EVOLUTION OF INTERNATIONAL CRIMINAL JURISDICTION: INDIVIDUAL RESPONSIBILITY AND THE DEFINITION OF WAR CRIMES - A study

Sundaramurthy Purushothaman*

INTRODUCTION

The modern history of war crimes began with the Nuremberg Trial following World War II that pierced the veil of national sovereignty and command responsibility and held major German leaders responsible for their actions during World War II. The Charter of the International Military Tribunal sought to prosecute crimes against peace, war crimes, and crimes against humanity. The Statute of the Tribunal for the Former Yugoslavia expanded the definition of crimes against humanity to include rape, persecution, and other inhumane acts. The International Tribunal for Rwanda clarified the various guises that genocide takes. The Rwandan situation also allowed Belgium to successfully test its then-existing law claiming universal jurisdiction to prosecute persons committing crimes against humanity. The Special Court for Sierra Leone included in its Statute that involving or conscripting children in the conflict was a violation of international humanitarian law. The International Criminal Court provides a potentially permanent institution to address future war crimes, although the lack of participation by the United States raises concerns.

All in all, although international humanitarian law underwent substantial development from the middle of the nineteenth century until after World War I, its enforcement was lagging behind. The failures in establishing an international tribunal or international military tribunals after the Versailles Treaty and the serious short comings of holding those accountable during the Leibzing trials indicate that "while the contours of war crimes law had been increasingly well established by World War II, persons violating that law faced only a hypothetical possibility of criminal sanction. In a sense, war crimes law had not yet truly become a form of criminal law."[1]

* Research Scholar @ Department of Legal Studies and Research, Acharya Nagarjuna University; Email: purushoth@hotmail.co.in; Contact: +91-8144898989

[1] See http://www.historians.org/projects/GIRoundable/Criminals/Criminals3.htm (last visited on 20 April 2012).

The Charter of the Nuremberg Tribunal manifests individual criminal responsibility[2] moreover, it states official capacity of defendants does not free them from responsibility, and the defence of superior order cannot be applied as negating responsibility, only, at most, as a mitigating circumstances[3]. It was therefore the Nuremberg and Tokyo procedures that initiated the evolution of individual criminal responsibility in international law and produced important jurisprudence in this regard.

As a consequence, the International Law Commission (ILC) manifested individual criminal responsibility in its 1950 report, even in case the crime in question was not criminalized in national law[4]. The ILC understood international crimes as those coming under the jurisdiction of the Nuremberg Tribunal and this is how eventually crimes defined in international law became "crimes under international law".

During about this time, the "search for and prosecute" obligation appeared in the 1949 Geneva Conventions[5]. This was one of the novelties in the 1949 Conventions, as the 1929 Conventions entailed only a very weak reference to responsibility[6]. The 1949 Geneva Conventions expressly oblige states to punish perpetrators of grave violations in national law: "ensure respect" and the repression obligations, moreover, the exercise of universal jurisdiction has now become binding on states[7].

In addition, the Geneva Conventions list the grave breaches, and the list is more comprehensive than the war crimes in the Nuremberg Charter. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts and its 1999 Protocol, as well as the 1977 Additional Protocol I all contain similar rules, extending the list of international crimes.

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[2] Dieter Fleck. **The Hand Book of International Humanitarian Law**, Second Edn.(Oxford University Press, Oxford, 2008.

[3] Charter of the International Military Tribunal, Article 6.

[4] Charter of the International Military Tribunal, Article 8.

[5] Principles du Droit International Consacres par le Statut du Tribunal de Nuremberg et dans le Judgment de ce Tribunal, adopted by the UN International Law Commission on July 1950, Principle II. In : Dietrich Schindler Jiri Toman: Droit des Conflicts Armes, CICR, Institute Henry – Dunant, Geneva (1996), p. 1312

[6] Geneva Convention of 1949, articles 49/50/129/146 respectively.

[7] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva,27 July 1929, Article 30:,, On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention when such violation has been established the belligerents shall put an end to and repress it as promptly as possible."

Based partially on the Geneva Conventions, the Statutes of the two ad hoc tribunals established to try violations committed in the ex-Yugoslavia and Rwanda[8] respectively do not only refer to the grave breaches of the Geneva Conventions, but also to other serious violations – including the serious violation of common Article 3 and Additional Protocol II and the laws and customs of war, already referred to in the Nuremberg Charter.

The high peak of these developments was the further expansion of the list of international crimes in the Rome Statute of the International Criminal Court, probably the main merits of which is the enlarging of the list of crimes committed in non – international armed conflicts.

Summing up, international law today undoubtedly accepts individual criminal responsibility. The main enforcement body today, with the gradual closing down of the two ad hoc tribunals is the International Criminal Court, in case it has jurisdiction. The primary responsibility, however, still lies with states.

MEANING OF WAR CRIME

Generally a war crime may be defined as a serious violation of the laws and customs applicable in armed Conflict also known as international humanitarian law, which gives rise to individual criminal responsibility under international law[9]. Unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act can constitute a war crime. For war crimes law, it is the situation of armed conflict that justifies international concern[10].

According to the Encyclopedia Britannica, the term 'war crime' means "in international law, serious violation of the laws or customs of war as defined by international customary law and international treaties." The definition pretty much covers the notion, and it can probably be agreed that it is due to the fast development of customary law that makes identification of the list of war crimes today rather difficult.

DEVELOPMENT OF WAR CRIMES IN INTERNATIONAL LAW (OBJECT OF THE STUDY)

[8] The obligation to exercise universal jurisdiction is not expressisverbis entailed in the text, however, the autdedereaut judicare obligation practically means the same. See Jean S. Pictet (Ed) : Commentary to Geneva Convention, I, ICRC, Geneva, First Reprint (1995), pp. 365-366.

[9] Lesile Green, **The Contemporary Law of Armed Conflict** (Manchester 2000) p.20

[10] Ibid at p.25

Laws and customs regulating warfare may be traced back to ancient times. While such norms have varied between civilizations and centuries, and were often shockingly lax by modern standards, it is significant that diverse cultures around the globe have recorded agreements, religious edicts and military instructions laying out grounds rules for military conflict. In recent centuries, military codes such as the Lieber Code promulgated during the American Civil War have refined and developed these customs[11]. Codification and progressive development at the international level was spurred in part by the efforts of one individual. In 1859, Henri Dunant, a businessman from Geneva, witnessed the aftermath of the Battle of Solferino, and was shocked by the horrors of wounded soldiers left to die on the Red Cross in 1863 and the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1984. Since then, there have been many treaties developing international humanitarian law (IHL). These are sometimes divided into 'Geneva law', which primarily focuses on protecting civilians and others who are not active combatants (such as the wounded, sick, ship-wrecked and prisoners of war), and 'Hague law', which regulates specific means and methods of warfare, with a view reducing unnecessary destruction and suffering. Among the most significant in the latter category are the 1907 Hague Regulations, which recognized that 'the right of belligerents to adopt means of injuring the enemy is not unlimited', and laid down many provisions on the means and methods of warfare that are now recognized as customary law[12].

Other significant treaty developments have strengthened the protection of cultural property, the prohibition or regulation of certain weapons such as biological and chemical weapons[13] and Anti-personnel mines, and whether parties to the conflicts have ratified those conventions. Some, but not all, provisions of the Additional Protocols have obtained recognition as customary law.

[11] Christopher Greenwood, **Historical Development and Legal Basis Handbook of International Humanitarian Law,** (Oxford University Press, Oxford, 2008) pp.1-44.

[12] Henri Dunant, UN Souvenir de Solferino, Geneva, 1862.

[13] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980; four protocols there to including Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines 1993; Convention, 18 September1997

The Versailles and Sevres Treaties did not list war crimes. The Leipzing Trials, conducted as a consequence of the Versailles Treaty, were based on the 1907 Hague Regulations, which, however, did not list war crimes either, instead, the Regulations concentrated on the payment of compensation by the state as the chief form of punishment – however, this obviously did not mean individual responsibility. At the same time, violations of the Hague Regulations had long been seen as violations for which members of the armed forces or civilians could be held individually responsible[14], and thus the rules of the Hague Regulations served the basis for the determination of war crimes during the Leipzing Trials.

The 1919 Commission, in its report, drew up a list of war crimes[15], including murder and massacre, torture of civilians, rape, and internment of civilians under inhuman conditions[16]. The list, however, and the justifications for including certain elements in the list indicate that it included both war crimes and what later became crimes against humanity. This last element was the main criticism of the United States against the findings of the Commission, indicating that violations of the "laws of humanity" were vague and not well established; therefore it would violate the principle of legality[17]. Obviously, the American opinion on this changed substantially by the time of the Nuremberg Tribunals.

The next instrument where war crimes appeared was the Statute of the Nuremberg Tribunal is lacking in listing the war crimes in the 1929 Geneva Conventions. The antecedent event was the inauguration of the United Nations War Crimes Commission (UNWCC) on October 20, 1943 to investigate war crimes; many findings of which were adopted in the Nuremberg Charter. The Commission relied on the war crimes listed by the 1919 Commission, mainly to avoid criticism that it had invented new war crimes after they had been perpetrated, and also because Italy and Japan had also been part of the 1919 Commission, and Germany had not objected to its findings.

[14] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993., Articles 2-3 and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between I January 1994 and 31 December 1994, Articles 1 and 4.

[15] See Meron (2006), p.554.cf.Supra Note:2

[16] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (March29, 1919), reprinted in 14 **American Journal of International Law** (1920) pp92-95.

[17] See Meron (2006), p.555 Cf. *Supra Note*:2

The text of the Statute of the Nuremberg Tribunal referred to laws and customs of war, laws meaning mainly the 1899 and 1907 Hague Treaties and the 1929 Geneva Conventions, none of which mentioned war crimes. Therefore it was the Nuremberg Statute that first operated with the term "War Crime" and provided a definition to it. The Nuremberg Statute also relied heavily on customary law to overcome the problem of a lack of proper international regulation of prohibition of attacks against civilians in the international treaties in force at the time of the Second World War. Hence, the Nuremberg Statute did not only apply the term war crimes, but also filled it with precise meaning, basically codifying existing customary law.

The 1949 Geneva Conventions and their provisions on penal repression and grave breaches were obvious followers of the Nuremberg Statute. However, the Geneva Conventions used the term 'grave breaches' instead of 'war crimes' and for a reason. According to the ICRC Commentary, the actual expression "grave breaches" was discussed at considerable length. The USSR Delegation would have preferred the expression "grave crimes" or "war crimes". The reason why the Conference preferred the words "grave breaches" was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word "crimes" had different legal meanings in different countries."[18] More specifically, the idea was to emphasize the difference between these very serious crimes and ordinary crimes or infractions under national law[19]. The Geneva Conventions therefore concentrated on grave breaches of the Conventions, whether they were called crimes or not in specific domestic laws.

The lists of grave breaches in the Geneva Conventions are substantially longer than in the Nuremberg Statute. In addition, the 1949 Geneva Conventions made the obligation of the 1929 Convention I regarding national legislation more imperative. While the 1929 Convention I merely said that "[t]he Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention."[20] The obligation of the 1949 Conventions has been made considerably more imperative. The Contracting Parties are more strictly bound to enact necessary legislation

[18] See Meron (2006), p. 556, Cf. *Supra Note*:2

[19] Commentary to GCI, p.371

[20] Gabrielle Kirk McDonald – Olivia Swaak – Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts*, Volume I, Commentary, Kluwer Law International, (The Hague 2000), p. 70.

than in the past"[21]. The difference basically lies in the imperativeness: while the 1929 Convention I should more like a recommendation 'shall propose' the 1949 text is clearly an obligation of 'Parties undertake to enact'.

The 1977 Additional Protocol I made further developments. Article 11 lists prohibited acts, while Article 85 lists further grave breaches, making the list longer[22]. In addition, it makes grave breaches of the Geneva Conventions applicable to grave breaches of Additional Protocol I, if these are committed against persons or objects newly protected by Additional Protocol I[23]. Therefore Additional Protocol I extended the number situations in which acts would become grave breaches, and added one more grave breach, notably the perfidious use of protective signs and signals.

Finally, Additional Protocol I adopted a text that was initially highly controversies, notably stating that grave breaches constitute war crime[24]. As outlined below in Chapter II.2.(i), the difference between the notions of grave breaches and war crimes lies in where they are regulated. 'Grave breaches' are terms used by the Geneva Conventions or Geneva law, whereas the term 'war crimes' was used in the Nuremberg Charter, originated from Hague

[21] 1929 Geneva Convention, Article 29

[22] Commentary to GCI, p. 363.

[23]Additional Protocol I substantially widens the area of protection and extends it to, among others, civilian medical personnel, transport and material and certain protected objects. It also includes specific fuels on means and methods of warfare with providing more detailed provisions on the notion of combatants. According to Articles 11 and 85 of Additional Protocol I, acts considered as grave breaches in addition to those described in the Geneva Conventions include the following : physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation not justified by the state of health of the person; any willful act or omission which seriously endangers the physical or mental health or integrity of any person; [when committed willfully, in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health]: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack violating the principle of proportionality; launching an attack against works or installations containing dangerous forces; making non defended localities and demilitarized zones the object of attack; the perfidious dangerous forces; making non – defended localities and demilitarized zones the object of attack; the perfidious use of the protected emblems; [when committed willfully and in violation of the Conventions or the Protocol]: the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Geneva Convention IV; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, historic monuments, works of art or places of worship the object of attack, causing as a result extensive destruction; depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.

[24] Claude Pillod, Yves Sandoz, Bruno Zimmermann, **Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949**, International Committee of the Red Cross, (MartinusNijhoff Publishers, 1987), p. 991, para 3460.

law. Therefore many regarded grave breaches as referring to violations of Geneva law, and war crimes as violations of Hague law.

This differentiation or grouping was made obsolete by the mentioned provision of Additional Protocol I[6625], and also by the fact that Additional Protocol I includes both Geneva law and Hague law. What was clear however at the time was that grave breaches and war crimes therefore international criminal responsibility were not applicable to violations committed in non-international conflicts. This text in Additional Protocol I, finally adopted by consensus, merely confirms that there is only one concept, assuring however that "the affirmation contained in this paragraph will not affect the application of the Conventions and the Protocol"[26].

However, this grouping is not entirely reflected in the ICC Rome Statute. Article 8 specifies only grave breaches in the understanding of the Geneva Conventions, but not in Additional Protocol I. This can be explained by the fact that Additional Protocol I was not ratified by many of the states negotiating the Rome Statute, including the United States which knowingly played an important role in the Preparatory phase. Therefore these states were reluctant to incorporate grave breaches of AP I into the Rome Statute. The Rome Statute only works with the notion 'war crimes' and not grave breaches, however, one set of war crimes are grave breaches of the Geneva Conventions. Therefore with respect to the war crimes and grave breaches relation, it shall state that all grave breaches of the Geneva Conventions are war crimes, but not all war crimes are grave breaches of the Geneva Conventions.

METHODOLOGY

In this work, mainly doctrinal research has been adopted. Going by the words of S.N.Jain[27] doctrinal research is analyzing the existing statutory provisions, legal documents, decided case laws of various courts etc. The historical method has also been employed in this research

[25] Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." Article 85para 5, Additional Protocol I.

[26] See Schabas (2005), p. 53 cf. *Supra Note*: 24

[27] S.N.Jain, *"Doctrinal and Nona-Doctrinal Legal Research in Legal Research and Methodology*", edited by S.K. Varma, M.Afsal Wani (Second Edition, Indian Law Institute, New Delhi,2001) p.68. According to S.N. Jain, Doctrinal Research, of course, involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions but it does more- it creates law and its major tools (but not only tool) to do so us through legal reasoning or rational deduction.

work for tracing out the history and development of the concept of war crimes. Analytical method too is used wherever necessary.

Sources

For realizing this research study materials from both primary and secondary sources have been utilized. The Four Geneva Conventions and its Additional Protocols, Rome Statute, United Nations Charter, Relationship Agreement between the United Nations and The International Criminal Court, Ottawa Convention, International Convention for the Suppression of the Financing of Terrorism etc. are relied upon as primary sources. The secondary sources referred herein are treatises, commentaries, text books, case comments, law journals, and case reports both national and international.

As a primary source the study goes with the following:

Four Geneva Conventions and its Additional Protocols,

Rome Statute,

United Nations Charter,

Ottawa Convention,

International Convention for the Suppression of the Financing of Terrorism,

As a secondary source the study goes with the following books:

Abrams, Jasons, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2001.

Ackerman, Peter, *A Force More Powerful: A Century of Nonviolent Conflicts*, Palgrave, 2000.

Acuna, T.F., *The United Nations Mission in El Salvador-A Humanitarian Law Perspective*, Kluwer Law International, The Hague, 1995.

Alston, P., *The United Nations and Human Rights- A Critical Appraisal Clarendon*, Press, Oxford, 1992.

Alvarez, Alex, *Governments, Citizen, and Genocide: A Comparative and Interdisciplinary Approach*, Indiana University Press, Bloomington, 2001.

CONCLUSION

Therefore, it may be safely concluded that serious flaws in current single nation and *ad hoc* attempts to avenge human rights violations and war crimes. The U.N. and the vast majority of nations now clearly recognize the need for a permanent international criminal court. U.S. opposition to this Court is obviously contrary to our history as the world's leader in defense of human rights. Moreover, the public objections expressed by U.S. officials and congressmen to the Court appear, for the most part, to be based on the understandings and unlikely hypothetical. To the extent they have merit, fairly minor adjustments in ICC procedures could correct the problem. More importantly, it is vital to understand that our opposition to the ICC is against our best interests. This international institution and international criminal law have arrived, and it is far better that the U.S. controls the process in the future and use it to its advantage then stand alone as its own rogue state against ninety-nine civilized nations. When we decide to join the ICC, we will not see the international community and the Court as the enemy, nor will others perceive us in this manner. We will instead recognize the great potential of the Court to provide stability to the world and to serve as a channel of unified action against terrorists, aggressors, and tyrants. Those who consider themselves nationalists, moderates, or members of the right wing of American politics need to consider these arguments in the years to come. If they do, the author is confident that not only will the U.S. join the ICC, but it will emerge as its leader and greatest advocate.