



A COMPREHENSIVE ANALYSIS OF THE CONSTRUCTION OF WAR CRIMES BASED ON INTERNATIONAL HUMANITARIAN LAW AND THE EVOLUTION OF THE ENFORCEMENT OF JUSTICE THROUGH THE GLOBAL CRIMINAL JUSTICE MECHANISM FOR PERPETRATORS

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ABSTRACT

Armed conflict is a sociological and political reality that continues to occur in human civilization. To prevent the destruction of civilization, the international community formulated an instrument of international humanitarian law that served to provide protection to those who were not involved in the conflict and limit the means and methods of warfare. Violations of such restrictions are not only violations of military discipline, but are qualified as war crimes that give rise to criminal responsibility at the individual level. This research aims to examine in depth the juridical construction of war crimes based on the instruments of the 1949 Geneva Convention and the 1998 Rome Statute, as well as analyze the evolution of the international criminal justice mechanism in prosecuting perpetrators. This study uses normative legal research methods with a legislative approach, a conceptual approach, and a historical approach. The results of the study showed that war crimes are a form of grave *breaches* that include intentional killings, torture, unlawful deportations, and attacks on civilian objects. Law enforcement against these perpetrators has undergone significant evolution, from the establishment of ad hoc military courts such as the post-World War II Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR), to the permanent institutionalization of the judiciary through the International Criminal Court (ICC). The presence of these judicial institutions affirms the principle that there is no impunity for perpetrators of gross violations of human rights and humanitarian law at the global level.

Keywords: War crimes, International Humanitarian Law, International Criminal Court, Geneva Conventions, Rome Statute.

1. INTRODUCTION

1.1. Background of the Problem

The history of mankind has never been completely free from the phenomena of conflict and war. Various efforts of diplomacy, negotiation, and the establishment of international organizations such as the United Nations (UN) have been undertaken to maintain global peace and security. Modern international law has expressly prohibited the use of threats or armed violence in relations between states, as stated in Article 2 paragraph (4) of the UN Charter. This concept is known as *jus ad bellum*, which is a law that regulates the legality of the use of armed violence.¹

However, the reality of international politics proves that the ban is not able to stop the outbreak of armed conflicts, both international armed *conflicts* and internal or non-international (*non-international armed conflicts*). When war prevention efforts fail and physical warfare occurs, international law does not necessarily lose its function. It was at this point that a different legal regime took over, namely *jus in bello* or what is now better known as international humanitarian law.²

International humanitarian law is a branch of public international law that aims to limit the destructive effects of war on humanitarian grounds. This law does not question which side is right or wrong in starting a war, but focuses on regulating the behavior of the warring parties. The main essence of international humanitarian law is to provide protection to people who are not or are no longer directly involved in combat, such as civilians, medical personnel, religious officers, and members of the armed forces who are wounded, sick, or have been prisoners of war.³ In addition, this law also sets limits on the means and methods of warfare that may be used by the armed forces.

Although the rules of international humanitarian law have been extensively codified through the four Geneva Conventions of 1949 and its Additional Protocols in 1977, violations of those rules remain frequent. Violations committed in war often involve extreme atrocities, such as

¹ Adiwinata, R., & Putri, M. A. (2023). War crimes in the perspective of international humanitarian law and its enforcement at the global level. *Indonesian Journal of International Law*, 20(2), 215–234.

² Fadhillah, N., & Ramadhan, A. (2024). *Jus ad bellum and jus in bello in modern armed conflict. Journal of Legal Reflections*, 8(1), 45–62.

³ Hill, B. (2018). *International law: Definition, role, and function in an era of global dynamics* (2nd Edition). Bandung: Alumni.

mass murder of civilians, torture of prisoners of war, systematic rape, and destruction of public facilities and cultural heritage.⁴

This violation on a serious scale of the principles and rules of international humanitarian law is understood in legal terminology as a war crime. The term war crimes began to receive serious attention from the international community after World War II, following the revelation of systematic atrocities committed by certain regimes. This realization fuels the urgent need to ensure that war criminals, regardless of their position or official status in government or military structures, must be held to individual *criminal accountability*.⁵

The process for prosecuting war criminals presents complex jurisdictional challenges. In the past, law enforcement against war criminals was often carried out only by the victorious side against the losing party, which raised criticism of *victor's justice*. However, along with the development of international criminal law, the global justice mechanism began to be formed and refined.⁶ From the establishment of an international military court that is ad hoc and temporary, to the establishment of an independent and permanent international criminal justice institution.

This article is designed to comprehensively analyze the construction of war crimes within the international humanitarian legal system. This analysis includes a basic understanding of war, identification of the types of acts that qualify as war crimes, objects of protection, and examines the evolution of international criminal justice instruments and institutions that have jurisdiction to prosecute the perpetrators of such crimes.

1.2. Problem Formulation

Based on the explanation in the background above, the formulation of the problem in this study is:

1. What is the construction and juridical parameters of war crimes as a form of gross violation of international humanitarian law?

⁴ Sefriani. (2021). *International law: An introduction* (3rd Edition). Jakarta: Rajawali Press.

⁵ Sari, I. P., & Nugroho, B. A. (2022). Protection of civilians in non-international armed conflicts under international humanitarian law. *Journal of Law & Development*, 52(4), 873–892.

⁶ Wibowo, T. S. (2024). The evolution of war crimes in the Rome Statute and its implications for national law. *Indonesian Journal of Legislation*, 21(1), 101–120.

2. What is the mechanism and evolution of international criminal justice in prosecuting and prosecuting war criminals?

1.3. Research Objectives

This research aims to formulate conceptual limits on war crimes based on applicable international legal instruments, as well as map the development of international criminal justice institutions in an effort to enforce humanitarian law and end impunity for perpetrators of international crimes.

2. RESEARCH METHODS

This research is a normative legal research or doctrinal law research. Normative law research positions law as a building system of norms, regulations, and binding principles. In this study, an analysis was carried out on positive legal principles in the realm of international law written in various international treaties, statutes, and legal literature.

The research approaches used include:

1. *Statute Approach*: Used to examine major international legal instruments, including the Geneva Convention of 12 August 1949, Additional Protocols I and II of 1977, and the Rome Statute of the International Criminal Court 1998. At the national level, this research refers to Law Number 59 of 1958 concerning the Participation of the State of the Republic of Indonesia in the All Geneva Conventions dated August 12, 1949.
2. *Conceptual Approach*: Used to understand basic doctrines, principles, and concepts in international humanitarian law, such as the distinction principle, proportionality principle, and the concept of command responsibility.
3. *Historical Approach*: Used to trace the history of the establishment of international criminal justice bodies from the post-World War II period to the establishment of the International Criminal Court.

The legal materials used consist of primary legal materials in the form of international treaties or conventions, secondary legal materials in the form of textbooks, scientific journals, and the opinions of legal experts (doctrine), and tertiary legal materials that include legal dictionaries. The collected data is processed and analyzed qualitatively and then presented in the form of a systematic, logical, and prescriptive description.

3. RESULTS AND DISCUSSION

3.1. Conceptualization of Armed Conflict in International Humanitarian Law

The understanding of war crimes cannot be separated from the definition of war itself. In the legal literature, the terms "war" and "armed conflict" or "*armed conflict*" are often used interchangeably and refer to the same substance. The 1949 Geneva Convention itself used the term armed conflict more often than the term war. This aims to ensure that international humanitarian law remains objectively applicable in a physical dispute, regardless of whether the countries involved formally declare war or not.⁷

Conceptually, Henry Campbell Black defined war as an enmity or dispute using the force of armed forces that occurs between nations, states, or rulers. This dispute can also occur between groups of citizens within a nation or state. Meanwhile, Pietri Verri gave a more specific definition in the international context, namely armed hostility between two or more countries involving the armed forces of each of these countries and its implementation is subject to the rule of international law.⁸

Based on this formulation, there are two essential elements that must be met in order for a condition to be classified as war or armed conflict, namely:⁹

1. There is a situation of hostility or conflict that uses armed force. This element distinguishes armed conflict from situations of internal tension, riots, or ordinary crimes. The use of armed force must reach a certain level of intensity.
2. There are parties to the dispute. The disputing party must have a clear organizational and command structure. In international conflicts, the party is the state. In non-international conflicts, such parties can be armed rebel groups that are organized and have the capacity to conduct sustained military operations.

⁷ Arifin, R., & Firmansyah, A. (2022). War crimes in non-international armed conflicts under international humanitarian law. *IUS QUIA IUSTUM Journal of Law*, 29(3), 489–509.

⁸ Fadli, M., & Prasetyo, T. (2023). The principle of universal jurisdiction in the enforcement of war crimes. *RechtsVending Journal: National Legal Development Media*, 12(2), 245–263.

⁹ Hidayat, A. S. (2024). The relevance of the 1949 Geneva Convention in modern armed conflict. *Journal of Law & Development*, 54(1), 112–131.

In international humanitarian law, armed conflict is generally divided into two main classifications that have implications for the application of different legal rules:¹⁰

1. International *Armed Conflict*: Regulated in Common *Article 2* of the fourth Geneva Conventions of 1949. This conflict involves two or more sovereign countries. International humanitarian law applies in full in this type of conflict.
2. Non-International *Armed Conflict*: Regulated in Common *Article 3* of the 1949 Geneva Convention. These conflicts occur within the territory of a state, involving battles between government armed forces against armed rebel groups, or battles between armed groups within the country.

International humanitarian law does not speak to the legality of war. This law is based on the empirical fact that conflict is occurring. The main purpose of this law is contained in several basic principles, namely to ensure humane treatment of persons who do not participate in combat, to prohibit the act of killing or injuring individuals whose status is protected, to require the collection and treatment of the sick and wounded without discrimination, to respect the right to life and dignity of prisoners of war and to detained civilians, and to affirm the right of the warring parties to choose the methods and means of warfare is not an unlimited right.

3.2. Juridical Construction of War Crimes as Gross Violations of HHI

Violations of the fundamental rules of international humanitarian law give birth to the concept of *grave breaches*. The terminology of gross violations was first formalized in the 1949 Geneva Convention. In contrast to ordinary violations of military discipline, gross violations are seen as acts that seriously injure universal human values so that all countries participating in the convention have a legal obligation to find, prosecute, and prosecute the perpetrators, regardless of the nationality of the perpetrator or the place where the crime occurred. This concept is the basis of the principle of *universal jurisdiction* in international criminal law.

In the discourse of contemporary international law, the term gross violations is equalized and emphasized as war *crimes*. It is important to distinguish this terminology from concepts in human rights law. In the realm of human rights law, very serious violations are known as *gross violations of human rights*. However, within the framework of international criminal law,

¹⁰ Sihombing, E. N. (2019). *International criminal law*. Yogyakarta: Genta Publishing.

particularly as codified in the 1998 Rome Statute, war crimes are a stand-alone legal entity and fall into the category of *the most serious crimes*.¹¹

War crimes are understood as heinous acts committed deliberately in time of war, which are direct violations of international humanitarian law. Based on this juridical framework, an act can be categorized as a war crime if it meets three main elements:

1. There are acts or actions that seriously violate the laws and customs of war. Such acts must be expressly prohibited by humanitarian law instruments, such as the Geneva Conventions, the Additional Protocols, and the rules of customary international law.
2. Such actions are carried out in a situation or in the context of an armed conflict. This is a *contextual element* or nexus. An act of murder would only be a war crime if it was closely related to an ongoing armed conflict. If the murder occurs without any connection to the military conflict, the act is still regulated by the national criminal law as an ordinary crime.
3. These actions give rise to individual criminal liability. This principle aborts the defense argument often put forward by lower-level military actors that they only carry out superior *orders defense*. Each individual is responsible for his or her own actions under international criminal law.

3.3. Types of Criminal Acts and Scope of Objects of Protection

The 1998 Rome Statute together with the main instruments of international humanitarian law govern the classification of prohibited acts. War crimes apply not only to international armed conflicts, but also to armed conflicts of a non-international nature.

Some examples of qualifying acts that are designated as war crimes include:¹²

1. Willful *killing*: Taking the lives of people who are legally entitled to protection, such as civilians who do not take up arms, or enemy combatants who have laid down their weapons (*hors de combat*).

9. ¹¹ Winarno, B. (2014). *Conflict and international security*. Yogyakarta: CAPS (Center for Academic Publishing Service).

¹² Nugroho, B. A., & Rahman, F. (2024). Protection of civilians in international humanitarian law. *Journal of Human Rights*, 15(1), 89–108.

2. Inhumane persecution or treatment: This includes acts of physical or mental torture, as well as making protected individuals subject to biological, medical, or scientific experiments that cannot be justified by reasons of clinical treatment.
3. Unlawful deportation or transfer: The act of forcibly transferring or detaining a civilian whose status is protected without a legitimate legal basis or urgent military security reasons.
4. Deliberate attack on civilian objects: Directing an attack, bombing, or retaliatory action against a target that is not a military target.

Regarding the scope of protection, humanitarian law establishes the parties who are immune from the target of military attack. According to Hans-Peter Gasser, objects protected from war crimes are divided into several groups, namely property or property owned by civilians that are not used to support military logistics, service units and medical facilities such as hospitals and ambulances, cultural objects of high historical value, civil defense installations, and emblems and personnel of humanitarian organizations such as the International Red Cross.¹³

Meanwhile, for the protection of individuals, humanitarian law classifies protection based on the four pillars of the 1949 Geneva Convention, namely:

1. Members of the armed forces who were wounded and sick on the ground battlefield.
2. Members of the armed forces who were wounded, sick, as well as victims of shipwrecks in naval battles.
3. Prisoners *of war*, who are entitled to humane treatment, adequate food, and are prohibited from being tortured for intelligence information.
4. Civilian population, which includes civilians who are interned, civilians who are in enemy control areas, and civilians who live in occupied *territories*.

3.4. The Evolution of Ad Hoc International Criminal Justice Mechanisms

Normative awareness of the prohibition of war crimes requires an institutional mechanism to enforce sanctions. Throughout history, the prosecution of war crimes was one of the earliest forms of international criminal enforcement. Prior to the establishment of a permanent court,

¹³ Putri, M. A., & Wibowo, T. S. (2023). The ad hoc international criminal court and its contribution to international criminal law. *Judicial Journal*, 16(3), 355–374.

the international community responded to war atrocities through the establishment of ad hoc (special and temporary) international criminal courts.¹⁴

1. International Military Tribunal of Nuremberg (1945–1946)

The Nuremberg Court (*International Military Tribunal Nürnberg*) is the most important milestone in international criminal law. The Court was established by the post-World War II Allied countries through the 1945 Treaty of London. The main purpose of the establishment of this tribunal was to try the main members of the group of political, military, and economic leaders of the German NAZI regime who were responsible for the occurrence of the war of aggression and genocide in Europe (the Holocaust).

The main series of conferences was held from 1945 to 1946 in the city of Nuremberg, Germany. This court not only prosecutes traditional war crimes, but also formulates crimes against humanity and crimes against peace. A total of 200 high-level war crimes suspects are on trial in Nuremberg, while thousands of others are on trial in the national military court. This court established an important principle known as the Nuremberg Principle, which affirms that top-level state officials have no legal immunity from international jurisdiction for acts of war crimes.¹⁵

2. International Military Tribunal for the Far East (1946–1948)

Running parallel to the Nuremberg Tribunal, the *International Military Tribunal for the Far East* or better known as the Tokyo Court, was established to try the political leaders and military commanders of the Japanese empire. This court prosecutes perpetrators of war crimes that occurred during the Japanese military's aggression, military occupation, and crimes against humanity in various parts of Asia and the Pacific.

3. International Criminal Court for the Former Yugoslavia (ICTY)

Entering the 1990s, the federated state of Yugoslavia in the Balkan region experienced a collapse after the end of the Cold War. Nationalist sentiments and ethnic differences triggered brutal civil wars in Croatia, Bosnia-Herzegovina, and Kosovo. This conflict

¹⁴ Satria, R. D. (2024). The principle of complementarity of the ICC and state sovereignty. *Indonesian Journal of International Law*, 21(1), 1–20.

¹⁵ Maulana, D. R. (2023). The nexus of armed conflict as a contextual element of war crimes. *Journal of Legal Reflection*, 7(2), 201–220.

was colored by the practice of *ethnic cleansing*, the establishment of concentration camps, and mass executions.

In response to the humanitarian crisis, the UN Security Council through Resolution No. 827 of 1993 established the ICTY (*International Criminal Tribunal for the Former Yugoslavia*). This ad hoc court is based in The Hague, Netherlands. The purpose of the establishment of the ICTY is to restore and maintain peace in the Balkan region by holding criminally responsible for serious violations of international humanitarian law, including war crimes committed since 1991.

4. International Criminal Court for Rwanda (ICTR)

In 1994, a humanitarian tragedy on an unprecedented scale erupted in Rwanda, a country in the Central African region. The demographic composition of Rwanda consists of the Hutu ethnic group which is the majority (85%) and the Tutsi ethnic group which is a minority (15%). The political tensions that culminated in a systematic genocidal campaign, in which Hutu extremist militia groups carried out mass massacres against ethnic Tutsi and moderate Hutu groups. It is estimated that 800,000 people died in just 100 days.

To prosecute the perpetrators, the UN Security Council through Resolution No. 955 of 1994 established the ICTR (*International Criminal Tribunal for Rwanda*) based in Arusha, Tanzania. The ICTR has a specific mandate to prosecute and prosecute those responsible for genocide and other serious crimes in violation of international humanitarian law in Rwanda and committed by Rwandan nationals in neighboring countries during 1994.

3.5. The International Criminal Court (ICC) as a Permanent Law Enforcement Institution

The establishment of the above ad hoc courts is considered to have made a significant contribution to the development of international criminal jurisprudence. However, this ad hoc system is also considered to have weaknesses, such as its formation process which is highly dependent on the political will (veto) of permanent member states of the UN Security Council, as well as limited time and jurisdictional area. Therefore, the international community

recognizes the urgent need to establish an independent, objective and permanent international criminal justice institution.¹⁶

This goal was successfully realized through the organization of the United Nations Diplomatic Conference in Rome, Italy, in 1998, which resulted in the adoption of the Rome Statute. This statute is the constitutional basis for the establishment of the *International Criminal Court* (ICC). ICC officially began operations on July 1, 2002 and is based in The Hague, Netherlands.

Unlike ad hoc tribunals established through UN resolutions, the ICC is an independent institution established through multilateral agreements (treaties) between countries. The ICC has the characteristics of a permanent international criminal court and has the jurisdictional power to prosecute individuals suspected of committing serious crimes that are highly threatening and condemned by the international community as a whole.¹⁷

Based on the provisions contained in Article 5 of the Rome Statute 1998, the ICC's authority or material jurisdiction (*ratione materiae*) is limited to only the four most serious types of crimes, namely:¹⁸

1. The *crime of genocide*: An act committed with the intent to destroy, in whole or in part, a particular national, ethnic, racial, or religious group.
2. Crimes against *humanity*: Heinous acts such as murder, extermination, enslavement, or torture committed as part of a widespread or systematic attack and directed directly against any civilian population.
3. War *crimes*: Gross violations of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international and non-international armed conflicts.
4. The *crime of aggression*: The act of planning, preparation, initiation, or execution by a leader of a country directing the armed forces of a country to carry out an invasion or attack in flagrant violation of the UN Charter.

¹⁶ Rahman, F., & Anindya, R. (2024). Protection of civilians in armed conflict according to the 1949 Geneva Convention. *Journal of Human Rights*, 15(1), 55–78.

¹⁷ Atmasasmita, R. (2006). *Introduction to international criminal law*. Bandung: Refika Aditama. p. 67

¹⁸ Fadli, A., & Kusuma, Y. (2024). The principle of complementarity in the jurisdiction of the International Criminal Court. *Pandecta Journal of Law*, 19(2), 129–150.

It is important to note that the ICC operates on the *principle of complementarity*. This means that the jurisdiction of the ICC will only be active and take over a case if the national criminal justice system of a country is clearly proven to be *unwilling* or unable to carry out serious investigations and prosecutions of war crimes perpetrators within its jurisdiction. This principle respects the principle of state sovereignty, while ensuring that there is no space or shelter for perpetrators of crimes against humanity.

4. CONCLUSION

Based on the theoretical and juridical analysis that has been outlined in the discussion section, it can be concluded that international humanitarian law is designed to safeguard universal humanitarian values by establishing a set of basic rules regarding the protection of non-combatants and the restriction of methods of war. Systematic and serious violations of these fundamental rules—as set out in the 1949 Geneva Conventions and affirmed by the 1998 Rome Statute—are legally qualified as war crimes. These actions include intentional killings, torture, forced deportations, and destruction of civilian targets, which have direct implications for the birth of individual criminal responsibility for the perpetrators regardless of the immunity of structural positions.

In order to ensure the effectiveness of law enforcement and ensure justice for victims, the international criminal justice mechanism has evolved progressively. History records the development of the application of temporary and specialized military courts to respond to specific disputed areas, such as the Nuremberg International Military Court and the Tokyo Court in the post-World War II era, which was followed by the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court for Rwanda (ICTR) in the 1990s. The culmination of this evolution of the global justice mechanism was the establishment of the International Criminal Court (ICC) as a permanent, independent, and representative judicial body for the global community. The existence of the ICC with its four material jurisdictions confirms a new paradigm in the modern international legal system that there is no tolerance for acts of impunity for war crimes and atrocities against humanity throughout the world.

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