



JURISDICTION OVER WAR CRIMES

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JEL Category: Y90

Abstract

The article deals with jurisdiction over war crimes. It quotes cases in domestic and international courts, as well as at the Statute of the International Criminal Court (ICC). The notion of the statute of limitations and the principle of universal jurisdiction are also exposed to examples. Especially as far as the jurisdiction of the International Court of Justice is concerned. State responsibility and individual responsibility for war crimes will be presented in relation to the universal jurisdiction. The ICTY and the ICTR case law will be shown in relation to the definition of the war crimes and violation of the ICL (International Customary Law). The introduction of three new war crimes by the Resolution ICC-ASP/16/Res.4, adopted at the 12th plenary meeting, on 14 December 2017, by consensus, as amendments to article 8 of the Rome Statute of the International Criminal Court, will be presented with the explanation.

Keywords: *universal jurisdiction, state responsibility, the definition of war crimes, individual responsibility, ICL (international customary law).*

1 INTRODUCTION

According to ICL codification, rule 157” *States have the right to vest universal jurisdiction in their national courts over war crimes*”.

Generally, criminal law of a State applies to crimes committed on its territory or by its own nationals, but States are passing laws that allow their courts to prosecute crimes committed outside their territory. This is the principle of the universal jurisdiction which enables States to prosecute any person who has committed a grave breach of IHL, irrespective of his nationality and the place where the crime was committed. This is the rule established by the State practice as a norm of customary international law with respect to war crimes committed in both international and non-

international armed conflicts. (Hovell, D., 2018) (Kluven, T., 2017). It is worth to remember what Professor Theodor Meron, the world's most important author on issues of international humanitarian law said already in 1998 about the universal jurisdiction: "There is, of course, a synergistic relationship among the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction". (Meron, Th., 1998)

National legislation, as well as treaty law, support the right of States to vest universal jurisdiction in their national courts for war crimes. The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of armed conflict from 26 March 1999, in article 16(2)(a) states that: "2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention: a. this Protocol does

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not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law". It was interpreted as expressing the right of States for the universal jurisdiction in their national courts for war crimes. (Henckaerts, J-M., 1999) The Genocide Convention of 9 December 1948, in art. VI says: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction „ This article refers to territorial jurisdiction but was interpreted as not prohibiting the application of the principle of universal jurisdiction to genocide. (UNTS, 1951) The Statute of the International Criminal Court does not oblige States to establish universal jurisdiction over the war crimes it lists, but many States have incorporated the list of war crimes contained in the Statute in their national legislation and vested jurisdiction in their courts to prosecute persons suspected of having committed such war crimes on the basis of the principle of universal jurisdiction. ¹

The International Court of Justice in the judgment of 14 February 2002, ² focused on the immunity of heads of State and of ministers of foreign affairs. In this case, the Democratic Republic of the Congo challenged the arrest warrant issued by a Belgian judge against the Congolese Minister of Foreign Affairs. DRC argued, that the indicted person needed to be in the territory of the State exercising such jurisdiction. The ICJ did not rule on the issue of universal jurisdiction as such because Belgium had referred to the non-ultra petita principle. However, judges of the Court in their separate and dissenting opinions and declarations expressed their views on the universal jurisdiction. As far as universal jurisdiction in absentia for war crimes and crimes against humanity was concerned, except for the question of possible immunities, five of the judges in their separate or dissenting opinions were in favor of the right of States to prosecute persons, even if they were not present

on their territory. Four other judges expressed their opinion that a right of States to exercise such a universal jurisdiction without any territorial link did not exist yet. In his separate opinion, President Guillaume stated that "universal jurisdiction in absentia is unknown to international conventional law" and that the same would be true for international customary law. In his declaration, Judge Ranjeva stated that even if the text of the judgment left the question open, in his opinion the law did not permit the exercise of universal jurisdiction in the absence of a territorial or personal active or passive connection. But he stated that: „Without any doubt, the evolution in the contemporary world of political ideas and conditions were favorable to the weakening of the territorial approach to the jurisdiction and to the emergence of a more functional approach in the meaning of serving a superior common goal". In his separate opinion, Judge Rezek stated that universal jurisdiction without any territorial link was not authorized by today's international law. He stated that there would be no customary law "information" deriving from the isolated action of one State. Judge ad hoc Bula-Bula was of the same opinion and said, that Article 129, second paragraph, of the 1949 Geneva Convention III did not envisage jurisdiction in absentia. In his dissenting opinion, Judge Oda stated: „It is one fundamental principle that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law ... The scope of extraterritorial criminal jurisdiction has been expanded over the past few decades ... Belgium is known for taking the lead in this field and its [Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended (1993)] may well be at the forefront of a trend. There are some national case law and some treaty-made law evidencing such a trend". He also added, that "the law is not sufficiently developed". In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal stated: „There are ... certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi*

¹ For example Belgium, Canada, Germany legislations.

² www.icj-cij.org/files/case, DRC v Belgium; see separate opinion of judge Bula-Bula

provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded today as reflecting customary international law". These judges also found that the PCIJ judgment in the Lotus case from 1927³, supported the lawfulness of the exercise of universal jurisdiction in absentia. However, they found that it was necessary that "universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community". Besides piracy, "war crimes ... may be added to the list". Judge Koroma, in his separate opinion, stated that "In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide." Judge ad hoc Van den Wyngaert stated in her dissenting opinion: "It follows from the "Lotus" case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law." She stated that neither conventional nor customary law prohibited the exercise of universal jurisdiction in absentia and concluded: „International law clearly permits universal jurisdiction for war crimes and crimes against humanity... For crimes against humanity, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. In the case of war crimes, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 [of the 1949 Geneva Convention IV], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians".

Unfortunately, I disagree with the justification of the ICJ as far as considering a war crime as an act always committed in private capacity and I accept totally the view of Prof. M. Spinedi, that: „ In my view, treating a war crime or a crime against humanity as an act that is, by its nature, always committed in a private capacity is not only wrong

per se, but would constitute a remedy more harmful than the wrong it was intended to remedy". (Spinedi, M., 2002; Cassese, A., 2002; S Wirth, S., 2002)

In addition to the Geneva Conventions and Additional Protocol I, there are many different Conventions which oblige States, parties to these Conventions to provide for universal jurisdiction over certain crimes, including when they take place during armed conflict. For example: the Convention against Torture, the Inter-American Convention on Forced Disappearances, the Convention on the Safety of UN Personnel and the Second Protocol to the Hague Convention for the Protection of Cultural Property. We can conclude, that international law permits universal jurisdiction for war crimes and crimes against humanity.

2 NATIONAL CRIMINAL JURISDICTION.

Article 1 of the ICC, the Rome Statute stated that: "An International Criminal Court is hereby established. It [...] shall be complementary to national criminal jurisdictions". It means that where the state is unwilling or unable to prosecute international crimes, the ICC based on the complementarity principle, may prosecute persons responsible for the commission of the crimes under its jurisdiction, such as genocide, crimes against humanity, war crimes, and the crime of aggression. Domestic courts will be mainly responsible for prosecuting persons responsible for international crimes and the ICC should be regarded as a *last resort*. However, it can be difficult and complicated in practice because many states still do not have the right legislation in place to prosecute international crimes on a domestic level and even those that have, they meet many obstacles and limitations to prosecute such crimes. It happens for example when a state has not incorporated the international crimes into its domestic law or does not provide for universal jurisdiction. When a state does have a basis to prosecute international crimes, these cases are often complex and there are difficulties to obtain evidence from the respective states. Many states do not have specialized war crimes units in their tribunals like

³ S.S. Lotus case (France v Turkey), PCIJ, series A, no10, 1927

Germany, France, and the Netherlands for example have. They offer great support for the war crimes investigation. Sometimes there is a lack of political will to prosecute international crimes.

Domestic courts can exercise jurisdiction over international crimes based on the principle of *universal jurisdiction*. This principle is based on the notion that any state may exercise jurisdiction over a situation involving crimes considered “*to be of extreme gravity and concern the international community*.” The ICC in its Statute, obliged member states to amend their domestic legislation to be able to prosecute international crimes. The ICC can intervene and has jurisdiction based on the *principle of complementarity*, only over cases where states are unwilling or unable to take action.

Universal jurisdiction is the most used form of jurisdiction for international crimes. There are other forms of jurisdiction that provide domestic courts with the power to prosecute international crimes, especially those not falling under the Rome Statute. The *territoriality principle* permits jurisdiction based on where the crime took place. Domestic courts can use this type for example in cases of terrorist attacks if they have been committed to the state’s territory. The *active personality principle* permits jurisdiction based on the nationality of the perpetrator, so when the perpetrator is a national of a state, that state may prosecute him or her. The *passive personality principle* allows for a state to claim jurisdiction based on the nationality of the victim. The *protective principle* bases jurisdiction over a person on the protection of national interests or security even when the person is outside the state’s boundaries.

2.1 In international courts.

A. International Criminal Tribunals for the former Yugoslavia and Rwanda.

The cornerstone for the prosecution of individuals for violations of the laws of war, after WWII, was the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and of the International Criminal Tribunal for Rwanda (ICTR). They were created as ad hoc tribunals by the United Nations Security Council and

based on Chapter VII and Art. 25 UN Charter. (Meron, Th., 1999)

The Statute of the ICTY, restricted to the former Yugoslavia, did not use the term ‘war crimes’ but included two categories of them: Art. 2 ICTY Statute penalizes ‘grave breaches of the Geneva Conventions against persons or property protected under the provisions of the relevant Geneva Convention’ committed in an international armed conflict; Art. 3 ICTY Statute penalizes ‘violations of the laws or customs of war’, amended by an illustrative list that contains elements of the Hague Rules of Land and Warfare as well as certain provisions of Additional Protocol I of the Geneva Conventions. Art. 3 ICTY Statute, as interpreted by the Tribunal, serves as a ‘general provision covering all violations of humanitarian law’ not qualified as grave breaches, acts of genocide, or crimes against humanity regardless of whether the violation occurs within the context of an international or non-international armed conflict⁴. In the Tadić Case, the Appeals Chamber ultimately concluded that ‘all of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules of the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife’.⁵

The Statute of the ICTR covers war crimes committed in a non-international armed conflict. Art. 4 ICTR Statute includes ‘violations of Article 3 common to the Geneva Conventions and of Additional Protocol II’ (Geneva Conventions Additional Protocol II [1977]). In its first judgment in the Akayesu Case, the ICTR adopted the view of the Appeals Chamber in the Tadić Case and concluded that ‘the violation of these norms entail, as a matter of customary international law individual responsibility for the perpetrator.’⁶

The jurisprudence of the ICTY and the ICTR influenced the negotiations for the creation of the ICC and for the extension of its over war crimes committed in non-international armed conflicts, and the adoption of a substantive list of war crimes committed in non-international armed conflicts into

⁴ Op.cit. paras 128–37, 134

⁵ Op.cit. paras 128–37, 134

⁶ Prosecutor v Akayesu, Judgment, ICTR-96-4-T, 2 September 1998, para 616.

Art. 8 ICC Statute. The ICC Statute is, after the ICTR Statute, the second international instrument that explicitly recognized the criminal liability of individuals for war crimes committed in non-international armed conflicts.

The Security Council adopted Resolution 1966 (2010) in which it established the Mechanism for International Criminal Tribunals (Mechanism or MICT) as a subsidiary organ of the Council with the mandate to continue the jurisdiction, rights and obligations, and essential functions of the ICTR and ICTY. The Mechanism is composed of two branches: one in Arusha, for matters arising from ICTR cases, and one in The Hague, for matters arising from ICTY cases. The Arusha branch commenced functioning on July 1, 2012, and The Hague branch began its operations on July 1, 2013.

B. War crimes under the ICC Statute

Art. 8 ICC Statute, with an enumeration of 51 war crimes, is currently the most comprehensive provision in international treaty law regulating the law of war crimes. (Klamberg, M., 2017) The codification takes into account recent developments by customary international law as well as case law from previous international criminal tribunals such as the ICTY and the ICTR. This is reflected in the fact that the Rome Statute for the first time provides an explicit codification of war crimes committed in non-international armed conflicts which led to a considerable extension of the notion of war crimes. Such new war crimes was codified in the Rome Statute, as the recruitment of child soldiers (Arts 8 (2) (b) (xxvii), 8 (2) (e) (vii) ICC Statute) and attacks on peacekeepers (Art. 8 (2) (e)(iii) ICC Statute). The Statute also codified the gender-based crimes and sexually violent crimes, such as 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' (Art. 8 (2) (b) (xxii)). (Dixon, R., 2002; Meron, Th., 1993)

The structure of Art. 8 ICC Statute classifies war crimes into four main categories: two of them are applicable to international armed conflict and two to

non-international armed conflict. War crimes applicable to international armed conflict are regulated in Art. 8 (2) (a) ICC Statute, which criminalizes 'grave breaches of the Geneva Conventions of 12 August 1949' and in Art. 8 (2) (b) ICC Statute criminalizing 'other serious violations of the laws and customs applicable in international armed conflict'. War crimes applicable to non-international armed conflict are regulated in Art. 8 (2) (c) ICC Statute, which criminalizes 'serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949', and in Art. 8 (2) (e) ICC Statute criminalizing 'other serious violations of the laws and customs applicable in armed conflicts not of an international character' primarily based on the Hague Regulations of 1907 and Additional Protocol II to the Geneva Conventions of 1977. The Rome Statute defines war crimes by reference to the nature of conflict as well as by reference to their humanitarian law source.

In contrast to customary international law as well as the statutes of the ICTY and the ICTR, the ICC provides a particular contextual element for war crimes. Art. 8 (1) ICC Statute determines that the ICC 'shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' and 'the statutory requirement of either large-scale commission or part of a policy is not absolute'⁷.

Art. 8 ICC Statute includes two different thresholds for the existence of a non-international armed conflict. Art. 8 (2) (d) ICC Statute refers to the 'classical' threshold of common Art. 3 Geneva Conventions, Art. 8 (2) (f) ICC Statute 'applies to armed conflicts that take place in the territory of a State when there is a *protracted* armed conflict between governmental authorities and organized armed groups or between such groups.' Under current international humanitarian law, we can distinguish three different types of non-international armed conflicts: the conflict according to common Art. 3, as applied by Art. 8 (2) (d) ICC Statute (lowest threshold), the conflict according to Art. 8 (2) (f) ICC Statute (medium threshold), and the type of conflict according to Art.1 (2) AP II (highest threshold).

⁷ Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I, 13 July 2006, para. 70

In the Resolution ICC-ASP/16/Res.4, adopted at the 12th plenary meeting, on 14 December 2017, by consensus, on amendments to article 8 of the Rome Statute of the International Criminal Court, three new war crimes were introduced:

Annex I

Amendment to be inserted as article 8-2-b)(xxvii) and article 8-2-e)(xvi) of the Rome Statute

Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;

Annex II

Amendment to be inserted as article 8-2-b)(xxviii) and article 8-2-e)(xvii)

Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;

Annex III

Amendment to be inserted as article 8-2-b)(xxix) and article 8-2-e)(xviii)

Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices;

It is in accordance with article 121, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court which permits the Assembly of States Parties to adopt any proposed amendment to the Rome Statute after the expiry of seven years from the entry into force of the Statute.

These new war crimes are related to the use of prohibited weapons in international as well as non-international armed conflicts. During the discussion, there was controversy regarding the legality of adding these new war crimes to the list of war crimes. One of the concerns was that there would be fragmentation of the Rome Statute system with different crimes applicable in different situations to different individuals. This is because under the amendment procedure to the Rome Statute (Art. 121(5)) these new crimes would not apply to nationals of, or conduct on the territory of, non-ratifying states parties. Another concern was that the new crimes (or at least some of them) are, in the view of some states, not criminalized under customary international law and thus not suitable for addition for inclusion in the ICC Statute.

2.2 Statutes of limitations.

According to ICL, Rule 160. Statutes of limitation may not apply to war crimes. State practice establishes this rule as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts.

The non-applicability of statutory limitations to war crimes and crimes against humanity is provided for by the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes.⁸

⁸ UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity-1968, The preamble recognizes that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".

Article 1 provides: No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (1974) - Article 1 provides: Each Contracting State undertakes to adopt any necessary measures to secure that statutory limitation shall not apply to the prosecution of the following offences, or to

Between 1969 and 1973, the UN General Assembly adopted several resolutions calling on States to ratify the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and, in 1970, welcoming its entry into force.⁹

Article 29 of the 1998 ICC Statute provides: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.” This provision was not controversial, because the International Criminal Court has jurisdiction in relation to acts committed after the Statute enters into force. Also, the UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offenses, including genocide, war crimes, crimes against humanity and torture. Section 17(1) provides that these offenses “shall not be subject to any statute of limitations”.

In military manuals of many States, like for example Australia, Italy, the United States, there is a provision that statutes of limitation do not apply to war crimes. Also the legislation of many States such as Argentina, Belgium, Germany, Switzerland, including those not being party to the UN or European Conventions on the Non-Applicability of Statutory Limitations to War Crimes or Crimes against Humanity. The United States in 1986, in the diplomatic note to Iraq, (also not a party to the UN Convention) wrote, that

the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law:

1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
2. (a) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, (b) any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by

individuals guilty of war crimes could be subject to prosecution at any time, without regard to any statute of limitations.¹⁰ Another official statement in relation to the statute of limitations was a letter sent by Yugoslavia in 1993 to the UN Secretary-General, in which Yugoslavia stated, that war crimes were not subject to statutes of limitation.

In the *Mengistu and Others* case in 1995, the Special Prosecutor of Ethiopia stated that “it is ... a well-established custom and belief that war crimes and crimes against humanity are not ... barred by limitation”.¹¹ An interesting situation took place in France. France’s Penal Code provides for the non-applicability of statutes of limitation for genocide and “other crimes against humanity”. In the *Barbie* case in 1985, France’s Court of Cassation held that in contrast to crimes against humanity, war crimes committed during the Second World War were subject to the time-limits imposed by statute.¹² But France signed the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes and has ratified the Statute of the International Criminal Court.

Israel’s Nazis and Nazi Collaborators (Punishment) Law provides that there shall be no period of limitation for prosecution of war crimes, but this law applies only to war crimes committed by Nazis in the Second World War. But in the

reason either of its factual and intentional elements or of the extent of its foreseeable consequences;

3. any other violation of a rule or custom of international law which may hereafter be established and which the Contracting State concerned considers according to a declaration under Article 6 as being of a comparable nature to those referred to in paragraph 1 or 2 of this article.

Article 2 provides: 1. The present Convention applies to offences committed after its entry into force in respect of the Contracting State concerned.

2. It applies also to offences committed before such entry into force in those cases where the statutory limitation period had not expired at that time.

⁹ UN GA, Res.2583 (XXIV), Res.2712 (XXV), Res.2840 (XXVI).

¹⁰ United States, Department of State, Diplomatic Note to Iraq.

¹¹ Ethiopia, Special Prosecutor’s Office, *Mengistu and others* case

¹² France, Court of Cassation, *Barbie* case.

official statement, Israel declared, that statutes of limitation do not apply to any war crimes.

Treaty law, the practice of States, internal law, official declarations, the jurisprudence of national courts an

3 CONCLUSION

The issue of war crimes occupies a serious place in the doctrine of international criminal law. Although the war is not permitted by international law as a solution of conflicts, we are witnesses of many regional wars, non-international armed conflicts, in which many peoples including civilians are victims. The jurisprudence of the ICTY and the ICTR created rules and regulations, especially as the recognition of war crimes in non-international armed conflicts is concerned. The creation of the ICC and the catalog of war crimes in art.8 of the ICC Statute is a great achievement, which permits for its amendments in the future, by two-thirds majority required. It allows eventually for including other crimes, as the category of war crimes, and in that way to enrich customary humanitarian law by conventional regulations. Actually, they are 122 member states of the ICC, among them, 70 enacted implementing legislation on a national level. Comparing to 111 Member States in 2010 and 44 implementation of the ICC provisions, it makes a great achievement and progress. The Review Conferences should permit further extension of the war crimes list. We also noticed that the concept of universal jurisdiction is in great

development and States in their national legislation include different war crimes.

International law, as well as international criminal law, is created by States and only with their acceptance, will and cooperation, the positive development of IHL is possible. New situations create new solutions, and for example, the idea of the Responsibility to Protect (R2P) in the field of human rights is actually permitting the intervention of the International Community into internal affairs of other countries, the situation that 50 years ago was not possible to imagine in classical international law. With the development of new arms, maybe new crimes will be created, but their use in the field of human rights and IHL should be outlawed.

Another important question is how international courts identify the existence of a rule of customary international law (CIL)? Especially as we examine the „humanization trend” in international law after WWII, it means international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL). (Hakimi, M., 2016; Joyner, D., 2018) The ICRC’s study from 2005 on CIL was criticized by some authors, (Wilmshurst, E., & Breau, S., 2007) and although I believe that as Daniel H. Joyner said, that: “the sources of international law are essentially based, even if imperfectly, upon the consent of states to be bound to international legal obligation”. (Joyner, D., 2018) I disagree that some obligations in IHL are created without a sound basis in the consent of states to be bound by its rules,

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Received for publication: 19.12.2019
Revision received: 31.12.2019
Accepted for publication: 10.01.2020

How to cite this article?

Style – **APA Sixth Edition:**

Salkiewicz-Munnerlyn, E. (2020, January 15). Jurisdiction over war crimes. (Z. Cekerevac, Ed.) *MEST Journal*, 8(1), 101-110. doi:10.12709/mest.08.08.01.12

Style – **Chicago Sixteenth Edition:**

Salkiewicz-Munnerlyn, Ewa. 2020. "Jurisdiction over war crimes." Edited by Zoran Cekerevac. *MEST Journal* (MESTE) 8 (1): 101-110. doi:10.12709/mest.08.08.01.12.

Style – **GOST Name Sort:**

Salkiewicz-Munnerlyn Ewa Jurisdiction over war crimes [Journal] // MEST Journal / ed. Cekerevac Zoran. - Belgrade – Toronto : MESTE, January 15, 2020. - 1 : Vol. 8. - pp. 101-110.

Style – **Harvard Anglia:**

Salkiewicz-Munnerlyn, E., 2020. Jurisdiction over war crimes. *MEST Journal*, 15 January, 8(1), pp. 101-110.

Style – **ISO 690 Numerical Reference:**

Jurisdiction over war crimes. **Salkiewicz-Munnerlyn, Ewa**. [ed.] Zoran Cekerevac. 1, Belgrade – Toronto : MESTE, January 15, 2020, MEST Journal, Vol. 8, pp. 101-110.