ACROSS
www.across-journal.com
ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

https://doi.org/10.5281/zenodo.8037268

WAR CRIMES COMMITTED IN NON-INTERNATIONAL ARMED CONFLICTS

Olga DORUL and Andrei NASTAS
"Dunarea de Jos" University of Galati, Romania

Abstract

The international society of the 21st century has made it imperative to eliminate impunity for international crimes. To this end, a number of mechanisms have been created to repress and punish crimes against peace, humanity, and war crimes. At the same time, the classification of war crimes committed during non-international armed conflict is an intellectual exercise for the perpetrators of justice, who face essential difficulties in classifying the actions of atypical participants in armed conflict. Contemporary armed conflicts are markedly different from the armed conflicts known to international society in the 19th and 20th centuries when the laws and customs of war were developed. In this article, we aim to elucidate which rules of international humanitarian law apply to qualify the conduct of participants in non-international armed conflicts.

Keywords: armed conflict, non-international armed conflict, war crime, international crime, Republic of Moldova, former Republic of Yugoslavia

1. INTRODUCTION

Civil wars have traditionally been considered the internal affairs of states, interference in which is prohibited. In Article 3 common to all the Geneva Conventions of 1949, for the first time, rules were included to cover non-international armed conflicts. These rules were developed in Additional II Protocol, but they were less detailed and complex than the rules of the I Protocol which apply to armed conflicts of an international character. In this connection, it is not surprising that the wrongfulness of violations of international humanitarian law occurring in non-international armed conflicts has not been affirmed in international law for a long time. As long ago as 1993, the International Committee of the Red Cross stated in its commentary on the Statute of the International Tribunal for the Former Yugoslavia that

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

the concept of war crimes was limited exclusively to armed conflicts of an international character. [1, p. 487]

2. METHODOLOGY

In the drafting of this article, we have resorted to international codifications in the field of international criminal jurisdiction in order to highlight the quantitative and qualitative evolution of legal instruments in the field of bringing individuals to international responsibility for committing war crimes. The exposition of the evolution of the legal institution that is the object of the present scientific investigation allows us to deduce the intention of the authors of the Rome Statute at the stage of elaboration of the constitutive act of the first international court of permanent criminal jurisdiction. Moreover, such an approach emerges from the argument used by the International Criminal Court when it exposes cases alleging the commission of war crimes. The ICC does not operate in a legal vacuum. The court frequently refers to the findings of the two international criminal tribunals that preceded it.

3. RESULTS

3.1 Normative framework on the qualification of crimes committed in the context of non-international armed conflicts

Most contemporary conflicts are either non-international in nature or contain grey areas in terms of their qualification. [2, p. 77]

Article 3 common to the four Geneva Conventions, referred to as the "mini-Convention", inter alia regulates the scope of application of the provisions of the Conventions ratione materiae as follows: "In case of an armed conflict not of an international character arising in the territory of one of the High Contracting Parties, each of the Parties to the conflict shall apply at least the following provisions:

This provision is to be interpreted in the light of Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts [3], Article 1 of which determines the scope ratione materiae:

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

"1. This Protocol, which develops and supplements common Article 3 of the Geneva Conventions of 12 August 1949 without modifying its present conditions of application, shall apply to all armed conflicts not covered by Article 3 of the Geneva Conventions. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and which are carried out in the territory of a High Contracting Party between its armed forces and dissident armed forces or organized armed groups which, under the direction of responsible command, exercise such control over part of its territory as to enable it to conduct sustained and coordinated military operations and to apply this Protocol."

In addition, the preamble of Additional Protocol I to the Geneva Conventions further reaffirms that the provisions of the Geneva Conventions of 12 August 1949 and Protocol I must be fully applied in all circumstances to all persons protected by these instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes claimed by or attributed to the parties to the conflict. [4]

These clauses confirm that non-state actors have a set of international obligations. Contemporary war crime regulations reflect this thesis. They apply not only to situations of application of armed force in inter-state relations and conflicts between a government and armed groups but also to conflicts between two or more organised armed groups fighting each other. [2, p. 79]

3.2 Jurisprudential findings on the qualification of unlawful acts committed in armed conflicts without international character

G. Werle considers that it was only after the establishment of the International Criminal Tribunal for Rwanda that the international community applied international criminal law to the armed conflict with countless international elements. The Rwandan genocide was committed by Rwandan citizens against other Rwandan citizens. This circumstance was not relevant in determining the punishment for crimes against humanity or genocide committed in the course of the armed conflict, as the components of these crimes did not imply a mandatory link with the international armed conflict. At the same time, the Statute of the International Criminal Tribunal for Rwanda also provides for the imposition of a sentence for violation of

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

international humanitarian law, inter alia because they are easier to prove and to fill gaps in the law. It was decided to recognize the jurisdiction of the International Criminal Tribunal for Rwanda in the event of non-compliance with the common provisions of Article 3 of the Geneva Conventions and Article 4 (2) of Additional Protocol II to the Geneva Conventions. This was a decisive step towards the formation of the legal institution of liability for crimes committed in civil wars. [1, p. 487]

The tribunal for the former Yugoslavia in order to elucidate the types of armed conflicts in which the crimes within its competence were committed, under the conditions in which art. 3 and art. 5 of the Statute (cited above) created confusion in the process of applying the rules, resorted to the literal and teleological interpretation of the Statute.

The General Court found that it was not clear whether the provisions of the Statute applied only to offenses committed in international armed conflicts or to those committed in non-international armed conflicts. Article 2 refers to "serious violations" of the 1949 Geneva Conventions, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 seems to suggest that the article is limited to conflicts. international armies. Nor does Article 3 contain any express reference to the nature of the armed conflict. A first reading of this provision in itself may give the impression that it applies to both types of conflict. Instead, Article 5 explicitly confers jurisdiction on crimes committed in non-international or international armed conflicts. An argument to the contrary based on the absence of a similar provision in Article 3 of the Statute could suggest that Article 3 applies only to one category of conflicts rather than both. In order to better determine the meaning and scope of those provisions, the Board of Appeal of the General Court took into account the object and purpose behind the adoption of the Statute. Thus, by adopting Resolution 827, the United Nations Security Council established the International Tribunal for the stated purpose of bringing to justice those responsible for serious violations of international humanitarian law in the former Yugoslavia, thus discouraging future violations and contributing to the restoration of peace and security. security in the region. The context in which the Security Council acted indicates that it intended to achieve this goal without reference to whether the conflicts in the former Yugoslavia were internal or international.

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

As members of the Security Council were well aware, in 1993, when the Statute was drafted, conflicts in the former Yugoslavia could have been characterized as both non-international and international, or, alternatively, as a non-international conflict. with an international conflict, or as a non-international conflict that has become internationalized due to external support, or as an international conflict which has subsequently been replaced by one or more non-international conflicts. [5]

The fact that the Security Council deliberately refrained from classifying armed conflicts in the former Yugoslavia as international or non-international, and in particular did not intend to oblige the International Tribunal by classifying conflicts as international, is confirmed by the argument reductio ad absurdum. If the Security Council had classified the conflict as exclusively international and, in addition, decided to engage the International Tribunal in it, it would appear that the International Tribunal should consider the conflict between Bosnian Serbs and the central authorities in Bosnia and Herzegovina as being international. Since it cannot be argued that Bosnian Serbs constitute a state, it is likely that the classification just referred to is based on the implicit assumption that Bosnian Serbs act not as a rebel entity but as organs or agents of another state, the Federal Republic. Yugoslavia (Serbia-Montenegro). Consequently, the serious violations of international humanitarian law committed by the government army of Bosnia and Herzegovina against Bosnian Serb civilians in their power would not be considered "serious violations", as such civilians, having the nationality of Bosnia and Herzegovina, would not be considered “protected persons” pursuant to Article 4, paragraph 1, of the Geneva Convention IV. Instead, the atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be considered "serious violations", as such civilians would be "protected persons" under the Convention, meaning that Bosnian Serbs would act as organs or agents of another state, Federal Republic of Yugoslavia (Serbia-Montenegro) whose nationality would not have Bosnians. This would, of course, be an absurd result, in the sense that it would place Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities in Bosnia and Herzegovina. This absurdity confirms the error of the argument put forward by the prosecutor before the Appeals Chamber. Based on the above, we conclude that the conflicts in the former Yugoslavia have both domestic and international issues, that the members of the Security Council clearly considered both aspects of the conflicts when

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

they adopted the Statute of the International Tribunal and that they intended to empower the International Tribunal to try violations of humanitarian law that have taken place in both contexts. To the extent possible under existing international law, the Statute should therefore be interpreted to give effect to this purpose. [5]

Crimes between armed groups have been prosecuted, among other things, in the context of the Sierra Leone civil war, the Balkan conflict. This extension increases the protection of civilians. But it also raises new questions about the standards that non-state authorities (for example, non-state armed groups) must meet, for example in terms of detention. Detention by armed groups has become a routine activity in a conflict. Non-international armed conflict does not have a regime analogous to military occupation, ie a framework that limits power and defines duties in relation to law and order in cases where armed groups exercise effective control over the territory. [2, p. 80]

It should be noted, however, that all persons deprived of their liberty on grounds of unarmed armed conflict should be given the opportunity to challenge the lawfulness of detention unless the government of the State affected by the non-international armed conflict has claimed belligerent rights. If enemy "combatants" were captured, they should be treated in the same way as prisoners of war in international armed conflicts, and detained civilians should be treated in the same way as civilians protected by the Fourth Convention. from Geneva in international armed conflicts. [6]

In general, from the findings made by the judges of the two international criminal tribunals, we can deduce that the subject who commits serious violations of international humanitarian law is to be prosecuted in accordance with international criminal law. However, the criminal nature of comparable violations during international armed conflicts is a considerable argument in favour of their punishment as well as in non-international armed conflicts. [1, p. 489]

If until the adoption of the ICC Statute in 1998 the lack of regulations in international acts on the one hand and the clarifications proposed by Additional Protocol II, on the other hand, allowed the conclusion to be drawn that there are two types of non-international armed conflicts their characteristic features (especially in relation to their intensity) are regulated either by the Additional Protocol II and by art. 3 common, and art. 19, or

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

only the last ones, except for Additional Protocol II, then it seems that the authors of the ICC Statute are trying to create the third category of non-international armed conflicts (in the latter case see Article 8 paragraph 2 letter f of the Statute ICC that applies to non-international armed conflicts that have long been opposed by the government authorities of that state and organized armed groups or organized armed groups. [7, p. 34]

In general, the structure of Article 8 (2) of the ICC Statute is complicated and to some extent hides the link between different crimes. Moreover, as there is an approximation of the contents of the regulations applicable to international armed conflicts and those applicable to non-international armed conflicts, the distinction between different types of conflicts no longer corresponds to reality. It would make more sense to classify crimes according to material criteria. It seems more appropriate to distinguish between the provision of protection of persons and property (essentially deriving from the provisions of the Law of Geneva), on the one hand, and the prohibition of certain methods and means of carrying out armed actions (derived from The Hague Law) - on the other. other side. [1, p. 491]

It should be noted that the International Criminal Court currently has no jurisdiction over the isolated or sporadic use of force. Thus, for example, the mission to capture Osama Bin Laden in Pakistan could never be considered a war crime, even if Pakistan had been a party to the Rome Statute of the International Criminal Court, as it was not committed in the context of an international armed conflict or a non-international armed conflict. [8]

When several types of armed conflict are taking place in the territory of the State at the same time, the general qualification of the armed conflict as exclusively international or non-international would lead to inconsistent conclusions and gaps in the part of establishing liability. For such situations, there is no single criterion by which the existence of an armed conflict could be established and its qualification as an international or non-international armed conflict. Rather, such an act is to be examined functionally in the light of the context in which it was committed. It is necessary to take into account whether this act was part of an international armed conflict or of a non-international armed conflict. It essentially depends on the belligerent party to whom the perpetrator belongs and the circumstances of the conflict in which the act was committed. If, for example, an armed conflict with another state takes place in the territory of a state, along with a conflict between the same

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

state and a non-state organization, it is necessary to determine to which party the perpetrator may be referred and in which conflict it was committed. committed this deed. Only in this way can it be determined whether the act was committed in connection with an international armed conflict or a non-international armed conflict and which regulations on war crimes apply to it. [1, p. 503]

We consider it appropriate to expose, in the context of the present scientific investigation, with reference to the nature of the armed conflict of 1992 in Transnistria. On July 8, 2004, the Grand Chamber of the European Court of Human Rights delivered the judgment in the Case of Ilaşcu and others v. Moldova and Russia in which he observed the following: "all the Moldovan witnesses questioned categorically confirmed the active involvement, whether direct or indirect, of the 14th Army, and later of the Russian Operational Group in the Transdniestrian region of Moldova, in the transfer of weapons to the Transdniestrian separatists. They also confirmed the participation of Russian troops in the conflict, particularly the involvement of tanks bearing the flag of the Russian Federation, shots fired towards the Moldovan positions from units of the 14th Army and the transfer of a large number of 14th Army troops to the reserves so that they could fight alongside the Transdniestrians or train them.

These assertions are corroborated by the information contained in OSCE report no. 7 of 29 July 1993, added to the file by the Romanian Government, and by other sources. In that connection, the Court notes both the abundance and the detailed nature of the information in its possession on this subject. It sees no reason to doubt the credibility of the Moldovan witnesses heard, and notes that their assertions are corroborated by the Moldovan Government, who confirmed these facts in all of the observations they submitted throughout the proceedings."

This finding from 2004 vis-à-vis the nature of the Transnistrian conflict remains the only one made by an international court in a jurisdictional way, which took the form of an irrevocable decision.

The decision of the Grand Chamber on the Case of Ilașco and others v. Moldova and Russia is still today perceived by doctrinaires and practitioners as the most important legal reference text in order to determine the nature of the armed conflict of 1992 in the territory of the Republic of Moldova. Since

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

the negotiations for the settlement of the Transnistrian dispute are at a standstill, and the Republic of Moldova cannot effectively realize its sovereign prerogatives on the eighth part of its territory, it is absolutely natural that the Moldovan authorities intend to strengthen the legal basis for bringing to criminal responsibility persons accused of war crimes.

After the events of 1992, the Moldovan legislator took care of drafting regulations in the field of war crimes, regulations inspired by international standards, especially by the provisions of the Statute of the International Criminal Court. In the criminal legislation of the Republic of Moldova, we find the traditional approach to war crimes depending on the nature of the armed conflict, as well as in relation to the object of the crime.

Thus, the Criminal Code of the Republic of Moldova adopted on April 18, 2002 in the General Part, proposes the meaning of some terms or expressions used in the Code, including the definition of persons protected by international humanitarian law (article 127¹): A person protected by international humanitarian law means:

a) in an international armed conflict: any person protected within the meaning of the Geneva Conventions of August 12, 1949 regarding the protection of war victims and Additional Protocol I of June 8, 1977 regarding the protection of victims of international armed conflicts, especially the sick, the wounded, shipwrecked, prisoners of war and civilians;

b) in an armed conflict without an international character: any protected person within the meaning of art. 3 common of the Geneva Conventions of August 12, 1949 and in the sense of Additional Protocol II of June 8, 1977 regarding the protection of victims of armed conflicts of non-international character (the sick, the wounded, the shipwrecked, the persons who do not directly participate in military operations and who are under the power enemy side);

c) in an armed conflict with or without an international character: members of the armed forces and combatants of the enemy side who have laid down their arms or who, for any other reason, can no longer defend themselves and who are not under the power of the enemy side.

Additionally, art. 137 of the Criminal Code of the Republic of Moldova "War crimes against persons" regulates crimes against persons that may be

committed in the context of an armed conflict of an international character (paragraph 1) and crimes against persons that may be committed in the context of an armed conflict with or without international character (paragraphs 2-4). The same approach can be found in the provision of art. 137¹ "War crimes against property and other rights". At the same time, several articles of the Criminal Code of the Republic of Moldova criminalize illegal acts committed both in armed conflicts with or without an international character: article 137² "Use of prohibited means of warfare", article 137³ "Use of prohibited methods of warfare", article 137⁴ "Unlawful use of distinctive signs of international humanitarian law" and article 138 "Giving or executing an obviously illegal order. Non-exercise or improper exercise of due control".

4. CONCLUSIONS

Generalizing the findings of international criminal tribunals, the International Criminal Court deduces that the intention of international courts is to diminish the quantitative and qualitative distinction between war crimes committed in the context of armed conflicts of an international character and war crimes committed in the context of armed conflicts of a non-international character. We consider this trend to be beneficial from the perspective of ensuring the realisation of the principle of universal repression of war crimes and, in general, from the perspective of the consistent realisation of international humanitarian law. In this sense, the attitude of national legislators who transpose international standards into the domestic legal order and gradually blur, where appropriate, the distinctions between the components of war crimes committed in international and non-international armed conflict is plausible.

REFERENCES

[1] Г. Верле, «*Принципы международного уголовного права*». Одесса, Москва: Фенікс, ТрансЛит, 2011.
[2] C. Stahn, *A Critical Introduction to International Criminal Law*. Cambridge: Cambridge University Press, 2018. 448 p.
[3] Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts to the Geneva Conventions, signed on 12 August 1949 in Geneva.

ISSN 2602-1463
Vol. 7 (5) 2023 Cross-border Laws and Regulations

Adopted/concluded in Geneva on 08.06.1977. In force for the RM since 24.11.1993. Published in: International Treaties, vol. 5, p. 259. Registered at the UN under No. I-17513
[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Adopted/concluded at Geneva on 08.06.1977. In force for the RM since 24.11.1993. Published in: International Treaties, vol. 5, p. 189. Registered at the UN under No. I-17512
[5] Decision on the defence motion for interlocutory appeal on jurisdiction of: 2 October 1995 PROSECUTOR v. DUSKO TADIC a/k/a "DULE" par. 70 The International Criminal Tribunal for the former Yugoslavia (ICTY).
https://www.icty.org/x/cases/tadic/acdec/en/51002.htm
[6] J.-M.Henckaerts, L. Doswald-Beck, "Customary International Humanitarian Law". Volume I RULES. Cambridge University Press. International Committee of the Red Cross, p. 352, 2005.
[7] Nastas A., Cernomoreț S., Cazacu D. Statements by the Prism of the Criminal Law. În: The Annals of „Dunarea de Jos" University of Galati, Legal Sciences, Fascicle XXVI, Volume 4, No. 1, 2021, Romania, Galati, pp.34 ISSN 2601-9779
[8] Tsilonis V., "The Jurisdiction of the International Criminal Court". Springer Nature Swetzerland, 2019. 283 p.