

1999

Definition Of War Crimes and Their Use In The International Criminal Tribunals for the Former Yugoslavia and Rwanda

Leon Friedman

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Leon Friedman, *Definition Of War Crimes and Their Use In The International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 3 Hofstra L. & Pol'y Symp. 9 (1999)

Available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/471

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

EDITOR'S MESSAGE:

DEFINITION OF WAR CRIMES AND THEIR USE IN THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

*Leon Friedman**

Before beginning the articles, I think it necessary to define terms that you will encounter in the following articles. It is also necessary to view how we might go beyond these legal definitions. The International Criminal Tribunals for the Former Yugoslavia and Rwanda are examples of this extension.

What is the lesson we are learning about war crimes in the International Criminal Tribunals for the Former Yugoslavia and Rwanda? We begin with this question: what is a war crime and how have the definitional difficulties come to the fore in conjunction with the International Criminal Tribunal for the Former Yugoslavia? One broad category of war crimes, called "crimes against peace," as established by the Nuremberg Charter,¹ is simply commencing an aggressive war in violation of treaties. A second category is "crimes against humanity." But in the definition of a crime against humanity there is a qualifying phase — "before or during the war" — which suggests that there must be a war or "an armed conflict" somewhere before the concept of crimes against humanity

* Joseph Kushner Distinguished Professor of Civil Liberties Law, Hofstra University School of Law, A.B., L.L.B. Harvard University

1. THE NUREMBERG CHARTER was annexed to the London Agreement and provided for three categories of crimes defined in the Charter. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex containing Charter of the International Military Tribunal, Article 6(c), August 8, 1945, 59 Stat. 154, 82 U.N.T.S. 279 [hereinafter the London Agreement]. *Ibid* Art. 6(a-c) for the Charter's three categories of crimes.

can be applied. The third category is "war crime." That is to say, ill treatment of prisoners, civilian population, and unnecessary destruction, all of which require a war.

Not only are these definitions limited by the requirement of a "war," whatever that may be, but by the kind of war in question. For example, the four Geneva Conventions,² which were passed in 1949 and cover a wide variety of prohibited conduct, require an "international armed conflict." There must be a declaration of war between states. Unfortunately, there are no easy wars anymore. There are wars like Vietnam or Yugoslavia. Are those international armed conflicts? No one has declared war. We no longer have formal declarations of war. There are internal wars in which international states have participated. Vietnam and Yugoslavia are not the only examples. Take, for example, the Spanish Civil War. The Spanish Civil War was an insurrection by Franco. However, immediately thereafter the German and Italian armies intervened on behalf of the rebels, namely Franco and his generals. Would that intervention necessarily invoke the requirements of the Geneva Convention?

How about a purely internal war? How about the American Civil War? Should the law of war have applied to the American Civil War? How can we classify something even farther away from international strife, namely the Shining Path in Peru, or the insurrection in Guatemala, or the actions of the Argentinean generals who would massacre their political opponents? What happens in those situations? Is the international community going to do something about it? And what can they do?

A good example of this definitional problem occurred when Alfred Rubin, who was a military legal advisor during Vietnam, was asked by his superiors to define the kind of war we were having in Vietnam. Was it an internal conflict, governed by the rules appropriate to civil war; was it covered by Article 3 of the Geneva Con-

2. The term Geneva Conventions refers to four conventions of 1949: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1959, 6 U.S.T. 3516, 75 U.N.T.S. 287.

vention,³ and thus, an armed conflict not of an international character; or was it an international armed conflict, governed by Article 2 of the Geneva Convention?⁴

Rubin decided that as a matter of legal categories, in Vietnam there were several conflicts taking place in a confined space and with different participants: (1) a civil war with the authorities of South Vietnam against indigenous Viet Cong; (2) an international conflict against the Viet Cong infiltrating from the North; (3) and a conflict governed by Article 3 of the Geneva Convention,⁵ to the degree the United States confined its activities to South Vietnam.

The above example proves that one must consider a whole series of definitions in order to determine what a war crime is, depending on the kind of war involved. And sometimes those definitions of war are not so clear. A purely international war is one in which a state declares war against another state and crosses international barriers in order to carry on that war. In that case, it is easy. Simply, the four Geneva Conventions apply.

But what if there are both internal and international elements as is the case of what occurred in Yugoslavia? Here we confront another definitional problem: that of "internal war." There was an effort to deal with "internal war" in 1977. Protocol II to the Geneva Convention⁶ covered "internal war." But the definition of internal wars is as follows: "It shall apply to all armed conflicts which are not international and which take place in a territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups, which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." Therefore, we must have "dissident armed forces" or "organized armed forces" occupying territories in order to satisfy the definition of "internal war."

In such cases, Protocol II to the 1977 Geneva Convention⁷ applies. It was ratified by 134 states, *not* including the United

3. *Supra* note 2.

4. *Id.*

5. *Id.*

6. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, December 12, 1977, 1125 U.N.T.S 609 [hereinafter Protocol II].

7. *Id.*

States, which chose not to adopt it. Protocol II applies if there is an internal war and a dissident armed force occupies a territory. Now, can one say that this is what happened in Yugoslavia? Was there another armed force occupying territory in Yugoslavia; Or Peru; Or Argentina; Or Guatemala?

More recently a broader definition has been afforded "internal conflict" by the appeals court in the case of *Prosecutor v. Tadic*.⁸ The International Criminal Tribunal for the Former Yugoslavia has an Appeals Bureau, which recently considered the jurisdiction of the court over Yugoslavia. And they had a slightly different definition of what constitutes an armed conflict. The International Criminal Tribunal for the Former Yugoslavia held that an armed conflict exists "when there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state." The Court broadened the definition. Unlike what is defined in Protocol II,⁹ the International Criminal Tribunal for the Former Yugoslavia held that there need not be actual territory occupied by the organized armed group. The appeals court definition in the *Tadic* case,¹⁰ which was handed down in 1995, said there is international jurisdiction if there is organized fighting within a state between organized armed groups whether or not they occupy any territories.

This definition worked in that particular case. But again, what do we do about a conflict between armed groups which does not quite meet the definition just described? Is the international community going to throw up its arms and say, "Well we don't have jurisdiction, and we cannot act."

We have one last body of laws that may be applicable: the Genocide Convention.¹¹ The Genocide Convention was adopted by the United Nations, but again, not by the United States. The Genocide Convention very explicitly condemns certain acts whether or not there is war; whether or not there is peace; whether or not there are organized armed groups or not. And the Genocide

8. *Prosecutor v. Tadic*, No. IT-94-I-T (Yugoslavia Tribunal Trial Chamber, August 10, 1995, *aff'd* No. IT-94-I-AR 72. (Yugoslavia Tribunal, Appeals Chamber, October 2, 1995) reprinted in 35 I.L.M. 32 (1996).

9. *Supra* note 6.

10. *Supra* note 8.

11. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 227.

Convention defines genocide as follows, "Any of the following acts committed with the intent to destroy a national, ethnic, racial or religious group, such as killing members of the group, causing serious bodily or mental harm, deliberately inflicting on other groups conditions of life, calculated to bring about its physical destruction". This is obviously a much broader definition, but it is restricted to focusing on members of national, ethnic, racial or religious groups.

The above definition, therefore, would apply in cases like Rwanda and Yugoslavia. But there are other countries where this definition would not apply. It would not apply, for instance, in a case like Cambodia. In Cambodia, the country was simply wiping out political enemies. They were not wiping out a particular racial group.

Taken together then, depending on the type of conflict and whether it is an international conflict, an internal conflict, an internal conflict with an armed group that occupies territory, a conflict with an armed group that is organized, or even a conflict not involving the occupation of territory, we may have a different application of a treaty with different rules applying.

In sum, the Hague Convention of 1907¹² is very specific and only applies to international conflicts between the states. The Geneva Conventions of 1949¹³ apply only to armed conflicts between states. The Protocol II,¹⁴ which governs internal conflicts, applies only when there is an organized armed group occupying territory. The Genocide Convention¹⁵ applies whether or not there is a conflict, but requires some class based violence, in particular, against racial, religious or ethnic groups. The Nuremberg Charter¹⁶ deals with crimes against humanity; however they must occur "about, before or during war." The Nuremberg Charter, therefore, anticipates that at one point there is going to be a conflict, and that in anticipation of a conflict these acts or crimes against humanity occurred.

12. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277.

13. *Supra* note 2.

14. *Supra* note 6.

15. *Supra* note 1.

16. *Supra* note 1.

A problem still remains. What if none of these specific preconditions occurs? Is the international community going to throw up its hands and say, "Well, these laws don't quite apply to this situation?" Of course not, because above and beyond these specific rules, there is something called the customary rules of international and humanitarian law. Beyond the specific statutory treaties or agreements, there exists basic human rights. Basic human rights derive from more specific treaties, agreements, conventions and resolutions. But the notion of basic human rights and the violation of international principles of humanitarian law fill in the gaps between these more specific provisions.

The International Criminal Tribunal for the Former Yugoslavia, to its credit, said that above and beyond the Geneva Convention,¹⁷ the Protocol II,¹⁸ the Genocide Convention,¹⁹ and Article 6C of the Nuremberg Charter,²⁰ there is something called "Customary Rules of International Human Rights." And indeed in the *Tadic* case,²¹ the International Tribunal said that they relied on the customary rules of international humanitarian law governing an armed conflict, whether or not the situation meets any of these definitions.

That is the most important event surrounding the creation of the International Criminal Tribunals of both Yugoslavia and Rwanda. These International Tribunals are saying that human rights mean something. They say, we know when those rights are violated because they derive from these very specific treaties, agreements, conventions that have been adopted by the international community. We consider violations of those rights to be an affront to the human community. What is being said in Yugoslavia and Rwanda is that those responsible will be punished. And that "this time we mean it". And I think that is the most important lesson we get out of what is happening in Yugoslavia and Rwanda. "This time we really mean it."

17. *Supra* note 2.

18. *Supra* note 6.

19. *Supra* note 11.

20. *Supra* note 1.

21. *Supra* note 8, ¶134.