

DE JURE NEXUS LAW JOURNAL

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WAR CRIMES AND GENOCIDE: INJUSTICE AGAINST HUMANITY**Abstract:**

The recent news of the Russia-Ukraine conflict and the Russian invasion of Ukraine that started on 24th February 2022 has once again turned the world's attention to international humanitarian laws. There have been multiple allegations on Russia on possible commission of war crimes but the question arises what exactly are war crimes? What is meant by genocide? What are the laws governing the same? The article is, therefore, an attempt to answer the said questions. The article also analyses the history of war crimes and genocide, how the concept originated in international law after the Second World War ended and the recent events of war crimes and genocide. The article also seeks to give suggestions as to how such situations can be avoided and the responsibility of the influential countries to deflect such situations.

Keywords:

Russia-Ukraine conflict, war crimes, genocide, international humanitarian laws, Second World War, etc.

War Crimes:**Background:**

Rules of war have existed since time immemorial. Even during the time of Mahabharata, there were certain war conducts that were deemed acceptable and some as unacceptable. The

concept of war crimes, was, however, conceptualized after the Second World War ended. The first mention of war crimes can be traced back to the Hague Conventions that were adopted in 1899 and 1907. Moreover, the Geneva Conventions, particularly the four 1949 conventions and the two Additional Protocols of 1977 also discuss certain provisions for the protection of persons no longer participating in warfare and those who were not a part of it in the first place. Any violation of the same constitutes a war crime.

The codification of war crimes cannot be found in a singular document. It has its mention in various documents under international humanitarian law as well as international criminal law. The Geneva Conventions, Nuremberg Tribunal precedents, an older field of law known as the Laws and Customs of War, and, in the context of the former Yugoslavia, the statutes of the International Criminal Tribunal in The Hague define war crimes (ICTY).

Definition:

As per Article 8 of the Rome Statute of International Criminal Court, war crimes are defined as follows:

- a. *“Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*
 - i. *Willful killing*
 - ii. *Torture or inhuman treatment, including biological experiments;*
 - iii. *Willfully causing great suffering, or serious injury to body or health;*
 - iv. *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
 - v. *Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;*
 - vi. *Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*
 - vii. *Unlawful deportation or transfer or unlawful confinement;*
 - viii. *Taking of hostages.”¹*

¹ *United Nations Office on Genocide Prevention and the Responsibility to Protect*, UNITED NATIONS, (Mar 8, 2022, 9:39 AM), <https://www.un.org/en/genocideprevention/war-crimes.shtml>

War crimes are categorized as severe violations of the Geneva Convention of 1949. It includes brutality committed against persons or property like murder, slavery, torture or inhuman treatment, rape, forceful pregnancies, destruction of buildings for educational, historical or art purposes, etc. It will also constitute a war crime to enrol a child below 15 years of age in warfare.

Elements of War Crimes:

There are two elements of war crimes, namely:

- Contextual element- when the conduct occurs in the context of an armed conflict, whether international or non-international.
- Mental element- both in terms of the individual act and the contextual factor, intent and knowledge are important.

Parties Protected in cases of War Crimes;

In case of international warfare, the parties protected include sick and wounded members of the security forces of a country participating in war, prisoners of war and civilians. In case of non-international warfare, the law seeks to protect those persons who are not actively taking part in the conflict, including members of armed forces who have surrendered their weapons and those placed "*hors de combat*" by sickness, wounds, detention, etc. in both the cases, medical and religious persons, humanitarian workers and civil defence staff are also awarded protection.

Victor's Justice:

A nation-state that has emerged victorious in the war rarely tries its own people for war crimes. It is usually the state who has lost that has to put its people on trial for such crimes. But some exceptions are also seen in cases of Americans that were tried for war crimes committed in Vietnam and the trials for war crimes related to the former Yugoslavia.

Who is responsible for war crimes?

The leaders, organizers, instigators and accomplices who are involved in the formulation and/or execution of a common plan or conspiracy to conduct any crime that constitutes a war crime face criminal responsibility for acts done by any person(s) who carries out the plan.

Superior Orders- not an Excuse:

A person who is following their superior's orders is not excused from their liability merely because they were following their superior's orders. It may be considered during the trials and the punishment so granted may be reduced at the court's discretion.

Are Civilian Casualties Legal?

Article 8 of the Rome Statute states that civilians cannot be directly attacked during a war and if they are made direct targets, it will amount to the commission of a war crime. Civilian casualties do not necessarily amount to criminal responsibility. The principles of proportionality and military necessity are applicable in this case. Military necessity is a principle that permits the killing of persons whose killing cannot be incidentally avoided. It, however, does not permit the taking life of an innocent person.

Liability of Aircrew involved in Warfare:

The International Criminal Tribunal for the former Yugoslavia rules that aircrew involved in warfare is free from criminal liabilities since a pilot is considered blind and they have to rely on external sources for direction. External sources directing the aircrew include headquarters, ground troops, etc.

Rendulic Rule:

The commanders are judged by the Rendulic Rule. The rule states that a person has to necessarily assess the military necessity of action before ordering its commission based on the circumstances at that time. If new information is discovered after the event, the person cannot be judged on its basis.

First Conviction of a War Criminal:

The first conviction of a war criminal took place in 1474. Peter von Hagenbach was convicted by an ad hoc tribunal of the Holy Roman Empire for commanding the soldiers

when it was established that his responsibility as a knight was to prevent criminal behaviour by a military force. He was found guilty, condemned to death and beheaded.

Punishment for War Crimes:

War criminals are punished in two ways in today's world, i.e. death or long term imprisonment.

Genocide:

Background:

The term 'genocide' can be found in the works of the Polish Jewish lawyer Raphael Lemkin. In 1944, he coined the term genocide while documenting the Nazi policies of Germany and the Holocaust. The word's origin can be traced to two languages; Greek and Latin. The word combines the Greek word *geno-*, meaning race or tribe and the Latin word *-cide*, meaning killing. Lemkin defined the genocide as "*a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.*"²

Definition:

Article 2 of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*

² *United States Holocaust Memorial Museum, Washington, DC* UNITED STATES MEMORIAL HOLOCAUST MUSUEM, (Mar 8, 2022, 9:43 PM), <https://encyclopedia.ushmm.org/content/en/article/what-is-genocide>

*(e) Forcibly transferring children of the group to another group.*³

Therefore, the crime of genocide means the intentional killing of members of a particular race, tribe or group, etc. It also includes causing corporeal hurt or mental harm to people, forcibly separating children of the said group and transferring them to another group, etc.

What Acts shall be Punishable?

Article 3 of the Convention lays down the acts which are punishable for genocide. They are:

- a) *“Genocide;*
- b) *Conspiracy to commit genocide;*
- c) *Direct and public incitement to commit genocide;*
- d) *Attempt to commit genocide;*
- e) *Complicity in genocide.*⁴

Who is Responsible for Genocide?

Any person can be tried for the crime of genocide if they are committing the act of genocide or any other act given under Article 3 of the Convention, irrespective of the fact that they are public officials, private individuals or the head of a state.

Countries bound by the Genocide Convention:

As of January 2018, 149 states have ratified the Genocide Convention. The International Court of Justice is of the view that all countries are bound by the Convention, regardless of the fact whether they have ratified the Convention or not.

Obligations of the State under the Genocide Convention:

- *“Obligation not to commit genocide (Article I as interpreted by the ICJ)*
- *Obligation to prevent genocide (Article I) which, according to the ICJ, has an extraterritorial scope;*
- *Obligation to punish genocide (Article I);*

³ *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Mar 9, 2022, 10:06 PM), <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Mar 9, 2022, 10:16 PM), <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

- *Obligation to enact the necessary legislation to give effect to the provisions of the Convention (Article V);*
- *Obligation to ensure that effective penalties are provided for persons found guilty of criminal conduct according to the Convention (Article V);*
- *Obligation to try persons charged with genocide in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with accepted jurisdiction (Article VI);*
- *Obligation to grant extradition when genocide charges are involved, in accordance with laws and treaties in force (Article VII), particularly related to the protection granted by international human rights law prohibiting refoulement where there is a real risk of flagrant human rights violations in the receiving State.”⁵*

First Conviction for Genocide:

The International Criminal Tribunal for Rwanda, on 2nd September 1998, found Jean-Paul Akayesu guilty of genocide and crimes against humanity. He was mayor of the Rwandan town of Taba and was convicted for his acts. This served as the world’s first conviction for the crime of genocide.

Difference between War Crimes and Genocide:

The major difference between war crimes and genocide is that genocide is committed against a single race, tribe or group, while war crimes may be committed against any individual irrespective of his race or tribe. Another difference between the two includes that genocide can occur in times of peace and war, while war crimes are committed during warfare only.

The Way Forward:

War crimes and genocide are grave crimes and have occurred throughout history even after several laws have been made to regulate the same. Aggressors have carried out genocide, of which several instances can be cited like the Armenian Genocide, the Holocaust, genocide during the Cold War, the Rwandan Genocide, the genocide of the Uyghur Muslims in China, etc. War crimes have also been committed throughout the history of wars.

⁵ *Office on Genocide Prevention and the Responsibility to Protect*, UNITED NATIONS, (Mar 8, 2022, 10:39 PM),

<https://www.un.org/en/genocideprevention/genocide-convention.shtml>

While it is not easy to stop these crimes, several steps can be taken to reduce the risk. Firstly, influential countries should use their influence to nudge those countries who have not accepted the Genocide Convention to sign and ratify it. Secondly, all nation-states should strive to establish a court with universal jurisdiction to prosecute people accused of committing these crimes. Thirdly, the international community should be on the lookout for societal as well as political signs that indicate extremism and severe polarization against a minority community and steps should be taken to dissipate these tensions as quickly as possible. Fourthly, minority representation should be increased in all nation-states so that inter-community dialogue can increase. Fifthly, the focus should be on minimizing weapons of mass destruction to the maximum extent possible. This will also include preventing visible as well as under the table arms deals with rogue nations. Lastly, when a conflict arises, UN peacekeeping missions should be prompt in responding.

Conclusion:

Enough blood has been lost in gruesome instances of genocides and war crimes. The international community should take a leaf out of India's cultural value of "Vasudhaiva Kutumbakam" and emerge as a Global Village. Nation-states should place humanity first and adopt the "world is one family" approach.

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