causes for which international society is kept at this rudimentary level of organization? Let's look at the entire system of international responsibility and the entire arsenal of tools created for the defense of international peace and security, but also for the protection of the human being, in an attempt to identify these negative functional factors.

Comparing international law with domestic law is very useful for understanding how it works. Over time, international law was supplemented with the sanctioning part, both by establishing the types of sanctions that can be applied to states and international organizations (criminal liability being excluded), as well as liability, generally criminal, for the most serious violations of international law by individuals. In this context, as a last resort,

the use of force appeared in international law as a legal method to defend international peace and security, when other sanctions did not have the intended effect or it is estimated that they will not achieve their effect. But this instrument is not available to any state, being enshrined in the UN Charter, as an exclusive attribute of the Security Council. However, in practice, coercive action within the UN is rare, as it requires coordination among the five permanent members of the Security Council and, obviously, that there is no issue that is considered by any of the major powers to be a threat to the address of his vital interests (Shaw, 2008, p. 4).

Beyond this possibility, states may use force, individually or collectively, to defend against aggression (Article 51 of the Charter). Once the state of war is established, the obligation to respect international humanitarian law arises. We can thus observe a tendency, still fragile, of international law to follow the direction of domestic law regarding the prohibition of violence of any kind and the peaceful resolution of differences between states.

The specificity of international law is that its subjects (states) create it themselves and freely choose whether or not they want to assume it. However, in general, the norms of international law are accepted and respected by states. Even if the sanctioning system is not as effective as that of domestic law, violations are not so frequent, but they can have much more serious consequences.

The instruments of international law are an increasingly useful alternative in the peaceful settlement of disputes between states, increasingly replacing the classic method: the use of force. Major problems arise when these tools are no longer an option for states, who decide to settle disputes by force. In this case, international humanitarian law is the only international instrument that still arbitrates the interaction between states. But, unfortunately, international humanitarian law has the same shortcomings as public international law in terms of its observance. States must do it willingly, the principle of good faith being the essence of success in applying these norms. But this positive attitude of the states must necessarily be doubled by the personal attitude of each individual involved. This aspect makes international humanitarian law much more difficult to apply and respect. This necessity arises, however, in an extremely dangerous and destructive context for society: armed conflict.

If, in times of peace, the idea of reciprocity in respecting international norms is still a key element of the interaction between states, in times of armed conflict reciprocity no longer has its logic. Humanitarian norms aim to reduce as much as possible the destructive effects of war, hence the obligation to respect them in all circumstances. This obligation has also generated another effect specific to these situations, namely the liability of individuals for violating the norms of international humanitarian law assumed by their states, and, more recently, even the establishment of international criminal liability for disregarding customary international law applicable to armed conflicts.

Another set of norms that exceeds the will of states is human rights, which the international community has assumed to protect regardless of the situation, especially in the case of serious violations that can lead to crimes against humanity or genocide. But even in these cases we stumble on the limits of the international system in the field of combating these violations. States must first willingly assume international jurisdiction, then they must submit unconditionally to its procedures. Otherwise it is extremely difficult to achieve justice through international coercion, especially when the need to use armed force arises and especially when the state in question is a permanent member of the UN Security Council or is supported by one of them through the use of the right of veto.

3. International instruments to support the application and respect of international humanitarian law

3.1. International Criminal Jurisdiction

Until the adoption of the Statute of the International Criminal Court (Rome, 1998), international criminal justice was carried out through ad hoc tribunals, established internationally by Security Council resolutions (such as those for the former Yugoslavia and Rwanda). The Court's jurisdiction is limited to states that are parties to the treaty, or that have accepted the Court's jurisdiction, for international crimes committed on their territory or by their nationals.

The jurisdiction of the Court can also be activated by the Security Council, which acts on the basis of Chapter VII of the UN Charter. Such action may extend the jurisdiction of the Court to non-signatory states. In all cases, the Court's jurisdiction is complementary to national justice systems, being activated when states are unable or unwilling to judge.

3.2. The defence of international peace and security by the Security Council

The concepts of international peace and security are not defined in the UN Charter. This fact allows the Security Council to develop and adapt its intervention capacity to various situations that may constitute threats in this field. In the last decades, the need to activate this attribution of the Security Council for the defense of human rights and international humanitarian law against states that no longer fulfilled these obligations was increasingly felt. The respective actions are done on the basis of Chapters VI and VII of the UN Charter and require the vote of the Security Council. In fact, it is about defending the human being where there are serious, mass attacks on individuals. The question of the legality of humanitarian interventions generated the emergence and implementation of the concept of the responsibility to protect.

3.3. The responsibility to protect

The UN documents from 2005 (G.A. Res. 60/1, U.N. Doc. A/RES/60/1, paragraphs 138 and 139) and 2009 (UN Doc. A/63/677) conceptualize the responsibility to protect, structured on three pillars: *pillar 1* focuses on the responsibility to protect that belongs to states for their own population; *pillar 2* envisages assistance by the international community to states in enforcing the responsibility to protect in relation to their own population; *pillar 3* consists in ensuring an effective and prompt response to prevent genocide, ethnic cleansing, war crimes and crimes against humanity through measures based on chapters VI and VII of the UN Charter, in collaboration with regional organizations, respectively the involvement of the UN General Assembly in this kind of response in the framework created by its resolution "*United for Peace*". International interventions based on this concept are made through Security Council resolutions.

4. The serious situation in Ukraine and issues of defending international humanitarian law

The application and observance of international humanitarian law in Ukraine has become a serious problem with the obvious attitude of the Russian authorities and army to not respect these norms. The non-recognition of the state of war and the need to apply international humanitarian law, the continuous attacks without discrimination, the direct targeting of civilians, the massive destruction of civilian and cultural property, the uncertain fate of prisoners and civilians in the occupied territories, the forced transfers of the population from the occupied territories to the territory Russian, the use of prohibited means and methods of war, the permanent threat of nuclear weapons, robberies, rapes and executions are examples of the defeat of the principle of good faith and the abandonment of humanism. In this context, the international community must intervene

to defend international humanitarian law and, consequently, to protect civilians and victims of war.

The international community began to react against these abuses of Russia. The first reactions were as early as 2014, with the annexation of Crimea by Russia. The question of the crime of aggression was raised. Some states have begun to impose sanctions against Russia, sanctions that have tightened with the invasion of Ukraine in February 2022. All these reactions are outside the UN Charter and have had no influence on the defence of international humanitarian law. In this context, the humanitarian crisis is deepening.

Although not a signatory to the Statute of the International Criminal Court, Ukraine signed a declaration in 2014 granting the Court jurisdiction over alleged serious crimes committed on its territory since 2014, regardless of the nationality of the perpetrators. Russia is not a signatory to the ICC Statute and does not recognize its jurisdiction. Even if the ICC prosecutor launched the investigation and is investigating the crimes on the ground, this action does not defend the application of international humanitarian law in this conflict either. The international criminal investigation only quantifies and certifies the violations.

The only instrument left to defend the application and respect of international humanitarian law in the armed conflict in Ukraine is the intervention of the Security Council based on Chapters VI and VII of the UN Charter. The Security Council tried to find a solution in this regard, but it ran into the right of veto of the permanent members, in this case Russia. Thus, in one of the meetings, which took place on February 25, the Council put to a vote a resolution prepared by the USA and Albania, with the support of several other member states, which would have deplored the Russian aggression against Ukraine and would have called for Moscow to withdraw all its troops. Eleven members voted in favour of the resolution and three (China, India and the United Arab Emirates) abstained, but Russia, which at the time held the Council presidency for the month, vetoed the text (United Nations News, 2022). This right of veto has blocked and will continue to block any attempt by the UN to defend international peace and security, despite the fact that Article 27 paragraph 3 of the Charter requires that: *"Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting"*.

This is not the first time that the UN has failed to defend entire populations against state abuses because of this veto. The right of veto was established in 1945 as an attribute (privilege) of the 5 permanent members (another privilege) of the Security Council (USA, UK, France, Russia, China). These privileges make the proclamation of sovereign equality between states, the foundation of the Charter, even more illusory. From the beginning, this system has attracted questions and uncertainties about the proper and fair functioning of the UN. Over time, increasingly vehement voices arose against this system, but attempts to reform the Security Council and the voting system failed. However, the UN General Assembly has found a way to achieve the main purpose of the organization even when the Security Council cannot act. Thus, in its resolution 377(V) of November 3, 1950 (known as "United for Peace"), the General Assembly *"Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall*

consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security" (United Nations, 1950). Action under this resolution could be taken in several cases involving permanent member states of the Security Council. This resolution is currently the only way the UN can intervene in the conflict between Ukraine and Russia. However, a forceful intervention by the international community will probably lead to a worsening of the situation, by directly involving powerful forces on both sides in the conflict.

In 2013, an initiative was launched by France and Mexico asking Security Council members to voluntarily suspend the use of the veto in cases of mass atrocities, genocide, crimes against humanity and large-scale war crimes. Although it was signed by more than 100 states, it remained without effect (*Reforming the UN Security Council*, a new report from Together First, 2020, p. 7).

Despite all these reform measures, Russia managed with a simple veto to prevent the UN from acting against the invasion of Ukraine. In a new attempt to combat this shortcoming, the General Assembly adopted, on April 26, 2022, a resolution aimed at holding the five permanent members of the Security Council accountable for using the right of veto. The Assembly decided that its President should convene an official meeting of the 193 members within 10 working days of the granting of the right of veto by one or more permanent members of the Council and hold a debate on the situation in which the veto has been expressed, if the Assembly does not meet in an extraordinary emergency session on the same situation (UN General Assembly, 2022). In this regard, the Assembly will invite the Council, in accordance with Article 24 paragraph 3 of the Charter, to present to the Assembly a special report on the use of the right of veto in question, at least 72 hours before the start of the meeting.

This new instrument is only a small step forward, even in this case the right of a permanent member to veto cannot be interfered with, but more pressure will be put on them to make decisions in accordance with the goals of the United Nations, but not with the particular interests of some states. However, the Security Council could not adopt any resolution regarding the situation in Ukraine. Even the recent annexation of occupied territories by Russia could not be the subject of such a resolution, running afoul of the same Russian veto.

Over time, for better functioning and regional representation of states in the Security Council, various options have been proposed, especially regarding the increase in the number of permanent and non-permanent members. Regarding the right of veto, there have been proposals to limit the use of this right, and even give it up. A working group (Intergovernmental Negotiations framework – IGN) was established within the UN, which, since 2009, has the role of proposing an optimal solution for the reform of the Security Council. Several regional interstate organizations are represented in this group. Such proposals, made by specialists (Popovski, 2015) are periodically presented to the UN, but, until now, the classic core of the Security Council has remained steadfast. Even though there have been some changes regarding the expansion of the number of non-permanent members, the system of permanent members and their right of veto have remained unchanged (UN Security Council, 2019). There are sufficient quality materials in the doctrine describing international efforts to reform the UN and the Security Council (Baccarini, 2018).

5. Conclusions

All the while, armed conflicts continue to produce real catastrophes and put all of humanity in great danger. If more

than 350,000 people have died in the 11 years of conflict in Syria, the conflict in Ukraine appears to have a much higher rate of mortality and destruction. This conflict shows us that the UN is incapable of combating such a threat and, consequently, enforcing respect for international humanitarian law and human rights.

Even in other conflicts, where the UN has been able to intervene, defending international humanitarian law proves a difficult mission. The serious atrocities and millions of victims of the last decades (former Yugoslavia, Rwanda, Congo, Somalia, Sudan and Darfur, Iraq and Afghanistan, Libya, etc.) are the testimony.

International humanitarian law is humanity's greatest achievement against the most terrible social phenomenon, war. The states of the world have undertaken to respect it, and to make it respected in all circumstances. The shortcoming is that, once good faith between states is gone, international humanitarian law is devalued and there is no objective instrument at the international level that can defend and restore it. Arriving at this unfortunate moment, we can only "deplore", count the victims and, if and when it will be possible, judge. In this context, reforming the Security Council and the right of veto is the fastest and most viable solution.

Proposals for amending the UN Charter and the Security Council (both in structure and in mode of operation) are many and varied. The biggest problem is the right of veto assumed by the 5 permanent member states. This right of veto can be used subjectively by some states, to achieve their goals sometimes opposed to the UN Charter. This is also the case of Russia, which, in the context of the invasion of Ukraine, seriously violates international humanitarian law and human rights. Russia uses the veto as a shield against the application of international law against her, turning the UN and the Security Council into mere spectators booing from the sidelines. Nor does the International Criminal Court have any influence on the observance of international humanitarian law by armed forces fighting for Russia, as long as Russia does not recognize its jurisdiction and protects its combatants from international jurisdiction.

It would be interesting to assume that Russia would not resort to vetoing a resolution against her. That resolution would be adopted and should be implemented. Here would come the hard part: a refusal by Russia to comply with the resolution would lead to the same result as using the veto. Activating the measures of Chapter VII of the UN Charter against Russia is currently a mathematical formula that has not yet been invented. The international community wants the exact opposite of such an evolution of the Russian-Ukrainian crisis. And when we also discuss the nuclear weapon, we realize that the UN is not prepared and has no real instrument to force such a state to submit. All kinds of radical solutions are circulating, such as suspending Russia's veto, losing permanent membership, even removing Russia from the UN. But all these solutions stop at the ability of the Security Council to adopt resolutions. Perhaps it is good that Russia opposes with the right of veto, stopping everything at this level, thus leaving us hope that there could be solutions. The only feasible solutions can still come from Russia, by returning to good faith and applying international norms. Otherwise, the wait for Russia to be defeated could be very long and painful for everyone.

At the moment, solutions such as increasing the number of members of the Security Council, those with the right of veto, etc., seem extremely good and effective, but against states like Russia the situation will be the same. The gross violations of international humanitarian law in Syria are still accounted for and shelved. There are no solutions for judging them. The same failure is found in Ukraine. We are horrified by the serious violations

and deplore them. And we will do the same in years to come. Only a great democratic and humanist revolution in Russia will be able to bring about justice.

The following years will be of great reforming turmoil at the UN – graphs, schemes, proposals upon proposals will be made and, meanwhile, numerous victims of the inefficiency of the current international law enforcement system will be counted. Which state will agree to surrender part of its own sovereignty in favour of increasing the power of the international community? Who will accept the transfer of nuclear weapons under international control? Who will accept the transition of arms production and trade under absolute international control? Who will accept a standing international army? ...And other reforms that would even lead to the idea of federalizing the UN. And this is where others come in, talking about the world government, shadowy or not, that could take over the entire planet for dark purposes.

For now we will remain divided into East and West, and we will continue to sift, through the sieve of international public, humanitarian and criminal law, the victims of a fragile balance.

REFERENCES

Baccarini, M.P.O. (2018). Informal Reform of the United Nations Security Council. *Contexto Internacional, Vol. 40, Issue 1,* http://dx.doi.org/10.1590/S0102-8529.2017400100005

Popovski, V. (2015). *Reforming and innovating the United Nations Security Council.* Commission on Global Security, Justice & Governance, The Netherlands: The Hague Institute for Global Justice and the Stimson Center.

Reforming the UN Security Council, a new report from Together First. (2020). News and Press Release.

Security Council Report. (2019). *The UN Security Council Handbook – A User's Guide to Practice and Procedure.*

Shaw QC, M.N. (2008). *International Law*. 6th Edition, Cambridge University Press.

UN General Assembly. (2022). *General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto*. News and Press Release, available at: https://reliefweb.int/report/world/general-assembly-adopts-landmark-resolution-aimed-holding-five-permanent-security

United Nations News. (2022). Available at: https://news.un.org/en/focus/ukraine

United Nations. (1950). *Resolution adopted by the General Assembly. 377 (V). Uniting for Peace*. 6th Session, A/RES/5/377, available at: http://www.un-documents.net/a5r377.htm

United Nations Organization. (1947). *Charter of the United Nations of June 26, 1945.* San Francisco.