DE GRUYTER OPEN
International Conference KNOWLEDGE-BASED ORGANIZATION
Vol. XXIV No 2 2018

LEGAL ASPECTS REGARDING THE EXISTENCE OF THE INTERNAL ARMED CONFLICT

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Abstract: *The issue of the existence of the internal armed conflict concerns both legal factors and political factors (recognition of the existence of the internal armed conflict). From a legal point of view, to declare a violent social phenomenon as internal armed conflict, we must resort to the specific rules of international humanitarian law: Article 3 common to the Geneva Conventions of 1949 and Article 1 of the First Additional Protocol to these conventions of 1977. However, these regulations, while describing the general parameters of the existence of an internal armed conflict, do not establish clear legal criteria for delimiting the internal armed conflict of internal tensions and disturbances or other forms of non-armed conflicts. This regulatory shortcoming has led to the emergence in the jurisprudence of some states, but also in the international one, of criteria for the existence of the internal armed conflict.*

Keywords: internal armed conflict, the beginning of hostilities, internal disturbances and tensions

1. Introduction

International humanitarian law starts to apply with the beginning of an internal or international armed conflict. International treaties establish the field of application of the rules of international humanitarian law (as can be seen in Articles 2 and 3 of the 1949 Geneva Conventions, Article 1 of the Additional Protocol I and Article 1 of Additional Protocol II in Geneva in 1977), but it does not clarify either the concept of armed conflict or the moment when a state of violence becomes armed conflict.

In order to be able to identify the moment when an internal armed conflict is triggered, or when internal tensions or disturbances are transformed into an internal armed conflict, we must as precisely as possible define what is meant by an *armed conflict not of an international character*, as it is called in Article 3 common to the Geneva Conventions of 1949.

Once this has been established, we can analyse the difference between violence within a state where international humanitarian law can apply and violence to which only common law applies (public order and security). Of all the situations, the most difficult to list are those in which, although not all the parameters of an internal armed conflict are met, the repression of social violence is done with the help of the armed forces equipped with war ammunition.

2. *Armed conflict not of an international character* - legal significance

The starting point for identifying the legal significance of this notion is the first legal text that mentions it: Article 3 common to the Geneva Conventions of 1949. It is already generally accepted the idea of a lack of a legal definition of the internal armed conflict and the concrete parameters of declaring a violent social event as

DOI: 10.1515/kbo-2018-0087

internal armed conflict.
The common Article 3 refers to two insignificant elements in this approach: it applies to an armed conflict without international character (ie common Article 2 is not applicable) and which must necessarily take place in the territory of a signatory State at least of one of the four Geneva Conventions of 1949. The problem with the signatory State has been resolved, the 1949 Conventions having universal applicability, even the Common Article 3 being already considered customary law and even *jus cogens*. [1]
But that 'in case of' remains an enigma. And this approach has a justification: a too rigid or even exemplary definition of the internal armed conflict would have allowed the parties to the conflict to escape from the application of these rules by the fact that the common Article 3 also does not refer to the conflict in which they are involved. The intention of this regulation is to extend as much as possible the field of application, leaving in the power of states to delimit. [2]
This optics is not as bad as it seems, although it leaves room for many controversies and limiting interpretations.
In theory, we are in the situation of two camps that are violently confronted within a state, without the need for governmental armed forces to be involved. However, in the case of internal tensions and disturbances, this is the same situation. Moreover, even at the level of internal tensions and disturbances, the rebels can be armed, and the use of armed force to restore order is possible. Interestingly, only the 1977 Additional Protocol II makes this difference, not the common Article 3. Even Article 1 paragraph 1 of Additional Protocol II states that „develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications", and paragraph 2 specifies that „This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." By interpreting it, it is assumed that, although the scope of Protocol II is reduced as set out in its first article, these restrictions are not applicable to the common Article 3, which remains applicable to those so-called low-intensity internal armed conflicts. [3] This does not exclude the possibility of differentiating between internal tensions and disturbances on the one hand and internal armed conflict on the other hand, on the level of common Article 3.
Even though, apparently, Protocol II defines internal armed conflict in its first article, it is not. This first article only sets out the conditions for the application of Protocol II, namely it applies to large-scale and intensive internal armed conflicts. [4] Thus, the scope of Protocol II is narrower than that of Common Article 3, applying only to those internal armed conflicts involving government forces, and insurgents are well organized, control territories, and can carry out sustained and coordinated military operations.
By the way the internal armed conflict is regulated in Protocol II, at this level, there can be no question of the existence of the armed conflict. It is accepted that Protocol II cannot be applied since the beginning of an internal armed conflict, the features of Article 1 being acquired during the confrontations, until then only common Article 3 has been applied. [5]

3. Internal tensions and disturbances

Paragraph 2 of Article 1 of the 1977 Additional Protocol II establishes a provision that apparently helps to clarify the idea of internal armed conflict and to apply international humanitarian law in such situations. Thus, situations of „internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" are excluded from the armed conflicts and

from the application of international humanitarian law.

At first glance, this paragraph seems to be illusory because paragraph 1 makes a very clear set of application criteria, difficult to meet even in many armed conflicts under the common Article 3. We consider that, although the paragraph clearly states that Protocol II does not apply to these situations, the legislation in question also applies to common Article 3, since the provision clearly excludes internal tensions and internal disturbances from the sphere of armed conflict. This is also reinforced by the provision in Article 8, paragraph 2 (d) of the Rome Statute of the International Criminal Court in 1998.

It is very difficult to differentiate between internal armed conflict and internal tensions and disturbances in the context of silence of the law. It is only in the Statute of the International Criminal Court that a clearer definition and differentiation is attempted in Article 8 (2) (f), recourses to the case law of the International Criminal Tribunal for the former Yugoslavia [6]:

„(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

It follows that important factors for determining the existence of armed conflict or the transformation of internal tensions and disturbances in armed conflict are the organization of the parties, the intensity of the struggles, their duration, and the willingness of states to recognize these armed conflicts.

Social violence in a state has different forms, ranging from violent protests to anti-governmental rebellions repressed by law enforcement. If these rebels survive the repression, and become more powerful and wider in space and time, they become insurgents (at the border between internal disturbances and internal armed conflict). Insurgency is the level at which it is currently considered that a violent social event becomes internal armed conflict, as is even apparent from the jurisprudence of international courts (International Criminal Tribunal for the former Yugoslavia). [7]

The distinction between insurgency (as internal disturbances) and belligerence (as internal armed conflict) is made in classical international law by the principle of belligerence recognition, based on the idea of sovereignty of the state in which confrontations occur. [8] In such a case the existence of the internal armed conflict is confirmed and international humanitarian law becomes applicable.

Current international humanitarian law requires its application in armed conflicts under all circumstances, including insurgencies. [9]

4. Conclusions

This regulation is the beautiful but poor girl who became old and just as poor! Even with the frequent aesthetic operations of international jurisprudence, the regulation of the internal armed conflict is far from being able to become a protective goddess of the victims of these tragedies.

We appreciate that it may, however, be considered a state of internal belligerence, a situation in which armed violence generalizes at the level of a state (appreciated as an intensity of violence through the broad interest of the population and wide territorial spread) even if the organization of the parties (in particular the rebellious population) is not well consolidated, or it has been achieved over time. We can speak, even in the absence of a political-military organization of the rebels, of a goal organization and of a unit of action in its realization (for example, the banishment of the governors and the taking over of power). It is also possible to

consider the subsequent emergence of a political group, even self-titled, as the central nucleus, to which the rebellious population becomes interested and leaves silently led.

In the violent confrontations between the population and the authorities, which generalize and encompass the entire territory, the intensity is obvious, but the organization and control of the territory becomes uncertain. Due to the fragmentation of the struggles and the difficulty of communication, or even the refugees of the authorities, elements of deconstruction of the state can occur. Even though the authorities have been removed, the fighting can continue until the former regime's followers are defeated or deployed, or until the new power pole becomes solid and manages to restore order and peace.

In all these situations, the common Article 3 should be considered as fully applicable, especially because the change of political regimes through violence comes in the same way with the change of the internal legal regime and even with legal goals between the denial of old laws and the emergence of new normative acts, and, in this time, leadership is often done more by political acts than juridical.

In fact, the overthrow of an oppressive political regime by the population also aims at eliminating the legal instruments created by that system in order to achieve its goals. Especially in such situations, when social chaos intervenes, even for shorter periods of time, it can give rise to opportunities for people or groups of malicious people who, under the banner of the „revolution", to rob, punish, kill, torture, humiliate, execute people without a fair trial, etc. And the existence of a party to the conflict that adopts perpetual tactics to create a state of confusion and social disorder does not justify punishing the other party to the conflict that fights correctly, and the civilian population, by not recognizing the internal armed conflict.

In the current context, the application of international humanitarian law to internal armed conflicts is a failure. Neither the Common Article 3 nor the 1977 Additional Protocol II succeed in imposing the respect for the law in such a conflict. But these international norms allow better punishment of those violating these rules through international and domestic criminal law. Perhaps this is one of the reasons why states or the winners in such a struggle refuse to recognize the character of internal armed conflict in order to avoid the emergence of criminal liability resulting from the state of war, especially for war crimes.

A very important role in establishing the character of internal armed conflict remains with the states, through the political recognition of belligerence, by establishing this character through an internal or international judicial procedure or by the power of a UN Security Council resolution.

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