

# War Crimes and Modern-Day Armed Conflicts

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## Abstract

*This article explores the multifaceted nature of war crimes through contemporary and historical lenses, highlighting evolving legal frameworks and accountability mechanisms. It begins with the Israel-Hamas conflict and extends to the Russian-Ukrainian conflict, detailing atrocities and violations of International Humanitarian Law by both sides. The historical development of war crimes is traced from early definitions and the Leipzig Trials post-World War I to the expanded scope and individual accountability established by the Nuremberg and Tokyo Trials after World War II. Key legal instruments such as the Geneva Conventions of 1949 and the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda are discussed, particularly their recognition of sexual violence as a war crime. The article analyses the Rome Statute of the International Criminal Court, its role in modern prosecutions, and challenges such as jurisdiction and the complementary role of national courts. It also examines command responsibility, emphasising the obligation of leaders to prevent and address war crimes by subordinates. The conclusion reflects on the evolving definitions of war crimes and the international legal framework's efforts to enforce*

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*accountability, stressing the importance of integrating these standards into national legal systems for comprehensive justice.*

## **Introduction**

In the ongoing Israel-Hamas conflict, war crimes have been committed by all parties.<sup>1</sup> Hamas gunmen killed 1,200 people and captured 253 hostages, mostly civilians, in an attack on Israel in Oct 2023. Palestinian armed groups launching indiscriminate projectiles across Southern Israel and the holding of hostages also violated International Humanitarian Law (IHL).<sup>2</sup> The attack sparked an Israeli offensive in Hamas-run Gaza, in which more than 34,000 people have been killed during the offensive. Allegedly, weapons supplied by the United States (US) to Israel are being used in violation of the IHL.<sup>3</sup> A United Nations report has found continued evidence of war crimes and human rights violations committed by Russian authorities in Ukraine, including wilful killing, torture, rape and other sexual violence and the deportation of children. There were three occasions when Russian authorities transferred Ukrainian unaccompanied children from one area, they controlled in Ukraine to another or to the Russian Federation. Such transfers occurred in violation of the IHL and qualified as unlawful transfers or deportations, which is a war crime.<sup>4</sup> There are also reports of systematic war crimes committed by the Ukrainian armed and security forces.<sup>5</sup>

## **War Crimes**

The term 'War Crime' has been difficult to define with precision. Put simply, a war crime is a violation of the law of war. However, all violations of the law of war do not qualify as war crimes. In 1872, war crime was used for the first time by German Johann Casper; who thought of it as military forces acting without orders during wartime, that was a war crime. The use of war crime has evolved since 1906, when Oppenheim coined the phrase in his influential treatise International Law.<sup>6</sup> However, the first systematic attempt to define a broad range of crimes during the Civil War was made on the 'Instructions for the Government of Armies of the US in the Field' (Lieber Code), drafted by Francis Lieber, which was issued by US President Abraham Lincoln during the American Civil War in 1863.<sup>7</sup>

### **The Leipzig Trials**

After the conclusion of World War 1 (WW I), Allied leaders developed a concept to try enemy leaders criminally for the international law violations they committed during the war. Articles 227 to 230 of the Treaty of Versailles stipulated the arrest and trial of German officials for 'Supreme offence against international morality and the sanctity of the treaty' and 'accused of having committed acts in violation of the laws and customs of war'. The legacy of the Leipzig trial is that it was the first attempt to develop a comprehensive approach and system for prosecuting international law violations in wartime. These prosecutions resulted in few convictions, with most sentences ranging from a few months to four years in prison.

### **The Nuremberg and Tokyo Trials**

The next major attempt to prosecute war criminals occurred in Europe and Asia after World War 2 (WW II).<sup>8</sup> At the conclusion of the war, the US, the United Kingdom, the Soviet Union, and France signed the London Agreement, which provided for an international military tribunal to try major Axis war criminals whose offences did not take place in specific geographic locations. This agreement was supported by 19 other governments, establishing the Nuremberg Tribunal. The charter listed three categories of crime: crimes against peace, which involved the preparation and initiation of a war of aggression, war crimes, and crimes against humanity. The war crimes included murder, rape, refusal of quarter, torture and ill-treatment, wanton devastation or destruction of property, attack on hospital ships, pillage and plunder, and deportation, etc. Nearly every act on this list was charged as a war crime against Japanese and German defendants after WW II. The trial of Japanese General Yamashita affirmed the principle of individual accountability for crimes against international law. The gist of the charge was that the petitioner had failed in his duty as an army commander to control the operations of his troops, 'Permitting them to commit' specified atrocities against the civilian population and prisoners of war. Yamashita was found guilty, and sentenced to death.<sup>9</sup>

### **The Geneva Conventions of 1949**

The four Geneva Conventions, adopted in 1949, provided for the protection of wounded, sick, and shipwrecked military personnel, prisoners of war, and civilians. The Geneva Conventions contain stringent rules to deal with what are known as 'Grave Breaches'. Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold. Grave breaches specified in the four 1949 Geneva Conventions are wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war/protected person to serve in the forces of hostile power, or wilfully depriving a prisoner of war of the right of fair trial. A number of grave breaches have been specified in Articles 11 and 85 of the 1977 Additional Protocol I to the Geneva Conventions. In addition, the Hague Conventions of 1899 and 1907, deal with the means and methods of war and forbid the use of expanding bullets, poison or poisonous weapons, the use of weapons calculated to cause unnecessary suffering, pillage, and bombardment of undefended buildings, villages, or towns, among other limitations. While these conventions themselves did not identify the above acts as war crimes they did create a penal system through which grave breaches could be prosecuted. States party to the conventions were obliged to adopt domestic laws criminalising the ordering or perpetration of such acts.

### **International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)**

More recently, definitions of war crimes have been codified in international statutes, such as the war crimes in the ICTY,<sup>10</sup> and ICTR, and the Rome Statute of the International Criminal Court (ICC). The governing statutes of the ICTY and ICTR defined war crimes broadly. The ICTY was given jurisdiction over four categories of crime: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. In both tribunals rape, murder, torture, deportation, and enslavement were subject to prosecution. The ICTY and ICTR

were the first international bodies to recognise sexual violence formally as a war crime.

### **The Rome Statute of the ICC**

The Article 8 of the Rome Statute categorises war crimes as follows:

- Grave breaches of the 1949 Geneva Conventions, related to international armed conflict.
- Other serious violations of the laws and customs applicable in international armed conflict.
- Serious violations of Article 3 common to the four 1949 Geneva Conventions, related to Non-International Armed Conflicts (NIAC).
- Other serious violations of the laws and customs applicable in NIAC.<sup>11</sup>

What constitutes a war crime may differ, depending on whether an armed conflict is international or non-international. Therefore, war crimes are those violations of IHL (treaty or customary law) that incur individual criminal responsibility under international law. War crimes contain two main elements: a contextual element: the conduct took place in the context of and was associated with an international/non-international armed conflict; and a mental element: intent and knowledge both with regards to the individual act and the contextual element. From a more substantive perspective, war crimes could be divided into: war crimes against persons requiring particular protection; war crimes against those providing humanitarian assistance and peacekeeping operations; war crimes against property and other rights; prohibited methods of warfare; and prohibited means of warfare. Some examples of prohibited acts include: murder; mutilation, cruel treatment and torture; taking of hostages; intentionally directing attacks against the civilian population; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals; pillaging; rape, sexual slavery, forced pregnancy or any other form of sexual violence; conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

## **War Crime Trials under ICC**

The ICC passed its first judgment in 2012 and since then has prosecuted several individuals who were accused of war crimes. These war crimes include: enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities; murder, attacking a civilian population, destruction of property and pillaging; abducting boys and girls under the age of 15 and forcing them to fight in a war; and intentionally directing attacks against religious and historic buildings. A few cases are still under progress at the ICC.

On 17 Mar 2023, ICC Pre-trial Chamber II issued warrants of arrest for Russian President Putin and Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. This was based on the applications by the ICC Prosecutor, Kareem Khan KC, on 22 Feb 2023. The Pre-trial Chamber concluded that there are reasonable grounds to believe that each bears responsibility for the war crime of unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, to the prejudice of Ukrainian children.

Under Article 8(2)(a) of the Rome Statute of ICC, conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities; or ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand, is a war crime. The head of a state can be prosecuted for such war crimes by the ICC.<sup>12</sup> Russia being a permanent member of the Security Council; the possibility of Putin's trial by the ICC for war crimes is nearly impossible.

## **Indian Military Law**

The ICC was established as a court of last resort to prosecute the most heinous offences in cases where national courts fail to act. The jurisdiction of the ICC is complementary to the national courts. In the case of India and a number of other states like the US,<sup>13</sup> Israel, and China, the domestic laws are considered adequate to prosecute a national accused of war crime during an armed conflict.<sup>14</sup> A number of European states have updated their domestic

criminal codes to include war crimes as contained in the Rome Statute.<sup>15</sup> The military legal system of India is not compatible with the provisions of the Rome Statute. The *Bharatiya Nyaya Sanhita, 2023* (New penal code of the country), defines certain crimes and provides for universal jurisdiction over such crimes.<sup>16</sup> Military personnel accused of breaches in the nature of torture, inhumane and degrading treatment, destruction of property, destruction of places of worship, etc., can be tried under different provisions of the Army Act. For serious criminal offences like murder, rape, etc., military accused can be tried under Section 69 of the Army Act. If one the claim is that the armed forces support the rule of law, the Indian military manuals should ensure compatibility with the Rome Statute in relation to crimes, the rights of an accused during trial, and the internationally accepted standards of command responsibility.

### **Command Responsibility for Subordinates' War Crimes**

The war crimes trials held immediately after the conclusion of WW II marked a clear recognition by the international community that all members of the chain of command who participate or acquiesce in war crimes must bear individual criminal responsibility.<sup>17</sup> The German and Japanese commanders were tried for war crimes in international tribunals at Nuremberg and Tokyo. Some of these commanders were tried for war crimes they ordered their troops to commit, but other commanders were tried for war crimes they merely failed to prevent. The Rome Statute provides that a military commander can be held liable for the war crimes or other crimes of his subordinates, over whom he has effective command and control, even though he has not directly participated in the crime or encouraged it in any shape or form.<sup>18</sup> A military commander has a positive duty to take all necessary measures to stop or prevent the unlawful conduct, and if he does not, he is deemed to have aided and abetted the commission of the offence and is as responsible for the crime as those who commit it.

In modern times, command is not restricted to military commanders. Command can be both military and civil, and includes the heads of state, high-ranking government officials, civilian ministers, and joint chiefs of staff. The determining factor is not rank but subordination. The aim of this provision is to encourage

commanders and superiors to effectively prevent the perpetration of crimes by their forces.

## **Conclusion**

Stories of war crimes have become an almost daily occurrence in the ongoing armed conflicts. The most common approach to defining a war crime has been to identify it as a violation of the IHL that has been 'Criminalised'. Treaties, including the Hague and Geneva Conventions, did not establish international war crimes in their present iteration. The rules governing the conduct of war have existed since long, the modern concept of war crime and the use of international courts to try war criminals is a modern practice. The shift in the understanding of war crime can be traced to changes that took place in the period between WW I and WW II. The 1949 Geneva Conventions offered an opportunity to clarify the scope of war crimes. They did not use the term international war crimes and obligated state parties to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the convention. Finally, the Rome Statute envisioned a universal, and precise rendering of war crimes, integrated into the criminal law of national legal systems.

Today, the reliance on 'Criminalisation' as a defining characteristic of a war crime is widespread. Thus, war crimes are violations of the IHL that are criminalised under international law. The states have an obligation to search for persons alleged to have committed, or to have ordered to be committed grave breaches of the convention, regardless of their nationality. A military commander can be held liable for the war crimes committed by his subordinates, even though he has not directly participated in the crime.

## **Endnotes**

<sup>1</sup> Gabrielle Tétrault-Farber, UN rights chief, Reuters, 29 Feb 2024.

<sup>2</sup> IHL is a combination of international treaties and customary international law. The Hague Convention of 1907 and various weapon ban treaties generally prescribes rules of conduct for armed forces, while the Geneva Conventions of 1949 and Additional Protocol I of 1977 address the rights of protected persons, such as civilians and prisoners of war, in an international armed conflict. Non-international armed conflicts are governed



by Article 3 Common to the Geneva Conventions and the Additional Protocol II of 1977.

<sup>3</sup> Pamuk Humeyra, Exclusive: Some US officials say in an internal memo Israel may be violating international law in Gaza, Reuters, 28 Apr 2024.

<sup>4</sup> The collected evidence shows that Russian authorities have committed the war crimes of wilful killing, torture, rape and other sexual violence, and the deportation of children to the Russian Federation. The Commission's investigations confirmed its previous finding that Russian authorities have used torture in a widespread and systematic way in various types of detention facilities which they maintained. Independent International Commission of Inquiry on Ukraine, UN HRC report A/78/540 dated 19 Oct 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A-78-540-AEV.pdf>.

<sup>5</sup> As reported, the Russian prisoners of war were electrocuted, beaten cruelly and for multiple days in a row with different objects (iron bars, baseball bats, sticks, rifle butts, bayonet knives, rubber batons). Techniques widely used by the Ukrainian armed forces and security forces include waterboarding, strangling with a 'Banderist garrotte' and other types of strangling. Other torture methods used by the Ukrainian armed forces and security forces include bone-crashing, stabbing and cutting with a knife, branding with red-hot objects, shooting different body parts with small arms. The prisoners taken captive by the Ukrainian armed forces and security forces were kept for days at freezing temperatures, with no access to food or medical assistance, and are often forced to take psychotropic substances that cause agony. An absolute majority of prisoners are put through mock firing squads and suffer death and rape threats to their families. Evidence of Ukrainian War Crimes in Donbass, 16 Mar 2023, available at: <https://www.osce.org/files/f/documents/b/2/540581.pdf>.

<sup>6</sup> Oppenheim defined four different kinds of war crime: (i) violations of recognized rules of warfare by enemy armed forces, if carried out without orders; (ii) hostilities committed by individuals not members of the enemy armed forces; (iii) espionage and war treason; and (iv) marauding acts. Oppenheim L., *International Law: A Treatise* (Longmans, Green & Co. 1906), p. 263-270.

<sup>7</sup> For example, the Lieber Code held that it was a "serious breach of the law of war to force the subjects of the enemy into service for the victorious government" and prohibited "wanton violence committed against persons in the invaded country," including rape, maiming, and murder. Punishment for these crimes was 'death'.

<sup>8</sup> Throughout the war, the Allies had cited atrocities committed by the Nazi regime of Adolf Hitler and announced their intention to punish those guilty of war crimes. The Moscow Declaration of 1943, and the Potsdam Declaration of 1945, issued by the US, the UK, and China (and later adhered to by the Soviet Union), addressed the issue of punishing war crimes committed by the German and Japanese governments, respectively.

<sup>9</sup> From their outset, the war crimes trials after WWII were dismissed by critics merely as “victor’s justice,” because: (i) Only individuals from defeated countries were prosecuted, and (ii) The defendants were charged with acts that allegedly had not been criminal when committed. The main criticism against these trials was that the Allies were engaging in victor’s justice.

<sup>10</sup> The armed conflict in the former Yugoslavia were marked by many war crimes, including ethnic cleansing, genocide and rape. It resulted in the death of 140,000 people. Serb forces deported about 100,000 Croats in Croatia in 1991–92 and at least 700,000 Albanians in Kosovo in 1999. In addition, the Serb forces drove at least 700,000 Bosnian Muslims from the area of Bosnia under their control. It has been estimated that during the conflict in Kosovo as many as 20,000 Kosovo women were raped. Not only women were victims of sexual violence during this conflict, men were subjected to sexual violence as well. Many of the Serbs acted on official orders to rape women as sexual violence was strategically used as an instrument of war and a weapon of terror during the conflict.

<sup>11</sup> Eleven crimes constitute grave breaches of the Geneva Conventions and apply only to international armed conflicts: willful killing; torture; Inhumane treatment; biological experiments; willfully causing great suffering; destruction and appropriation of property; compelling service in hostile forces; denying a fair trial; unlawful deportation and transfer; unlawful confinement; and taking hostages. Seven crimes constitute serious violations of article 3 common to the Geneva Conventions and apply only to non-international armed conflicts: murder; mutilation; cruel treatment; torture; outrages upon personal dignity; taking hostages; and sentencing or execution without due process. Another 56 crimes defined by article 8: 35 apply to international armed conflicts and 21 to non-international armed conflicts. Such crimes include attacking civilians or civilian objects, attacking peacekeepers, causing excessive incidental death or damage, transferring populations into occupied territories, treacherously killing or wounding, denying quarter, pillaging, employing poison, using expanding bullets, rape and other forms of sexual violence, and conscripting or using child soldiers.

<sup>12</sup> Article 27 of the Rome Statute provides jurisdiction to ICC over heads of State: (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

<sup>13</sup> The 1996 War Crimes Act sets forth conduct the United States punishes as war crimes. Previously, only when US nationals were involved as either perpetrator or victim would the conduct potentially fall under these provisions. Congress amended the provision in January 2023 to provide courts' jurisdiction over foreign nationals who are found in the United States and suspected of having committed war crimes anywhere.

<sup>14</sup> For instance, in May 2022, a court in Ukraine sentenced a 21-year-old Russian soldier, Vadim Shishimarin, to life imprisonment for the war crime of premeditated murder of a civilian, 62-years-old Oleksandr Shelipov. According to the prosecution, Vadim, a tank commander, has captured and shot a man walking his bicycle near his home in the Sumy region because he had a cell phone to his ear and could alert authorities to the Russian presence. In announcing the original sentence, the Judge pronounced Sergeant Vadim guilty of violating the laws and customs of war and of committing premeditated murder. The Kyiv Court of Appeals reduced his sentence to 15 years. The case was the first successful conviction of a Russian soldier accused of a war crime. Dan Bilefsky, A Ukrainian appeals court reduces the life sentence of a Russian soldier tried for war crimes, *The New York Times*, 29 July 2022.

<sup>15</sup> Hathaway Oona A., Paul K. Strauch, Beatrice A. Walton, and Zoe A. Y. Weinberg, What is a War Crime? *The Yale Journal of International Law*, Vol.44, No.1, 2019, pp. 53-113.

<sup>16</sup> The *Bharatiya Nyaya Sanhita*, 2023 (earlier the Indian Penal Code, 1860), contains few provisions under Chapter VI, for which a military person can be prosecuted under Section 69 of the Army Act, 1950.

<sup>17</sup> Mitchell Andrew, Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes, *Sydney Law Review*, 2000, Vol.22. pp. 381-410.

<sup>18</sup> Article 28 of the Rome Statute dealing with the "Responsibility of commanders and other superiors", provides: In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction

of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.