

**THE INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN THE NEW TYPES  
OF ARMED CONFLICTS**  
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**Abstract:**

*The international humanitarian law applicable in armed conflicts has evolved continuously since antiquity until today, its doctrinal writings pointing out during the modern period the influence that the progress of the concepts and the practices of war has had on the development of the normative conventions, especially the first and second world war, resulting in texts that are applicable even today.*

**Keywords: international humanitarian law, international relations, peace, cooperation**

**Introduction**

A careful look at the reality of the international life at the beginning of the 21<sup>st</sup> century will easily reveal the accelerated dynamic of the changes that have occurred in the process of using armed force in order to achieve some specific interests of the various international, supra state, state and intrastate actors, with all the humanitarian consequences, beneficial or disastrous, that have resulted from these practices.

With the aim of improving the human condition during an armed conflict, the international humanitarian law drawn up until the end of the 20<sup>th</sup> century seems no longer able to handle the challenges arising from the transformations occurring in the modalities of using organized armed violence. The continuation of politics by other means, as Carl von Clausewitz characterized it, the war remains for many a painful necessity even nowadays, modifying his peculiarities in a chameleonic way, exactly for which it is required, more and more insistently, the adaptation of the international humanitarian law with the new types of armed conflicts; increasingly, there are being reported in the specialty literature the references to discrepancies between the international traditional law, the classic law of war and the rapid developments of the modern means and methods of fighting at a strategic and tactical level, more and more unconventional and without explicit legal regulations in the legislative acts in the field.

On the other hand, there are highlighted the slower normative developments of humanitarian international law after the great encoding achieved in 1977, so that it has not been able to keep up with the developments of the conflicting practices of international relations. The explanation proposed by a great Romanian specialist in this field is that „experience shows that any new and progressive norm, in international relations, makes its way with difficulty, encountering numerous obstacles”<sup>1</sup>; indeed, concrete life and work at the international level are evolving faster than their legal regulations, being needed sustained efforts at institutional, jurisprudential and doctrinaire level in order to react to the new threats and risks to the international peace and security, after which, new threats arise again, which humanity must face and solve, this being in fact the history of humanity’s progress to the ideal of peace and well-

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<sup>1</sup> D. Mazilu, *Dreptul păcii*, Academica Publishing House, Bucharest, 1983, p. 31.

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being. In consensus with the optimistic vision of the future, we consider that the new rules of international humanitarian law (IHL) penetrate more and more the very different fields of the international relations during armed conflict, hereby contributing to the perfecting of the good global governance that benefits the entire global civil society of the people of the world.

In this context, the international humanitarian law applicable in “the new types of armed conflict” appears to us as being an issue of the ratio between law and international relations which they regulate and includes both continuities and discontinuities, humanistic traditions and revolutionary innovations in order to promote ideals and progressive human values, being, at the same time, a matter of will of the public legislative, executive and judicial authorities, from different levels of governing, to apply in their letter and spirit the principles and the rules of the positive international humanitarian law until the development of new normative documents that would eliminate the possibility of humanitarian disasters caused by war. Scientific research on this subject will start from the fundamental hypothesis that between international humanitarian law and international relations during an armed conflict there is a dialectic report from “law” to its object of regulation, hypothesis based on certain premises that must be demonstrated and developed in an elaborate mode, such as the issue of conventional developments always merging with the customary ones, or the issue according to which the conventional progress in this field is facilitated by jurisprudential interpretations, or the one referring to the contribution of the doctrine in the reiteration and the adaptation of the specific law to the current and possibly future practices of the international use of military force. Such a complex analysis necessarily involves, from a methodological perspective, an interdisciplinary approach of the phenomenon, in an attempt to bring unique contributions to the stage or research already carried out on the big humanitarian problems of the third millennium.

The general theory of law, starting from the acknowledgement that “law starts from the facts” so that each society has its own legislation<sup>2</sup>, reaches the encyclopedic conclusion in accordance with which the juridical defines a component part of the social reality which reflects it in the normative plan<sup>3</sup>, so that, as far as he is concerned, the international public law (to which also belongs the international humanitarian law), has as its object of regulation the international relations that manifest themselves both in the form of cooperation that involves peace and in the form of confrontation that involves war<sup>4</sup>. Even if in antiquity it was thought that “*inter arma silent leges*”, since then it also remains the phrase, “*ubi societas ibi jus*”, which means that the contemporary international humanitarian law governs the relations between states and other subjects of international law in times of armed conflicts, both international and non-international.<sup>5</sup> Specialists in the field emphasize that what forms the object of the international humanitarian law are the relations between the parts of an armed conflict, with or without international character referring to the carrying out of the military operations, the use of means and methods of war, the treatment of victims of war and of the civilian population as well as the relations between the belligerent parties and those which remains outside the armed conflict.<sup>6</sup>

Regardless of its actual military branch (the Hague law) or of its humanitarian one (the Geneva law), the international humanitarian law applicable in armed conflicts has evolved continuously since antiquity until today, its doctrinal writings pointing out during the modern period the influence that the progress of the concepts and the practices of war has had on the

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<sup>2</sup>M. Djuvara, *Teoria generală a dreptului*, Socec & Co Publishing House, Bucharest, 1930, vol II, p. 358-361.

<sup>3</sup>N. Popa, *Teoria generală a dreptului*, Europa Nova Publishing House, Bucharest, 1995, p. 28.

<sup>4</sup>G. Geamănu, *Drept internațional public*, Didactică și Pedagogică Publishing House Bucharest, 1981, vol. I, p. 51.

<sup>5</sup>I. Closca, I. Suceava *Treaty of international humanitarian law*, Bucharest, 2000, page 49-50. The authors carry forth that not all relations in the period of armed conflict are governed exclusively by international humanitarian law some falling within the general scope of public international law or international criminal law, in the law of diplomatic or international law of human rights.

<sup>6</sup>See also F. de Mulinen, *Manuel sur le droit de la guerre pour les forces armées*, Comité international de la Croix-Rouge (CICR), Geneve, 1989, p. 2 și A.P.V. Rogers, P. Malherbe, *Fight it right!, Model Manual on the law of armed conflict for armed forces*, International Committee of the Red Cross, Geneva, 1999, p. 17-18.

development of the normative conventions, especially the first and second world war, resulting in texts that are applicable even today.<sup>7</sup> Studies conducted under the auspices of the Police Academy „Alexandru Ioan Cuza”, show us that, despite the hopes of the disappearance of war by banning it in the Charter of the United Nations as an instrument of national policy of States, armed conflicts continued to manifest themselves in the form of international crimes of aggression or as a reaction of the global and regional governance against these crimes or as self-defense of the sovereign states, so the international law applicable in armed conflicts has always been reaffirmed and developed even in the post-war period until today<sup>8</sup>.

Researching the sources of the humanitarian law applicable to international armed violence there can be observed that in its regulatory objectives they highlight the existence of four types of armed conflicts governed by them: a) international armed conflict between states, governed by the Hague conventions and referred to in the art. 2, which is common to the four Geneva Conventions of 1949, and art. 1 paragraph 3 of the I<sup>st</sup> Protocol of 1977; b) the wars of liberation from under colonial domination, foreign occupation and racist regimes, referred to in art. 1 paragraph 4 of the I<sup>st</sup> Protocol; c) non-international armed conflicts stipulated by art. 3 common to the four Geneva Conventions of 1949 and d) non-international armed conflicts referred to in art. 1 of II<sup>nd</sup> Protocol of 1977. We could also add to this „formalized” typology the guerrilla or partisan wars, which can be both internal and international, resulting from art. 44, paragraph 3, which, taking into account that there are situations in armed conflicts, when as a result of hostilities a combatant cannot be distinguished from civilians, he retains the status provided that in such cases he should wear guns in plain sight for the duration of each military action and during the time he is exposed to the opponent's vision when he takes part in a military deployment preceding the attack. Unlike the classic law of war, this new typology of international armed violence, characterized by the concept of „armed conflict”, does not necessarily imply the formal recognition by the belligerents of the state of war, so that the term „international armed conflict” may include any armed struggle between two or more entities with recognized international personality (states, national liberation movements, organized populations, etc.), while that of „non-international armed conflict” refers to the armed confrontation inside the territory of a state carried out between government armed forces and dissident armed groups or those organized under a responsible command able to control part of the territory of a state and to carry out continuous and concerted armed operations on the basis of compliance with international humanitarian law. However, beyond this object of the international humanitarian law clearly defined by international conventions, there are social relations in time of armed violence which are not governed by the international humanitarian law, such as those from internal turmoil and unrest times or sporadic and isolated acts of violence, which come under the auspices of the national law or under those of international law of human rights.

It is more than obvious that the typology of the earlier mentioned armed conflict, which are included in the subject of the international humanitarian law, may not reflect the full complexity of the global reality in which is today armed force used. First of all, we see on the military operation theatres, belligerents fighting under the flag of some international organizations (UN, NATO, EU etc.) which are not parties to the Hague and Geneva Conventions, claiming for a long time that the respect for international humanitarian law is ensured by the commitments assumed by the member states of those organizations; however, as the crystallization of regional and global governance and in response to the pressure from public opinion, international security organizations with military attributions have adopted their own tools for the application of international humanitarian law, such as the UN Secretary-General's

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<sup>7</sup> More details in J. Pictet, *Développement et principes du droit international humanitaire*, Institut Henry Dunand, Genève, Editions A. Pedone, Paris, 1983, p. 11-72. See also I. Dragoman, *Drept internațional umanitar*, Andrei Șaguna Foundation Publishing House, Constanța 1999, p. 22-26.

<sup>8</sup> More details in I. Dragoman, D. Ungureanu, V. Velișcu, C. Stănculescu, *Manual de drept internațional umanitar pentru forțele de ordine și siguranță publică*, Sitech Publishing House, Craiova 2011, p. 64.

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Bulletin since 1999, the OSCE Code of conduct since 1995, the Standardization Agreement (STANAG) of NATO of 2004 for the training in the law of armed conflict or the EU Guide since 1995 on the promotion of international humanitarian law. We could match this new attitude of politico-strategic bodies of the international organizations to the IHL with the EU's accession to the European Convention of Human Rights and Fundamental Freedoms achieved through the Lisbon Treaty entered into force in 2009. Secondly, the concept of “armed groups” used by the II<sup>nd</sup> additional Protocol for the defining of civil wars can be interpreted in multiple ways<sup>9</sup>, these being able to act on the territory of several states or asking for the support of some international actors, which complicates things even more, leading even to “deconstructed conflicts”, “asymmetric conflicts” and “global war on terrorism”, in which the violations of the international humanitarian law are intertwined with those of human rights.

There is therefore no surprise that, since the last decade of the 20<sup>th</sup> century and so far, an entire literature devoted to new types of war has proliferated, starting precisely from the acknowledgement that, in the new millennium, we will not be faced with the classical forms of armed conflict, but with new risks and threats to human security, national, regional and global. That is why, the Millennium Declaration elaborated under the auspices of the United Nations, NATO's New Strategic Concept adopted in 2010 at their summit meeting in Lisbon, the EU's Security Strategy of 2003 as well as the national strategies of Romania of 2007 and 2008<sup>10</sup>, have described as global challenges and key threats the terrorism, the proliferation of weapons of mass destruction, the regional conflicts, violent or dormant, the failure of the state governing and cross-border organized crime. That is why that if in the classical theory of international relations there was talk of limited war or total war, of war waged by the entire population or against the whole population or of the mechanization of war and total domination<sup>11</sup>, in the more recent literature of “human security” it is resorted, to better describe the world of the 21<sup>st</sup> century, to notions such as: global war on terrorism, imaginary war, permanent war, identity war, ethnic conflict, humanitarian conflict, conflict, protecting intervention, cultural war<sup>12</sup>; it is also speculated, with the terms used before the prohibition of war as an aggressive instrument of national policy, as a religious war, as a just war, preventive war or war in advance or preemptive war<sup>13</sup>. As one author explains, the diverse terminology of armed conflict was born during the 1980s and 1990s, when there evolved a new type of organized violence, especially in Africa and in Eastern Europe, as an aspect of the globalised era, described as a “new war”, different from the “old” wars that took place in Europe from the late XVIII<sup>th</sup> century until to the middle of the XX<sup>th</sup> century<sup>14</sup>.

Although the concept of “war” is more widely used, to emphasize the political nature of both types of armed conflict, the new armed craft involves a mitigation of differences between war (usually defined as a military action between states or organized political groups, having political motivations), organized crime (the terrorist violence of private groups, pursuing especially financial earnings) and the systematic and widespread violations of human rights (committed with violence by the means of force of both states and political groups against individuals). It is said that the new wars are “post modern”, meaning that instead of expecting cases like foolish dictators such as Saddam Hussein and Muhamed Gaddafi to fight against us in the style of classic warfare, it would be more plausible to expect a chemical, biological or even a nuclear correspondent of Pearl Harbor; indeed the 9.11 attacks from New York and Washington, and those from Madrid and London have shown that the power of suicidal terrorists and cyber-criminals is “post-modern”, being asymmetric not only as operational goals, but also as rules and

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<sup>9</sup> This is the reason why an entire publication of *The International Review of The Red Cross* in 2011 was dedicated to this subject, *International Review of Red Cross*, Volume 98, No. 882, June 2011.

<sup>10</sup> Publicity in Official Monitor of Romanian no. 799/2008.

<sup>11</sup> Hans J. Morgentau, *Politica între națiuni*, Polirom Publishing House, Bucharest 2007, p. 393.

<sup>12</sup> Mary Kaldar, *Securitatea umană*, C.A. Publishing, Cluj Napoca, 2010, p. 12.

<sup>13</sup> Mircea Malița, *Jocuri pe scena lumii*, CH Beek Publishing House, Bucharest, 2007, p. 51.

<sup>14</sup> Mary Kaldar, *Războaie vechi și noi*, Antet Publishing House, p. 9-10.

systems of values on which it is based and which must be respected. On the other hand, it would be possible, that as future crises will manifest themselves more violent and inhumane, to realize that the world is not “modern” or “post modern” but a continuation of the ancient world which, despite various technological means, we must face it with constructive realism<sup>15</sup>.

Polemology analyzes the typology of armed conflicts based on the idea that “if you want peace you must know the war”, thus trying to decipher its forms.<sup>16</sup> In this framework we include legal science studies which show that in the past there were offensive and defensive wars, of a self or collective defense nature, local and global, terrestrial, aerial, maritime, civil and interstate, conventional and popular or guerrilla, high or low intensity and nuclear.<sup>17</sup> New types of wars, however, require a new polemology in order to understand why wars and armed conflicts have emerged from their classical forms, beating the previous boundaries and giving birth to new hybrid and indecisive forms, with the emergence of new state and supra-state actors, new weapons and new technologies as well as new ideological representations (in both military weak and strong ones). We believe that a new polemology might explain not only why the progressive democratization of humanity and the ideal of an international order insured by a global governance have limited the occurrence of classical armed conflict but also how could existing humanitarian law may apply in the case of new wars of our time.<sup>18</sup>

Also Irenology, as the science of peace, is concerned with the typology of armed conflicts, analyzing in particular the prohibition of aggression warfare, war propaganda and preparations, and also the condemnation of war usage for international disputes, as well as constituent elements of the right to peace.<sup>19</sup> We can ascertain, in fact, a comprehensive interdisciplinary effort that has been carried out in recent years, for thorough scientific research of the war-peace dynamics in security policies, studies being directed not only at the current conflict but also at the predictable future.<sup>20</sup>

Important vectors of scientific investigation in this field exist also in the doctrinal developments of the relationship between international humanitarian law and international relations in time of armed conflict, which includes not only legal issues but also political and strategic goals. In the Romanian scientific framework, the first analyses of the phenomenon appeared in the Romanian Journal of Humanitarian Law<sup>21</sup> so as, after the year 2000, systematic collections of the IHL doctrine undergone editing, first reserved to Romanian authors<sup>22</sup> in 2003

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<sup>15</sup> Robert D. Kaplan, *Politici de război*, Polirom, Bucharest, 2002, p. 30.

<sup>16</sup> Vasile Secăreș, *Poleomologia și problemele păcii*, Politică Publishing House, Bucharest 1976, p. 19. See also Corneliu Soare, *Gândirea militară*, Antet Publishing House, 1999, p. 3.

<sup>17</sup> *Tipologia conflictelor armate contemporane*, Militară Publishing House, Bucharest, p. 65-70. T. Grozea, *Implicații ale factorului militar în viața internațională*, Politică Publishing House, Bucharest 1987, p. 235-263.

<sup>18</sup> François-Bernard Huyghe, *L'impurité de la guerre*, in *Revue Internationale de la Croix-Rouge (RICR)*, volume 91, Sélection française, 2009, p. 23-24.

<sup>19</sup> D. Mazilu, *Tratat privind dreptul păcii*, Lumina Lex Publishing House, Bucharest 2006, p. 64 and next. See also: I. Pâlșoiu, *Dreptul păcii și al războiului*, Universitară Publishing House, Craiova, 2007; I. Căndea, *Războiul și pacea*, Militară Publishing House, Bucharest, 2006.

<sup>20</sup> Of interdisciplinary research on new armed conflicts we mention: Alvin and Heidi Toffler, *Război și antirăzboi*, Antet Publishing House, 1995; Samuel P. Huntington, *Ciocnirea civilizațiilor și refacerea ordinii mondiale*, Antet Publishing House, 1997; J. Adams, *Următorul-ultimul război mondial, arme inteligente și front pretutindeni*, Antet Publishing House, 1998; G. Arădăvoaice, V. Stancu, *Războaie de azi și de mâine, aprecieri neconvenționale*, Militară Publishing House, Bucharest 1999; G. Achcar, *Noul război rece*, Corint Publishing House, Bucharest, 2002; M. Mureșan, G. Toma, *Provocările începutului de mileniu, Convenționale, neconvenționale și asimetrice*, Universității Naționale de Apărare Publishing House, Bucharest 2003; T. Frunzeti, E. Bădălan, *Asimetrie și idiosincronie în acțiunile militare*, CTEA Publishing House, Bucharest, 2004; M. Mureșan, G. Văduva, *Războiul viitorului, viitorul războiului*, Universității Naționale de Apărare Publishing House, Bucharest 2004; Steve Tsang, *Serviciile de informații și drepturile omului în era terorismului global*, Univers Enciclopedic Publishing House, Bucharest 2008.

<sup>21</sup> *The Romanian Journal of Humanitarian Law* no. 15/1997 and 44/2003 addressing deconstructed conflicts and new types of war.

<sup>22</sup> The Romanian Association of Humanitarian Law, *Dreptul internațional umanitar la începutul secolului XXI*, Bucharest, 2003.

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and then including studies of both Romanian and foreign authors<sup>23</sup> in 2006. Thus the work “International Humanitarian Law at the beginning of the 21st century” emerges from the radiography of the IHL’s status in which the development of legal norms has slowed down being replaced with the interpretation of the existing norms which, added to the reservations expressed by States in international conventions has led to the creation of a justice parallel of the conventional law; and the fact that there were still gaps in IHL and sometimes States applied it chaotically through manuals and instructions of their own, raised the hardship in understanding the application of IHL in new types of armed conflict.<sup>24</sup> In turn, “Great humanitarian issues in the debates of scientists” contains remarkable ideas relating to the need to adapt international humanitarian law to its current object of regulation, among which we mention as examples: new conflicts that have stimulated large-scale development of the IHL following the end of the Cold War<sup>25</sup>; Elimination of semantic confusion embodied in the phrase “war against terrorism”, the fight against terrorism and the denunciation of this method being essential to maintaining a minimum of humanity during armed conflict<sup>26</sup>; finding convincing solutions for the applicability of international law in non-international conflicts and an increase in the importance of human rights in military operations.<sup>27</sup> Also, foreign expert literature, in particular the Western doctrine of IHL, contributed to the attempt to adapt the conventional humanitarian law to the new realities of international relations in time of armed conflict in these troubled times we live in. Thus, the editor-in-chief of the International Red Cross Journal epitomizes this problem in that “first you must determine if a situation is equivalent to an armed conflict and, if so, if it enters into the IHL object of regulation”, adding however that „this situation is the Achilles heel in IHL because even the sole existence of an armed conflict is often negated by the States either to minimize confrontations or to prevent rebels from obtaining any legitimacy”.<sup>28</sup> Things being as such is evidenced by the fact that the vast majority of current wars are taking place on the territory of the same State, which constitutes a further evolution in relation with international armed conflicts that marked the first half of the twentieth century; In addition, new phenomena emerged, especially the propagation of internal chaos and armed violence in the absence of effective State control, characterized by good governance, so broad-based confrontations of “ failed States” intolerably spread to neighbors, affecting international peace and security in which even the supra-national Government seems to no longer possess sufficient authority, as is the case with suicidal terrorism totally asymmetric between state military powers and the capacity to act globally of non-state groups. From this new internal, regional and worldwide situation, follows the contempt of the traditional distinction between international conflicts and those without international profile, the current wars being more of transnational, internal internationalized conflicts, not included in the classical object of international humanitarian law, although States are sometimes tempted to use humanitarian conventions to combat them instead of respecting human rights laid down in peace, that would involve more restrictions on the use of armed force.

As a solution to this new state of affairs, Prof Peter Walenstein, founder of the program on the development of information regarding the conflicts, is proposing the inclusion in this programme of three types of conflicts in order to better systematize the situation, namely the armed conflicts carried out as political disputes of a specific gravity between one state and another international actor (state and international organisation), non-state conflicts between non-state actors (the most conclusive example being Somalia) and unilateral violence targeting

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<sup>23</sup> *Mari probleme umanitare în dezbaterile oamenilor de știință*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest, 2006.

<sup>24</sup> I. Cloșcă, I. Suceavă, *op. cit.*, p. 11-12.

<sup>25</sup> See in this regard D. Schindler, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 91-98.

<sup>26</sup> See in this regard Y. Sandoz, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 141.

<sup>27</sup> See in this regard D. Fleck, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 321.

<sup>28</sup> Toni Pfanner, Editorial, in RICR, volume 91, Sélection française, 2009, p. 7.

specific not managed populations through the use of terrorism and genocide, carried out by a state or non-state actor (like Al-Qaeda) no matter where the operations are carried out.<sup>29</sup> In turn, another researcher of the phenomenon<sup>30</sup> is putting into question new concepts of warfare resulting from the “revolution in military affairs” or „transformation of the armed forces”; such is the case with “the war of the three blocks” in which the military should, in approximately about the same time, in a distance of only three buildings in a municipality, to carry out both measures of humanitarian assistance and peacekeeping operations as well as true lethal battles of medium intensity. Such is the case with the doctrine of “networking warfare”, involving the decentralization of command and operational control of the armed forces down to the smallest military structures, somewhat modeled on the decentralization of terrorist networks, and also the “fourth generation warfare” (the first generation being that of the armies on the battlefield organized in lines and columns, the second being characterized by the increased firepower, especially on the machine-gun and aviation, and the third on the “blitzkrieg” capacity of maneuver from the World War II<sup>31</sup>) which would correspond to the informational revolution, but with mobilization of whole populations, with an increased antagonism in all areas (political, economic, social, cultural) and having as an objective the psychological and organizational system of the individual.

Although examples of explanations over new typologies of contemporary armed conflicts could continue, we will evoke only two more authors. The first<sup>32</sup> starts from the just observation that although the IHL aims to limit the destructive effects of wars, it does not contain the complete definition of such situations that generate its material margin of application, the legal framework of international and non-international conflicts being still ambiguous although they are not identical<sup>33</sup>; also tensions and internal strife are not even covered by the international humanitarian law but by the human rights law and the international law; highlighting that the armed-conflictual reality is more complex than the model described by IHL, he proposes the permanent adaptation of the present legal categories, taking as an example the foreign intervention in a civil war that could be an Internationalization through support given to one of the countries, a peacekeeping operation, a non-international conflict exported across the territory of several states thereby becoming cross-border and even a global war against terrorism. The second author<sup>34</sup> shows us that modern armed forces are engaged in a wide range of operations, ranging from fighting social upheaval in times of peace up to international wars. Due to the lack of clarity (inherent) of justice and also political factors that influence the decision-making process in a general way, it's not always easy to clarify the various situations in order to determine the appropriate conventions and laws, military officers at different hierarchical levels hardly coping with this lack of legal clarifications; the solution could be that the persons targeted by the conventions and humanitarian laws, both civilians and soldiers, to actually benefit from the rights and protection as provided by Martens Clause.

An important contribution to the deciphering of the relationship between IHL and new international realities during armed conflict, was and is still brought by national and international jurisprudence which, according to the powers of law interpretation has often clarified complex situations of war practices. Such was the case with the civil war in Nicaragua between the

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<sup>29</sup> In the same volume 91 of ICRC, previously cited, p. 9-22.

<sup>30</sup> François-Bernard Huyghe, *op. cit.*, p. 32-35.

<sup>31</sup> The classification reminds of A. Toffler's, corresponding to the three waves of civilization and war, based on the agricultural, industrial and informational revolutions.

<sup>32</sup> Sylvain Vité, *Typologie des conflits armés en droit international humanitaire: concepts juridiques et réalités*, in *The International Review of The Red Cross* volume 91, 2009, p. 37 and the following.

<sup>33</sup> For this reason, the International Institute of Humanitarian Law in San Remo, after developing in 1995 the *Application guide for armed maritime conflicts*, it developed in 2001 the *Code of conduct for military operations in non-international armed conflicts*, doctrinal work to update humanitarian values and rules, although not imposing enforcement obligations to the states, but which they can use as a source of inspiration for military handbooks.

<sup>34</sup> Andrew J. Carswell, *Classification des conflits: le dilemme du soldat*, in RICR, volume 91, 2009, p.65 and following.

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Government and the rebel forces of the “contras”, which were aided by the United States. In “Military and paramilitary activities in Nicaragua and against it” from 1986, the International Court of Justice ruled, in the paragraph 219 according to its powers, that while armed conflict between the Government troops and the “contras” was a non-international armed conflict, and thus governed by the law applicable as such, U.S. actions in the war, and against Nicaragua must be analysed from the perspective of an international armed conflict; outside this overlapping of the law applicable to the same case, the ICJ said that, anyway, the basic humanitarian aspects are considered to be, since 1949 in the matter “Corfu”, as a requirement for any belligerent no matter the nature of the conflict.<sup>35</sup> Another court with duties and contributions on legal clarification concerning international realities is the European Court of Human Rights, whose Court Room developed on July 7, 2011 two decisions in the cases of Al-Jedda (from 2008) and Al-Skeini (from 2007) against Great Britain in respect of the behaviour of the British armed forces in Iraq, underlining the relationship between the applicability of the European Convention on Human Rights to military operations in the context of international humanitarian law and of the resolutions of the UN Security Council; these decisions clarify the link between IHL and the European Convention on Human Rights meaning that article 2 of the latter (on the protection of the right to life) must be interpreted in the light of the General principles of public international law, especially in cases of military occupation.<sup>36</sup>

Much more conclusive and edifying in what interests us are the sentences of the international criminal courts. To refer to just one example, famous in the international jurisdiction, which has inspired many other verdicts and courts, the International Criminal Court for the former Yugoslavia in the Tadić case from 1997 decided that wars that have engulfed the country since 1991 could be qualified as international armed conflicts and also non-international, internal internationalized conflict, international conflict replaced later by one or more internal conflicts or any combination of these situations. In the judgement of the Court, the existence of military discipline was essential because it would have allowed the application of relevant humanitarian conventions and punishment for those guilty of serious violations. In a particularly applied way, in the paragraphs 96 and 97 of the judgment, it is mentioned specifically the relationship between IHL and state of fact: “the logic of the IHL is not based on formal principles... Rather, the international humanitarian law is a realist branch of law, grounded in the idea of effectiveness and inspired by the objective that looks for discouraging deviations from its standards as much as possible. It follows that, among other things, the humanitarian law is holding accountable not only those who have a formal position of authority, but also those who have de facto powers, as well as those who exercise control over those who have committed serious breaches of the humanitarian law [...]. However, it is necessary to specify what level of authority or control must be exercised by another state on the armed forces fighting on its part to transform the *prima facie* conflict in an international one. Indeed, the legal consequences arising from the qualification of the conflict as international or domestic are extremely important. If the conflict is described as international, it would mean that that state could, in certain circumstances, be held accountable for violations of the international humanitarian law committed by armed groups acting on its part”.<sup>37</sup>

Of the many cases of internal jurisprudence, related to the relationship between IHL and the reality that it attempts to regulate, we bring into question only two with an impact on the qualification of war against the terrorism. In June 2006, The Supreme Court of the United States in the case of Hamdan vs. Rumsfeld has decided that in the situation of the sentences to Guantanamo by the military courts established by the President of the U.S.A, it is violated the art. 3, common to all of the Geneva’s Conventions applicable in the non-international armed

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<sup>35</sup> A. Sassoli, A. A. Bouvier, *How does law protect in war*, ICRC, Geneva, p. 909.

<sup>36</sup> F. Noert, *The European Court of Human Rights, Al-Jedda and Al-Skeini judgements, in Military Law and the Law of War Review*, No. 50/3-4 (2011), p. 309.

<sup>37</sup> Quoted after Beatrice Onica Jarka, *Drept internațional umanitar*, Universul Juridic Publishing House, Bucharest, 2011, p. 32-33.



conflicts, embedded in the U.S.A law, because these committees do not give the possibility of minimum judicial guarantees recognized as indispensable by the civilized people and, in addition, the offence of terrorist conspiracy does not constitute a breach of the right of war; the American Supreme Court rejects this way the government's position that it would be involved in an international war with Al-Qaeda despite the records that a civil war is always internal, thus being wrongly interpreted the relevant institutions involved. In such an approach, in December 2006, the Israel's Supreme Court's decision in the matter of "Targeted Killing" has considered that the methodology used by the Israeli army to assassinate punctually, especially in Gaza, the ones responsible for terrorist attacks against the civilian population of Israel could be legal with the following of some restrictions from the perspective of human rights, namely: the verification and the proving of the information referring to the identity and the activity of terrorists; the investigation of the circumstances of the terrorist attacks; trying to apply rather the legal process of arrest and penalties than the use of lethal force; proportionality in the attack of the terrorists responsible for killing unarmed Israeli civilians. These imposed restrictions are based on the idea taken into consideration by the Supreme Court that Israel is engaged in an international armed conflict with the Palestinian terrorist organizations because the occupation transforms a civil war into an international one. Both cases demonstrate the high degree of conceptual confusion produced within the traditional IHL by the growing involvement of non-state actors able to act cross-border without restrictions<sup>38</sup>. To be noted contextually that Romania lacks at the moment a relevant jurisprudence in the reviewed field and the new Criminal Code<sup>39</sup> contains five war crimes that can be committed „in an armed conflict with or without an international character” (art. 440-444). As a result of the above, it is evident that only a court will be able to interpret the factual reality for the application of these criminal dispositions, but not in a dogmatic way but in a creative and proper one.

Considering this status of the international humanitarian law in relation to the deeply provocative new typology of the conflicts in the early 21<sup>st</sup> century, it has been proposed, somewhat pleonastic, “the humanization of the humanitarian law”<sup>40</sup>. In reality, the normative framework of the situations in which armed force is used in internal or international relations has evolved continuously, an example in this regard being the new protocols adopted in the Convention of 1980 on the prohibition or the restriction of the use of certain conventional weapons which have indiscriminate effects or cause excessive traumatic effects. We believe, however, that unlike the arms race, which refers both to the means and methods of warfare, conventional rules will never be fully in line with the strategic objectives and politico-military tactics of the belligerents of the future as demonstrated by the impossibility of adopting thus far of a specific tool of a total and general ban of nuclear weapons with a devastating destructive potential to the existence of life on Earth; in spite of the increasingly insistent demands of the public opinion, of some governmental and non-governmental organizations as well as some specialists in international public law and humanitarian law, not even the International Court of Justice could decide on the issue, its advisory opinion in 1996 stating that “it cannot, however, be concluded definitively that the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which it would be put into question the very survival of a state”<sup>41</sup>.

However, this state of affairs does not alter the fact that we are still in a binary conceptual understanding involving both the international conflicts as well as the non-international ones, due to historical reasons and reasons of positive law, the international law arising only from the political-legal will of the States. As demonstrated by the introduction of civil wars in the subject

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<sup>38</sup> Marco Milanovic, *Lessons for human rights and humanitarian law in the war on terror: comparing Hamdam and the Israeli Targeted Killings*, in RICR, volume 89, No. 866, iune 2007, p. 373.

<sup>39</sup> Publicity in Official Monitor of Romanian no. 510/2009.

<sup>40</sup> Valentin Bădescu, *Umanizarea dreptului umanitar*, CH Beck Publishing House, Bucharest, 2007.

<sup>41</sup> C. Poenaru, *Legalitatea armelor nucleare în dreptul internațional umanitar*, in *The Romanian Journal of Humanitarian Law* no. 17/1997, p. 41.

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of regulation of IHL in 1949, reaffirmed and expanded in 1977, the paradox of the relationship between the international humanitarian law and the new typology of armed conflicts could be solved through the will of the states to specify expressly the broaden application of the art. 2 common to the Geneva's Conventions of 1949, already extended by the 1<sup>st</sup> Protocol of 1977. In support of this proposal comes also the already famous Martens clause, already reiterated in most humanitarian instruments, in accordance with which „in the conventional unforeseen cases, the civilians and the belligerents remain under the protection and authority of the principles of the international law, as it results from the usages established, from the principles of humanity and the requirements of public conscience”. The recourse to the customary humanitarian law, more adaptable and more dynamic than the conventional one, even if its existence is more difficult to prove, could be a solution for the solving of the security dilemma in which humanity stands, against the new threats to peace and its existence.

We can conclude that we are not standing in the face of a fatality because the fundamental humanitarian guarantees are solidly anchored in the IHL, both in the international conflicts as well as in the non-international ones and the human rights must be respected in a worldwide society based on democracy and on a good governance in all circumstances of armed violence. Alongside with the majority of the mankind we believe, with all our strength of conviction resulted from the knowledge of the evolution of humanitarian instruments, that the express introduction of new armed conflicts in the regulatory subject of the international humanitarian law can be solved via a new reaffirmation and development of the IHL, similar to that of 1977, thus dispelling uncertainties and confusion that still persist nowadays. Specialty studies may bring a thorough and valuable contribution to the crystallization of the political will of the governmental decisional elements in this direction, contributing to the creation and the exploitation of the spirit and of the culture, specific to the promoting of the human rights in any situation of armed conflict<sup>42</sup>.

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