THE SOURCES OF THE LAW OF ARMED CONFLICTS

IZVORI PRAVA ORUŽANIH SUKUBA

Ajla Škrbić, Faculty of Law, University of Travnik, B&H

ABSTRACT

The Law of armed conflicts is being developed simultaneously through the codification and the practice of international entities. Codification is primarily aimed at the goal of all the countries in the world becoming convention signatories in writing and that the convention set forth obligations for all entities in a conflict on a contractual basis. The practice of nation states and other international entities, on one side, must be in accordance with their contractual obligations; therefore these two processes are interrelated and conditional upon each other. The positive fact is that international community, on a daily basis, heads towards the creation of norms of jus cogens of armed conflict standards, making a unique system of the sources of the law of armed conflicts out of codification standards and practices of international entities.

Key words: war, law of armed conflicts, codification, practice of international entities, international custom

SAŽETAK

Pravo oružanih sukoba razvija se istovremeno kroz kodifikaciju i praksu međunarodnih subjekata. Kodifikacija prvenstveno ima za cilj da sve države svijeta postanu strankama konvencija u pisanom obliku i da te konvencije obavezuju sve sukobljene strane po ugovornoj osnovi. Praksa država i drugih međunarodnih subjekata, s druge strane, mora biti u skladu s njihovim ugovornim obavezama, tako da su ova dva procesa međusobno povezana i uslovljavaju jedan drugog. Pozitivna činjenica je da međunarodna zajednica svakodnevno ide u pravcu stvaranja jus cogens normi od normi prava oružanih sukoba, čineći od kodifikovanih normi te od prakse međunarodnih subjekata jedinstven sistem izvora prava oružanih sukoba.

Ključne riječi: rat, pravo oružanih sukoba, kodifikacija, praksa međunarodnih subjekata, međunarodni običaj

INTRODUCTION

War is the act of violence that is undertaken by one side in the conflict with the aim to force the other side to fulfill its interests. Legally, war is not conflict among peoples, but countries, or conflict between man and man - but conflict between soldier and soldier. Therefore, the goal of the law of armed conflicts is for it there to be respect of certain rules during conflicts, even towards the other side.

The law of armed conflicts is developed through codification and the practice of international entities as well. Codification has been developing through conventions, protocols, treaties etc. However, in theory, codification itself is not sufficient. For example, the Persian Gulf War (2 August 1990 – 28 February 1991) had shown that members of armed forces mostly are not familiar with the rules, and also, those they are familiar with – are not precise enough. Therefore, the attention has been stressed on the practice of international entities. Codification and practice of international entities are interrelated processes out of which there could be the result of the creation of Customary International Law

and could be led toward the codification of International Law.

CODIFICATION

Every conflict in history has basic rules on starting, running and ending the conflict. However, at the beginning it had been unwritten rules based on customs. Its basic characteristic had been spatial and temporal limitations. Namely, it had been related only to the actual conflict.[37] Presently, nation states make written rules which aim universal implementation. In order to achieve general acceptance by international entities, nation states began to understand that it is necessary to set up precise legal rules and procedures for the creation of international legal norms.[38]

The Lieber Code presents the first attempt at codifying the rules of the law of armed conflicts, which entered into force in April 1863. However, it did not have the status of International Treaty because it was aimed only at the Union soldiers in the American Civil War.[39] Later, other nation states adopted their own codes.[40]

The most important codification that had left the most significant mark on the law of armed conflict are the Hague rules and the Geneva rules, which are considered as parts of said law.

The Hague rules determine the rights and obligations of the sides in conflict, and limit the ways of achieving the losses to the enemy. The name comes from the city where its foundations were laid. It consists of the conventions that have been adopted at the Hague Peace Conferences in 1899 and 1907, and are related to the conduct of wars, or questions of military necessity.

The Geneva rules are related to the protection of the members of the armed forces who are not involved in the war any more, and also those persons who are not actively involved in the conflict. The name also comes from the city where its foundations were laid. Mostly it is related to the acts of humanity, i.e., principles of humanity.

Nowadays this division of law loses its significance, because two new Protocols were brought in 8 June 1977 and eliminate the differences among them - Protocol I relating to international armed conflicts and Protocol II relating to non-international armed conflicts.

Precise hierarchy in the implementation of the rules of the law of armed conflicts is provided by the Martens clause.[41] It was given in the introduction to Convention (IV) respecting the Laws and Customs of War on Land (1907), and it was confirmed in Protocol I, Paragraph 2, Article 1, from 1977.[42] It states that the rules of the Convention (IV) respecting the Laws and Customs of War on Land from 1907 as well as other convention would be implemented in all armed conflicts. If there are no such rules, then the principles of International

[37] The Croatian Red Cross. Izvori Međunarodnog humanitarnog prava. Retrieved August 02, 2011, from http://www2.hck.hr/?path=hr/static/page/Sto_radimo.Medunarodno_hum_pravo.izvori

[38] United Nations established the Commission for the International Law, that suggests, initiates and adopts legal norms.

[39] FPN – Centre for International Humanitarian Law and International Organisation. Pitanja i odgovori. Retrieved August 02, 2011, from http://mhp.fpn.bg.ac.rs/pitanja_odgovori/pitanja_odgovori_3.html

[40] The most complete was the Regulation of war and neutrality of Fascist Italy from 1938 (Degan, V. Đ. (2011). *Međunarodno javno pravo*. Zagreb: Školska knjiga. p. 809)

[41] „Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

[42] The question that often arises is who the „civilized nations" are. In fact, we are talking about two essential elements: that such principle by its content is highly value vise positioned, and that it is accepted by the relevant number of international entities.

Law carried out of established customs among civilized peoples would be implemented. If there are still no such rules, then entities in conflict must carry out principles of International Law that are stipulated as principles of humanity and the requirements of the public conscience.

Nowadays there pervades the thought that the rules governing the law of armed conflicts must go ahead of the erupting conflicts. The biggest problem is the fact that it is almost impossible to legally prohibit something for which it is still unknown if said thing is even possible to make or do (weapons). For these reasons, every convention, every contract that the subjects of public international law signed - it only after a great conflict in which, for example, new types of weapons were used; the contract, in essence, is just a confirmation of the consensus on an issue that has been mostly common knowledge.

Rules of law of armed conflicts are mostly kept in the four Geneva Conventions of 12 August 1949 and their Additional Protocols from 1977.

The Geneva Conventions of 12 August 1949 [43] are being implemented in the international armed conflicts, except for their common Article 3, that is implemented in non-international armed conflicts. They are founded on the idea of respecting every individuals and his or her dignity. Persons who are not actively involved in an armed conflict, persons who are not involved in the battle due to sickness, wounds, imprisonment etc. - must be protected. All wounded persons, no matter on which side they fought, should be provided with assistance, without any discrimination.

Two Protocols from 1977[44] update the Convention, and their main aim is to eliminate violence and to strengthen the rules governing behavior in hostilities.[45]

Protocol I has been implemented in the international armed conflicts, i.e. by developing rules from Geneva Conventions from 1949, by implementing the protection of civilian populations against enemies.

Protocol II has been implemented in the non-international armed conflicts, i.e. by expanding and the defining in detail the general provisions for the protection of persons who are not actively involved in the conflict.

Protocols from 1977 update protection of the Geneva Convention (1949), by expanding on all persons who are involved in the conflict, requesting from all members of all sides in a conflict to make distinctions between civilians and soldiers, as well as to make differences between civilian and military buildings, and to respect the principles of humanity. But no matter which type of armed conflict is in question, all provisions of law of armed conflicts have the same cause: to limit and to prevent suffering caused by war and to reconcile military needs with humanitarian reasons.[46]

[43] The International Diplomatic Conference was held in Geneva on 12 August 1949 at which four Geneva Conventions were made:
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- Convention relative to the Treatment of Prisoners of War;
- Convention relative to the Protection of Civilian Persons in Time of War.

[44] It was related to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (Protocol II).

[45] Protocol III (2005) by which was introduced additional distinctive character.

[46] „Considering:
That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
That for this purpose it is sufficient to disable the

Today there pervades the opinion that many conventions on the law of armed conflict are binding to all entities on the basis that they are now International Customary Law. Also, grave breaches of Geneva Conventions (1949) and their Protocols (1977) are considered as international crimes. International community is heading towards the establishment of *jus cogens* norms within the norms governing the law of armed conflicts. Yet, the main drawback of this area of law is its lack of ability to criminalize and forbid the use of force in general, to protect all who are affected by an armed conflict, does not differentiate the aims of the conflict, and perhaps its biggest flaw is the basis on which it rests and which is that all the goals of the sides in conflict are rational.[47]

In general, the aim of the process of codification of the law of armed conflicts was:

- that all countries of the world became signatory parties to the conventions and that all these conventions are binding for all parties to the conflict, on a contractual basis;
- to specify the rights and duties of the parties in order to prevent arbitrary interpretation of the rules of law of armed conflicts;
- to complement and build upon the right of armed conflict.[48]

PRACTICE OF INTERNATIONAL ENTITIES AS A SOURCE OF THE LAW OF ARMED CONFLICTS

In practice, government acts contribute the creation of law of armed conflicts. That refers to, for instance to the behavior on the battlefield, to the use of certain weapons, a variety of military manuals, instructions to the Armed Forces, opinions of official legal advisers, presentations before the international courts, etc.

Even decisions of international courts are considered as sources of the law of armed conflict. However, they are minor sources of law of armed conflicts, since they contribute to the development of rules of Customary International Law, and affect the further practice of international entities.

General principles of law of civilized nations are also sources of law of armed conflicts, in the sense that they fill legal gaps - if any exist. They have a subsidiary effect, as applied in situations where there are legal gaps present. They should be accepted by most nation states. The specificity of this source of law is not formed by consent of nation states, but arises from the national law of nation states. This, of course, does not mean that national law is applied, but that the norms of domestic law are taken as an abstract category, and with its contents fill the legal gaps in international law.

Given that international law develops more slowly than domestic law, we are faced with a situation that in international relations we have no verified norms of international law for any specific situation. Specifically, some states have developed legal rules that can be used by other international entities that have not yet developed such rules. However, the application of general legal principles does not mean a mechanical transfer of rules from one country to the level of international law, but includes the process of finding a common practice in certified

greatest possible number of men;
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
That the employment of such arms would, therefore, be contrary to the laws of humanity (...)" (Preamble to the St. Petersburg Declaration of 1868)

[47] Law of War, Exercises from May 16, 2008 *http://www.google.ba/#hl=bs&source=hp&q=inherentna+ograni%C4%8Denja+mhp&btnG=Google+pretraga&fp=51631f713c906d69&biw=1280&bih=670* (02.08.2011.)

[48] Degan, V. Đ. (2011). *Međunarodno javno pravo*. Zagreb: Školska knjiga. p. 804.

legal rules that can be applied to the entire international community.

CONCLUSION

Sources of law of armed conflicts are a result of the codification and the practice of international entities. Codification refers to the adoption of various conventions, treaties and other agreements, while the practice of international entities is mainly related to the practice of states as the most important entities of international law. These two processes are mutually dependent.

Rule of law of armed conflicts are mainly contained in the four Geneva Conventions from 1949 and their Protocols from 1977. Most of these norms transfer into *jus cogens* norms from which none of the subjects of international law cannot digress from. It leads to legal certainty and the successful functioning of the international community as a whole.

BIBLIOGRAPHY

[1] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

[2] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.

[3] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

[4] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

[5] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[6] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

[7] Degan, V. Đ. (2011). Međunarodno javno pravo. Zagreb: Školska knjiga.

[8] Exercises from May 16, 2008. Law of War. Retrieved August 02, 2011, http://www.google.ba/#hl=bs&source=hp&q=inherentna+ograni%C4%8Denja+mhp&btnG=Google+pretraga&fp=51631f713c906d69&biw=1280&bih=670

[9] FPN – Centre for International Humanitarian Law and International Organisation. Pitanja i odgovori. Retrieved August 02, 2011, from http://mhp.fpn.bg.ac.rs/pitanja_odgovori/pitanja_odgovori_3.html

[10] Krivokapić, B. (2010). *Enciklopedijski rečnik međunarodnog prava i međunarodnih odnosa*. Beograd: Službeni glasnik.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[13] The Croatian Red Cross. *Izvori Međunarodnog humanitarnog prava*. Retrieved August 02, 2011, from http://www2.hck.hr/?path=hr/static/page/Sto_radimo.Medunarodno_hum_pravo.izvori