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WAR CRIMES

IN NON-INTERNATIONAL ARMED CONFLICTS: AMENDMENTS TO ARTICLE 8 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Throughout the history of international humanitarian law the concept of war crimes was related only to international armed conflicts. The situation changed in 1990s when the Statutes of the International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda and the Rome Statute of the International Criminal Court considered war crimes in times of non-international armed conflicts. But these documents are not fully in line with customary international law that prohibits use of poisonous gases and other weapons in non-international armed conflicts.

War crime is one of the international crimes, crimes against general international law, the international legal order. In fact, a war crime is a violation of international humanitarian law, entailing criminal responsibility directly under international law¹. Armed conflicts not of an international character (or non-international armed conflicts) for centuries were considered an internal affair of a state, as they occurred in the territory of the state, which has been protected from interference due to the general principle of international law of non-interference. Article 3 which is common to the four Geneva Conventions of 1949 is the first provision of international law relating to non-international armed conflicts. The provisions of Common Article 3 were developed in Additional Protocol II of 1977 (AP II). The provisions of AP II are less detailed and accurate than the rules of Additional Protocol I (AP I), which applies only to international armed conflicts. Because of this violations of international humanitarian law (IHL) during armed conflicts not of an international character for a long time were not considered war crimes. Back in March 1993, the International Committee of the Red Cross (ICRC) noted in a comment to the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) that the concept of war crimes is limited only to international armed conflicts. Accordingly, in the early 1990s in international law the point of view prevailed that war crimes can only be considered a violation of IHL applicable in international armed conflicts.

¹ Верле, Г. (2011). *Принципы международного уголовного суда*. Одесса: Фенікс; Москва: ТрансЛит, 469.

Following the adoption of the UN Security Council resolution 827 (1993), which adopted the ICTY Statute, three permanent members of the Council (the United States, Great Britain and France) were of the opinion that the provisions of the ICTY Statute provided for the Tribunal's jurisdiction over violations of the laws or customs of war, covered also responsibilities established in the territory of the former Yugoslavia under IHL that operated at the time of commission of such acts, including Article 3 common to the four Geneva Conventions, and both 1977 APs. The three permanent members of the UN Security Council were of the view that the war crime can take place not only within the international armed conflict, but also in a non-international armed conflict, since Article 3 common to the four Geneva Conventions of 1949 and 1977 AP II regulate precisely armed conflicts not of an international character and forbid certain actions.

Very soon, in 1994, after the establishment of the International Criminal Tribunal for Rwanda (ICTR), the rules of international criminal law have been applied to the armed conflict, with few international elements, and, in fact, an armed conflict not of an international character, for the Rwandan genocide has been committed by Rwandan citizens against other citizens of Rwanda. Qualification of the situation had nothing to do with the sentence for crimes against humanity and genocide committed during the conflict in Rwanda, because the composition of these crimes does not require the connection with an international armed conflict¹. But the ICTR Statute also provided penalties for violations of international humanitarian law during the non-international armed conflict in Rwanda. It was decided to provide the ICTR with the jurisdiction over violations of Article 3 common to the Geneva Conventions (Article 4 of the ICTR Statute), and AP II (Article 4 (2) of the Statute). After that, the international community and international law doctrine formed the view that the war crimes and the punishment for their commission are also related to armed conflicts not of an international character.

In the development of the idea of the possibility of the existence of war crimes in non-international armed conflict, the important role was played by the decision taken by the Appeals Chamber of the ICTY in the case of *Dusko Tadic*, October 2, 1995. This decision is important for two reasons. Firstly, the Appeals Chamber of the ICTY ruled that several provisions of IHL (prohibition of perfidy, attacks on civilians and the use of certain weapons) also apply, in accordance with customary international law,

¹ Верле, Г. (2011). *Принципы международного уголовного суда*. Одесса: Фенікс; Москва: ТрансЛит, 487.

to non-international armed conflicts. The Chamber thus referred to the practice of States and stressed the importance of providing protection to victims. According to the Chamber, inhumane acts that are prohibited in international armed conflicts cannot be considered as permitted in armed conflicts not of an international character.

Secondly, the Chamber decided that violations of IHL applicable in non-international armed conflicts shall be considered crimes under international law. This is logical, because it is unclear, looking from common sense, why the rules relating to the criminalization of violations committed in non-international armed conflict, shall differ from the corresponding rules applicable in international armed conflicts. According to the Appeals Chamber of the ICTY, the spread of the laws and customs of war at the armed conflicts not of an international character also means subjecting them to the law of war crimes. In this case, the ICTY relied on the practice of States as a factor in the formation of customary rules and argued that in many jurisdictions the penalty for violations of IHL exists for violations committed in non-international armed conflicts¹. Thus, the ICTY concluded that if the individual commits serious violation of international humanitarian law he/she shall be subject to criminal liability in accordance with customary international law both in the cases of international and non-international armed of conflicts.

Rome Statute of the International Criminal Court (ICC) was not fully consistent with this trend of the concept of the existence of war crimes in non-international armed conflict. Article 8 (2) (c) stated criminal nature of violations of Article 3 common to the four Geneva Conventions of 1949. Article 8 (2) (e) considers these provisions as expanding regulations aimed at protecting the individual and based mainly on the provisions of AP II². Thus, within the meaning of the Rome Statute of the ICC, the protection of persons in the context of non-international armed conflicts in many respects are equivalent to the regime to their protection in international armed conflicts. But, it is worth emphasizing that the Rome Statute of the ICC does not contain provisions concerning the prohibition of the use of certain means and methods of warfare in armed conflicts not of an international character, and in this it is behind the trends in the development of customary international law. Customary international law provides that the use of certain means and methods of

¹ Верле, Г. (2011). *Принципы международного уголовного суда*. Одесса: Фенікс; Москва: ТрансЛит, 488.

² *The Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002). <[www.un.org/ru/law/icc/rome_statute\(r\).pdf](http://www.un.org/ru/law/icc/rome_statute(r).pdf)> (2014, September 26).

warfare are often prohibited not only in international armed conflict, but also in non-international armed conflict.

Subparagraph f of paragraph 2 of Article 8 of the Rome Statute of the ICC determines that paragraph 2 (e) applies to armed conflicts not of an international character, and 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 nature¹. 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. Thus, the provisions of subparagraph f of paragraph 2 of Article 8 of the Rome Statute of the ICC, defines the difference between a non-international armed conflict and internal disturbances or tensions. The basis for this difference was the definition of armed conflict in the ICTY's case of Dusko Tadic: an armed conflict exists whenever there is a resort to armed force between States or there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

In general, we can summarize that the violations of international humanitarian law applicable to international armed conflicts, can result in criminal liability in accordance with customary international law and, thus, war crimes can be committed in the context of non-international armed conflicts. However, the scope of criminal behavior in non-international armed conflict is narrower than in international armed conflict, as in international armed conflicts almost all the norms of international humanitarian law are used, and in non-international – only Article 3 common to the four Geneva Conventions of 1949 and DP II.

From 31 May to 11 June 2010 in Kampala, Uganda, the First Review Conference of States Parties to the Rome Statute of the ICC was held. The conference adopted several resolutions concerning the work of the ICC and the amendments of the Rome Statute: Amendments related to the definition of the crime of aggression in and amendments in the context of Article 8 of war crimes in armed conflicts not of an international character². Resolution 5 of the Conference includes the amendment to article 8 of the Rome Statute. It adopted an amendment and

¹ *The Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002). <[www.un.org/ru/law/icc/rome_statute\(r\).pdf](http://www.un.org/ru/law/icc/rome_statute(r).pdf)> (2014, September 26).

² Резолюции и декларации, принятые Конференцией по обзору Римского статута Международного уголовного суда (принятые 31 мая – 11 июня 2010 года). <http://212.159.242.181/iccdocs/asp_docs/ASP9/OR/RC-11-Part.II-RUS.pdf>.

added paragraph 2 e) to Article 8 of the Rome Statute of the ICC¹. This amendment is subject to ratification or acceptance and shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. With respect to the state-party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party or on its territory. This amendment adds a paragraph 2 e) of Article 8 of the Rome Statute of the ICC the following text:

«(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.»

State-participants of the Rome Statute of the ICC in Resolution 5 also adopted relevant elements to be added to the Elements of Crimes of the ICC².

The relevant amendment was offered to the Conference of the States Parties of the ICC by the Belgian delegation. The Belgian delegation explained that the draft amendments provide for extension of jurisdiction, which the ICC has already in the offenses referred to in paragraph 2 b) xvii), xviii) and ix) Article 8, to armed conflicts not of an international character by incorporating these crimes in paragraph 2 e) of Article 8 as new subdivisions xiii), xiv) and xv), respectively. It was stressed that the crimes that have been proposed to include in paragraph 2 e) of Article 8 are not new to the jurisdiction of the ICC, and that these amendments are not aimed at increasing the coverage of crimes and to expand the jurisdiction of the ICC. Together with Belgium, the amendment to article 8 of the Rome Statute of the ICC was supported by 18 more states during the preparatory meeting of the Assembly of States-Parties to the Rome Statute in November 2009: Argentina, Austria, Bolivia, Bulgaria, Burundi, Germany, Cambodia, Cyprus, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia

¹ Резолюция RC/Res.5 «Поправки к статье 8 Римского статута» (принята 31 мая – 11 июня 2010 года). <http://212.159.242.181/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-RUS.pdf>.

² Элементы преступлений, соответствующие предлагаемой поправке, содержащейся в приложении III к резолюции ICC-ASP/8/Res.6. (принята 31 мая – 11 июня 2010 года). <http://212.159.242.181/iccdocs/asp_docs/RC2010/ICC-ASP-8-Res.9-Annex.VIII-RUS.pdf>.

and Switzerland. Following the adoption of Resolution 5 as to the amendment to article 8 of the Rome Statute, France noted its support for the resolution and emphasized the need for the mental element for such war crimes. French viewpoint on this issue was supported by Canada, the United States and Israel.

It was noted that the offenses identified in paragraph 8 of the preamble of the draft resolution 5 (use of poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices) constitute serious violations of the laws and customs applicable in armed conflicts not of an international nature, which is reflected in customary international law. Rule 72 of the ICRC Study “Customary International Humanitarian Law” stipulates that the use of poison or poisoned weapons is prohibited¹. The study indicates that State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. In the Rome Statute of the ICC use of poison or poisoned weapons is not included as a war crime in the sections relating to non-international armed conflicts, and this issue was not discussed openly at the Rome Diplomatic Conference in 1998 with the adoption of the statute. As a result states implementing the Rome Statute of the ICC, limits the application of this rule only to international armed conflicts (Australia, Canada, Congo, Mali, the Netherlands, New Zealand, UK). However, the laws of some States which criminalize the use of poison yet are also applicable to non-international armed conflicts (Germany, the Democratic Republic of the Congo, Switzerland, Estonia). German law expressly states that this rule applies to both international and non-international armed conflicts. This rule is also included in some military manuals and instructions that apply or applied in non-international armed conflicts (Australia, Bosnia and Herzegovina, Germany, Italy, Canada, Kenya, Colombia, Nigeria, Ecuador, South Africa). Practice confirms the applicability of this provision in both international and non-international armed conflicts, because usually states do not have a different set of weapons for international and non-international armed conflicts, the weapon is always the same.

There were no confirmed reports of the use of poison or poisoned weapons during international or non-international armed conflicts. A military statute of Yugoslavia establishes that the poisoning of drinking water and food is not prohibited if it announced on or place of poisoning

¹ Обычное международное гуманитарное право. Нормы. < <http://www.icrc.org/rus/assets/files/other/customary.pdf>>.

were marked. However, one example of limited practices contrary to this norm is not enough to deny that the rule belongs to customary law.

Offense referred to in paragraph 9 of the preamble of the draft resolution (use of bullets that expand or flatten easily in the human body) is also a serious violation of the laws and customs applicable in armed conflict not of an international character. But as to this type of armed conflict there is no absolute prohibition, as the offense is committed only if the offender uses bullets to uselessly aggravate suffering or the wounding effect upon individual who is the target of such bullets, which is reflected in customary international law and is enshrined in the resolution 5 paragraph 3 of the element of the crime of use of prohibited bullets. Rule 77 of the ICRC Study “Customary International Humanitarian Law” stipulates that it is prohibited to use bullets which expand or flatten easily in the human body. State practice establishes this rule as a customary rule of international law applicable in both international and non-international armed conflicts. Prohibition of the use of expanding bullets in any armed conflict is enshrined in several military manuals and regulations (Australia, Germany, Spain, Italy, Canada, Kenya, France, Ecuador, South Africa). The use of these bullets is a crime under the laws of some states (Andorra, Germany, Ecuador, Estonia). Colombian Constitutional Court ruled that the prohibition of the use of bullets “dum-dum” is part of customary international law. Again, that this rule applies in the case of not only international, but also non-international armed conflict, providing the fact that during both conflicts the same ammunition is used. The fact that their universal non-use is not pure coincidence, said the fact that the use of weapons that cause unnecessary suffering is prohibited in both international and non-international armed conflicts. And expand or flatten bullets, of course, are weapons that cause unnecessary suffering.

Amendments to article 8 of the Rome Statute were supported by the ICRC. In March 2010 in a note regarding additions to Article 8 2 e) of the Rome Statute of the ICC, the ICRC noted that the adoption of such amendments will initiate a move towards greater protection of civilians and persons directly participating in the hostilities in a situation of armed conflict not of an international character. It will also lead article 8 of the Rome Statute of the ICC in accordance with the customary IHL. The ICRC also noted that during the Rome Conference on the adoption of the Rome Statute of the ICC in 1998, the debate about banning the use of certain weapons only concerned situations of international armed conflict. Almost no mention of whether or not to criminalize the use of the use of such weapons in non-international conflicts was made. Due to

lack of time, the states left the matter for further work of the Assembly of States-Parties or the Review Conference. The ICRC believes that taking supplements to Article 8 of the Rome Statute of the ICC is an important achievement and a positive result of the first Review Conference of the Rome Statute of the ICC.

Despite all the positive evaluation of the amendments to article 8 of the Rome Statute of the ICC, there are some negative reviews. Professor William Schabas, one of the most famous lawyers-experts in the field of international criminal law, said that in addition to amendments to the Rome Statute of the ICC regarding the aggression, the Conference in Kampala did not bring any positive results¹. According to Schabas, the amendment to article 8, concerning war crimes, is a good idea, but, in fact, these amendments are symbolic and unlikely to ever lead to the prosecution of persons. To this day, in the international arena was not a single trial for the use of such weapons. We only know that Saddam Hussein used poisoned gas in Halabja. The use of such weapons may constitute a crime against humanity or genocide, so Schabas calls into question the need for the amendments to article 8 of the Rome Statute of the ICC. He believes that as the years passed, people will remember the ban on the use of certain types of poisoned weapons, envisaged in Kampala, with irony, noting that the state-members of the ICC decided to ban the use of archaic weapons that has never been and is unlikely to be used in modern armed conflict, but could not turn to the important and topical issues: anti-personnel mines, cluster munitions, weapons with depleted uranium, and, of course, nuclear weapons.

Despite this criticism, in general, the amendment to article 8 of the Rome Statute of the ICC, adopted at the conference in Kampala, supplements the rules of customary international law concerning the prohibition of the use of poison or poisoned weapons and bullets which expand or flatten in non-international armed conflicts by the rules of treaty law. Of course, this will have a positive impact on the law of non-international armed conflicts, because the amendment to paragraph 2 e) of Article 8 of the Rome Statute of the ICC criminalizes the use of prohibited means of warfare in the context of an armed conflict not of an international character. This amendment is an important step towards the convergence of modes of international and non-international armed conflicts.

¹ Schabas, William A. An Assessment of Kampala: The Final Blog. *The ICC Review Conference: Kampala 2010*. <<http://iccreviewconference.blogspot.com>>.