



WAR CRIMES: AN UNIMAGINABLE ATROCITY

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ABSTRACT:

War crimes are grave violations of international humanitarian law (IHL) which incur individual criminal responsibility under International law. There is no defense for a person who has committed a war to say that he was following the orders of his seniors. one is supposed to not indulge in war crimes even on the orders of their superiors. The concept of a War Crime is related to international humanitarian laws. War Crime is a gross violation of international humanitarian laws as defined in the Rome Statute of the International Criminal Court. The basis of the development of these laws is the maltreatment of human beings especially during the war times. There have to be some boundaries on the treatment of a human being no matter to which religion or which nation or to which sex one belongs to, even during the war times. This article aims to draw attention to War Crimes, its impact on International Humanitarian Law and Human Rights Law. This article also highlights the challenges faced during war crime trials.

Key words: - *International Human Rights, International Criminal Tribunal, International Humanitarian Law, War Crime..*

INTRODUCTION :

War or armed conflict is a clash of two or more States . It is a raw violence. Result of war is immeasurable suffering among people, damage to life and object, suffering of men and animals and the whole ecosystem. War crimes are always committed in times of war. War crimes can be committed against a diversity of victims, either combatants or non-combatants, depending on the type of crime. In international armed conflicts, victims include wounded and sick members of armed forces in the field and at sea, prisoners of war and civilian persons. In the case of non-international armed conflicts, protection is afforded to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause. In both types of conflicts protection is also afforded to medical and religious personnel, humanitarian workers and civil defence staff.

War crimes are grave violations of international humanitarian law (IHL) which incur individual criminal responsibility under International law. There is no defense for a person (combatant) who has committed a war to say that he was following the orders of his seniors. One is supposed to not indulge in war crimes even on the orders of their superiors. The concept of a War Crime is related to international humanitarian laws. War Crime is a gross violation of international humanitarian laws as defined in the Rome Statute of the International Criminal Court. The basis of the development of these laws is the maltreatment of human beings especially during the war times. There have to be some boundaries on the treatment of a human being no matter to which religion or which nation or to which sex one belongs to, even during the war times.

International Humanitarian Law (IHL) is a branch of the law of nations or international law that governs relationships between members of the international community, namely, the state. International humanitarian Law is also called

the law of armed conflict and the law of war. IHL does not outlaw war but governs situations of armed conflict in the world of war. Its main purpose is to mitigate the effects of War by limiting the choice of means and methods of conducting military operation and second in that it obliges the belligerents to spare persons who do not or no longer participate in the hostile action. The four Geneva Conventions and Two Additional Protocols which codified the international customary laws of war that called for the penal actions for violation of IHL. IHL principles are universal in nature and applicable to all situations of international armed conflict or non- international armed conflict involving states and non- state forces alike.

DEFINING WAR CRIMES

The term “war crime” appears to have been first used in print in 1872, in the second edition of Johann Caspar Bluntschli’s *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*. More than three decades later, German jurist L. F. L. Oppenheim used the term “war crime” in his famous treatise on international law. Once again, while the term was the same as the term used today, Oppenheim’s description of a war crime reflected an understanding of “war crime” that was entirely different. The shift in the understanding of “war crime” can be traced to changes that took place in the period between World War I and World War II.

In 1943 Roosevelt, Stalin and Churchill in the Moscow Declaration spoke about atrocities and cold blooded mass execution by Hitler. Establishment of the Nuremberg Trial was the first curiosity over war crimes. It was the first international criminal tribunal, 1946. Similar tribunal was established in Tokyo. It was a slightly modified version of the Nuremberg Trial. For example judges are from different countries and not only from allied forces. This tribunal made an attempt to codify norms and principles

of international criminal law, international criminal responsibility and establishment of a permanent international tribunal.

The Geneva Conventions clarified the scope of War Crime but it did not use the term ‘war crimes’ and only obligated State Parties to have national law on prescribing effective penal sanctions for persons committing or ordering to be committee, any of the grave breaches of the said convention. Then in the 20th century the concept of international criminal responsibility and individual criminal responsibility was developed. The United Nations in 1993 and 1994 created two international criminal tribunals i.e. for Yugoslavia and Rwanda The tribunals were followed by the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998. All these international tribunals established that under international criminal responsibility includes war crimes and maintained that war crimes are violations of IHL. War crimes are those breaches of IHL that have been criminalized and therefore to which international criminal responsibility or individual criminal responsibility was attached.

Though what constitute war crimes depends upon the type of armed conflict, whether international armed conflict(IAC) or non-international armed conflict(NIAC), yet the war crime contain two main elements first contextual element (act/conduct took place or in association with armed conflict(IAC/NIAC)) and secondly the mental element(*Mens rea*).

In war crimes the existence of intent and knowledge is the most relevant fact. The act must be inhumane and the prosecutor must establish the relation between each element. The prosecutor must show that

1. At the time when these acts were committed there existed a state of armed conflict.
2. The acts of the accused were sufficiently connected to that conflict.

3. The offence allegedly committed constituted a serious infringement of a rule of international humanitarian law that entailed his or her individual criminal responsibility under international law at that time.

War crime is the serious violations and breaches of the Geneva Conventions and Additional Protocol I and II are defined as breaches of IHL.

The Rome Statute is another example of the global effort of defining the term War Crimes under Article 8. This definition is largely based on the principle developed by decisions of the Nuremberg Trial, Tokyo Trial, International Criminal Tribunal for the Former Yugoslavia and Rwanda. Under Article 8 War Crimes includes

- Grave Breaches of Four Geneva Conventions, 1949, related to IAC
- Other serious violations of the laws and customs applicable in international armed conflict
- Serious violations of Article 3 common to the four Geneva Conventions Related to NIAC
- Other serious violations of the laws and customs applicable in NIAC.

Article 8 of the Rome Statute provides a lengthy and detailed catalog to describe the word war crimes. Article 8 was interpreted by the ICC in Prosecutor v. Katanga and Ngudjolo. In that case, although the crimes could not be attributed to Katanga, the ICC found that forcible nudity constitutes an outrage upon personal dignity, which amounts to a war crime under Article 8(2)(b)(xxi). War crimes in simple sense means violations of IHL that are criminalized under International Law.

WAR CRIMES : VIOLATIONS OF IHL AND HUMAN RIGHTS LAW

The first international war crime trial took place on 18th October 1945 in Nuremberg. 24 high ranking military and political leaders charged with war crimes, crimes against humanity, and crime against peace. The Nuremberg Tribunal was severely criticized on many grounds but

remains one of the most influential and famous canon of international criminal law, international criminal responsibility and individual criminal responsibility under international law. In 1946, the United Nations recognized war crimes, crimes against humanity and crimes against peace as offenses under international law.

There are three basic principles of IHL i.e. principle of distinction, proportionality and precaution. If any of these principles or all of these principles are violated then it will amount to war crimes. Thus, even if a target in the conduct of hostilities is a lawful military objective under international humanitarian law (IHL), the rule of proportionality may either affect the means and methods of warfare that may lawfully be used, or even effectively prohibit an attack from being launched. Violating the rule of proportionality is an indiscriminate attack (in an international armed conflict) according to 1977 Additional Protocol I. Similarly Article 14 of the ICRC's 2005 study of customary international humanitarian law: Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. Second Principle is of Precaution which requires State Parties to a conflict to avoid or minimize the harm done to the civilian population. And the Third principle is of distinction i.e., to distinguish between civilian and combatant and civilian object and belligerent object.

We can take the example of Russia Ukraine Armed Conflict. Based on its investigations of the events in Kyiv, Chernihiv, Kharkiv, and Sumy regions in late February and March 2022, the Independent International Commission of Inquiry on Ukraine has found reasonable grounds to conclude that an array of war

crimes, violations of human rights and international humanitarian law have been committed in Ukraine. the Commission said on the day of submitting a detailed written report to the UN General Assembly.

“The impact of these violations on the civilian population in Ukraine is immense. The loss of lives is in the thousands. The destruction of infrastructure is devastating,” said Chair of the Commission Erik Møse. The Commission documented attacks where explosive weapons were used indiscriminately in populated areas that were under attack by Russian armed forces. The Commission also found that Russian armed forces attacked civilians attempting to flee. There are also examples of both parties to the armed conflict, although to different degrees, failing to protect civilians or civilian objects against the effects of attacks, by locating military objects and forces within or near densely populated areas.

Another example is Iraq. US officers have alleged that a top-secret military force repeatedly killed civilians and committed war crimes in Iraq and Syria. The military unit, known internally as Talon Anvil, was deployed in Iraq and Syria from 2014 to 2019, where they allegedly killed many civilians in a brutal campaign. A former US Air Force intelligence officer who worked on hundreds of classified Talon Anvil missions from 2016 to 2018 told the newspaper: “They were ruthlessly efficient and good at their jobs. But they also made a lot of bad strikes.”

Amnesty International, an international NGO, is constantly demanding an investigation of killing Afghan civilians by the US and UK Special Forces. “The International Criminal Court (ICC) has also opened an investigation in Afghanistan and the Prosecutor must urgently investigate, without fear or favour, allegations of war crimes committed by all parties to the conflict as soon as possible. However, despite harrowing reports of war crimes and crimes against humanity

being committed in Afghanistan by western militaries, including the USA, the ICC has not initiated any investigations, other than into the Taliban – leading to accusations of double standards in its approach.”

All these international incidents are pure violations of IHL general principles and therefore amount to War Crimes. The Geneva Conventions and Additional Protocol I establish that certain violations of IHL are to be considered “grave breaches”, and they must be prosecuted by High Contracting Parties on the basis of the principle of universal jurisdiction. Other serious violations of IHL are established by customary international law and by international criminal law treaties. Such serious violations of IHL, together with grave breaches, constitute war crimes. War crimes constitute one category of “international crime.

At the same time they violate basic human rights. There is a close relationship between serious human rights violations and war crimes. UN Security Council Resolutions adopted under Chapter VII of the UN Charter have referred to serious violations of human rights in the context of armed conflicts, and violation of international human rights law as threats to international peace and security. During armed conflict members of the civilian population often suffer the direct or indirect effects of fighting like lack of food, indiscriminating bombing, lack of health facility, etc. Women and children are the part of the civilian population that are most vulnerable. they are more exposed to the risk in such inappropriate situations

The conflict in Bosnia, Iraq, Afghanistan, and Herzegovina and now in Ukraine brought the issue of the rape of women, forced pregnancy, forced prostitution, sexual slavery and forced abortion as a means of warfare. All these are violations of IHL and undisputedly violation of Human Right like right to life, right to health, right to social security, right to movement, right

against slavery, right against torture and indiscriminate conduct and gender violation. Both men and women are subjected to maltreatment which include sexual violence, forced labour, and forced recruitment. The UN Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social, Cultural Rights, and other international human rights treaties protect all these rights.

The USA and UK military invasion of Afghanistan is another example of war crime. More than 18 years the USA and its allied forces invaded Afghanistan which was an ultimate failure for them. There is a lot of wrong done on part of US and its allied forces like killing civilians, raping and killing women and young boys were widespread. Muhammad, a fifteen year old, allegedly had died in a drone attack. A man called Muhammad Wali was shot when he had come out to get water. Khan Muhammad, a seven year old, was killed in a bomb explosion. Bor Agha, a 12 year old was fired from an Afghan national Base before being warned not to get too close to the base.

The report in the Washington Post on May 20, 2004, involved the killing by U.S. forces of more than forty civilians, most of them women and children, in the village of Makr al-Deeb in western Iraq. A U.S. military official in Baghdad said that “our sense is that this was a legitimate military target. We suspect that this was a smuggler or foreign-fighter” route. “It’s our estimation right now that the [Iraqi] personnel involved in this matter were part of the foreign-fighter safe house.” So, on the basis of suspicion of trafficking in unauthorized migrants, U.S. military forces, without warning, used aerial bombardments and strafing with high-powered guns to obliterate an entire village. All these incidents are clear examples of violation of IHL as well as IHRL. The IHL and International

Human Rights Law are totally different in their origin and codification but share a common link and strive to protect the lives, health and dignity of individuals, albeit from a different angle. In principle, IHRL applies at all times, i.e. both in peacetime and in situations of armed conflict.

In the present situation in Ukraine, Human Rights Watch has documented several cases of Russian military forces committing laws-of-war violations against civilians in occupied areas of the Chernihiv, Kharkiv, and Kyiv regions of Ukraine. These include a case of repeated rape; two cases of summary execution, one of six men, the other of one man; and other cases of unlawful violence and threats against civilians between February 27 and March 14, 2022. Soldiers were also implicated in looting civilian property, including food, clothing, and firewood. Those who carried out these abuses are responsible for war crimes. Many states and the International Criminal Court (ICC) also have the possibility to prosecute a wider set of war crimes although, in the past, states have not prosecuted many such crimes committed outside their own territory. Neither Russia nor Ukraine is a party to the ICC Statute, but Ukraine did declare it accepted the Court’s jurisdiction for crimes on its territory, and investigations have now started.

WAR CRIMES : ISSUES AND CHALLENGES

Following are the issues faced in handling war crimes

1. Establishing war crimes is difficult to prove. Example targeting civilians
2. In crime commission, intention plays a very important role. It has to be proved that the act is committed intentionally.
3. Collection and preservation of evidence
4. How to arrest suspects
5. Investigation of war crimes may take years to complete which often leads to frustration of victims.
6. Issue of immunity

7. Failure of universal recognition of International Criminal Court

8. Absence of effect prosecutorial mechanism

CONCLUSION:

War crimes are violations of IHL (norms developed through customs and treaty). It incurs individual criminal responsibility. It must take place either under international armed conflict or non- international armed conflict. Major role was played by the Four Geneva Conventions and its Additional Protocol I and II .With the events of Nuremberg trial, Tokyo Trial , tribunal for Rwanda , Yugoslavia and now ICC have become front page news. War crimes violations are cognizable offenses both at domestic and international ones. IHL and IHRL restricted the unlimited powers of the State in armed conflict. Number of treaties clearly regulated the means and methods of warfare. Even though there are a number of international treaties on IHL and IHRL which protect civilians under all situations, war criminals have escaped prosecution and punishment. Political will of the international community is a necessary precondition for preventing war crimes at any situations.

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- wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health etc. See Article 8 of the Rome Statute..
- committing outrages upon personal dignity, in particular, humiliating or degrading treatment and desecration of the dead;
- enforced sterilization;
 - compelling the nationals of the adverse party to take part in military operations against their own party;
 - killing or wounding a combatant who has surrendered or is otherwise hors de combat;
 - declaring that no quarter will be given;
 - making improper use of distinctive emblems indicating protected status, resulting in death or serious personal injury;
 - making improper use of the flag, the military insignia or uniform of the enemy resulting in death or serious personal injury;

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - taking of hostages;
 - the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- making the civilian population or individual civilians, not taking a direct part in hostilities, the object of attack;
- pillage;
 - committing sexual violence, in particular, rape, sexual slavery, enforced prostitution, enforced sterilization and enforced pregnancy

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