

The Subjectivity of Dangerous Violations of International Humanitarian Law

By

Thuraya Jassim Muhammad
College of Law, Kerbala University, Iraq
Email: Thuraya.j@uokerbala.edu.iq

Abd Ali Muhammad Sawadi
College of Law, Kerbala University, Iraq

Abstract

Currently, dangerous violations of the rules of international humanitarian law are among the most dangerous war crimes. Where, these violations of the aforementioned law are represented by two types of violations, the first of which is the means of combat, and the other concerned with the management and methods of military operations. These violations are characterized by the special nature that distinguishes them from other international crimes, especially other serious and simple war crimes. Also, these violations have advantages that differ from the features and characteristics of other violations of international humanitarian law, perhaps foremost among them is the commanding nature of the prohibition of these violations and the nature of their seriousness, in addition to the most important characteristic of them, which is the nature of the protected interest from the criminalization and prohibition of these violations.

Keywords: Dangerous Violations, International Humanitarian Law, Serious violations

Introduction

In recent, dangerous violations of international law are the most serious war crimes, as such violations are committed in two ways, the first either through traditional and new means of fighting or by or through prohibited methods of fighting. These violations are distinguished from other violations of public international law in general, and violations of international humanitarian law in particular. As such violations are characterized by some features, perhaps the most important of which are the nature of danger and the nature of the binding as well as the dual nature of the prohibition of these violations. In addition, dangerous violations of international humanitarian law are distinguished from other violations of the aforementioned law in terms of the nature of the penalty imposed and the nature of the legal rule that governs them, as well as the procedural nature of punishing these violations, especially the nature of the obligation to extradition.

Research Methodology

Significance of the Study

Such a type of violation is considered one of the most dangerous types of violations of international humanitarian law on the one hand, and the increasing number of violations of this type at present on the other hand. Therefore, the importance of this study lies in identifying these violations and examining their causes.

Research Problem

The problem of the study is to define the standard by which dangerous violations of international humanitarian law are distinguished from other violations of international humanitarian law. And if the dangerous violations of international humanitarian law are international crimes in general, and war crimes in particular, then how effective are the international conventions to address these violations?

Research Objective

This research entitled "the subjectivity of dangerous violations of international humanitarian law" aims at two types of scientific and practical goals. The scientific aim is to know the effectiveness of international conventions to limit war crimes, the most serious of which are dangerous violations, and the practical aims are to examine the extent of the effectiveness of the international criminal judiciary to address such violations.

Research Structure

To achieve these goals and reach scientific results, the research was divided into two parts, the first to show the characteristics of dangerous violations, while the second deals with distinguishing dangerous violations of international humanitarian law from other similar ones.

The Subjectivity of Dangerous Violations of International Humanitarian Law

The subjectivity of dangerous violations of the rules of international humanitarian law is distinguished from other international crimes on the one hand, and crimes related to armed conflicts on the other hand, as it is characterized by a set of distinctive features. In addition to distinguishing them from the rest of the violations of the aforementioned law. So, we will address such subjectivity by studying the characteristics of dangerous violations in the first branch and distinguishing dangerous violations from similar ones in the second branch.

Characteristics of Dangerous Violations

Dangerous violations are characterized by several advantages, the most important of which are as follows:

The Character of The Dangerousness

The idea of criminal dangerousness at the international level is linked to the concept of significant violations of the rules of international humanitarian law, as this last term raises various questions, including those related to the rights and the considered international interests, which are violated, and others related to the status of the perpetrator, and we can repeat these questions to adjective the evolution that characterizes international criminal law, towards extending its protection to include new interests and values (Al-Saadi, 2002:11).

Dangerous violations of the rules of international humanitarian law are among the most serious crimes for the international community, as the latter criminalizes only the most dangerous acts that affect international interests or human values and the world order which in turn, maintains international peace and security and the right of individuals to life. Dangerous violations of the rules of international humanitarian law are distinguished by their dangerousness, as they do not threaten a specific person, but rather threaten the structure of the entire international community. The International Law Committee expressed this by saying that there appears to be a consensus on the standard of dangerousness, as it is related to crimes affecting the human community itself. The criminal seriousness can be extracted either from

the nature of the criminal act of cruelty, atrocity, and brutality, or from the widening of its huge effects when the victims are people or civilian populations, from the motive of the perpetrator to genocide, or other several factors. Whatever the element that makes it possible to determine the seriousness of the violation, this seriousness is the main pillar of the crime that violates international peace and security. This crime is characterized by its degree of ugliness and brutality, which undermines the foundations of human society (Suleiman, 1992:89).

According to what was stated in the Public Prosecution's petition filed to the President of the Second Criminal Court in the Iraqi Supreme Criminal Court No. 1/C 2006, known as (the Anfal case), and in the merits of the ruling issued in the case on 6/24/2007, clearly, there is a difference between international crimes and internal crimes, in terms of the fact that internal crime does not often target the lives and property of a large number of victims, but we find, in the international crimes, that such crimes target dozens, hundreds, or perhaps thousands of victims and their property, hence they named war crimes, accordingly it is possible to reach the extent of the seriousness of international crimes through the effects and results left by the crime, where, that these effects and results are wide and influential in a way that makes international crime distinguished from other situations that are similar it (Al-Asadi, 2010:29; Al-Shukri, 2008:139).

Dangerous violations are not only described as dangerousness just because of their criminal effects and the killing of the largest number of victims and loss of property that exceeds what other international crimes achieve but rather international crime is described seriousness due to the heinousness and cruelty which accompanies it. This was included in the report of the United Nations Fact-Finding Commission on Darfur, where after three months of investigations, the commission concluded its report that the Secretary-General presented to the Security Council on January 31, 2005. The report included: The government of Sudan and the militia (Jongweed) are responsible for crimes that fall under international law. It included attacks on civilians, killing them, methods of looting and looting of property, forced displacement, and deportation, and these are all serious violations of international humanitarian law (United Nations Security Council, n.d.).

Finally, we can deduce the idea of criminal dangerousness from Article (78) and Article (110) of the Statute of the International Criminal Court (Rome): when deciding the penalty, the court takes into account factors such as the dangerousness of the crime and the special circumstances of the convicted person, under the rules of procedure and rules of evidence.¹

This means that in the international context, the International Criminal Court takes into account the danger inherent in the act and the perpetrator together, but without deciding the most appropriate penalty for those with criminal danger.

The criterion is always the dangerousness of the act (dangerous violation) and what this behavior reflects in terms of a flagrant violation of human values and principles, on which the international public order is based. This violation is identified by the International Law Commission in Article 19 of the State Responsibility Project, which results in a serious violation of an international commitment to an issue essential to maintaining international peace and security, such as the obligation to prohibit the use of nuclear weapons and other poisonous weapons. As well as a dangerous and widespread violation of the obligation of

¹ Article 110 of the Statute of the International Criminal Court stipulates that the court shall reconsider a judgment to decide whether it should be fulfilled when the person has served two-thirds of the sentence period or 25 years in the case of life imprisonment, and the court must not reconsider the judgment before serving the said period and Article 110 also affirms, "The court may, when reviewing it according to Paragraph 3, verify the sentence if it is proven that one or more of the following factors are available...."

fundamental importance to protect the human, such as the obligation not to attack civilians, or not issue an order no anyone alive, and the criminalization of sexual acts. Since all these actions are serious violations, a serious violation of the state's obligation of fundamental importance to protect and preserve the human environment, such as the obligation to prohibit gross pollution of the air or seas, it is noted that Article 19 of the draft International Criminal Law Commission evaluates the seriousness of the serious violations committed regardless of the perpetrator, so the norm as we said Previously, is the seriousness of the act, i.e. committing a serious violation (Al-Ithawi, 2007:28).

The Mandatory Character to Prohibit Dangerous Violations

The humanitarian rules regulating armed conflicts in international law are characterized by a mandatory character, not an optional one. This was confirmed by the Vienna Convention on the Law of Treaties dated May 25, 1969, where the mandatory rule was defined in Article 35 which stated: (It is the rule that is accepted and recognized by the international community in all its countries, as a standard that may not be violated and cannot be amended except by a new rule in general international law, which has the same characteristic). Then, it reaffirmed this characteristic in Article 60, which stated, "The provisions prohibiting retaliation against protected individuals contained in such treaties have a mandatory nature." Given the lofty values that defended the humanitarian rules represented by the legal controls for the means and methods of fighting, that is, what is known as the Hague Law, and because of its antiquity and the spread of its impact in the whole world, it can now be confirmed that these agreements have largely lost the forms of the mutual treaty within the framework of relations between states and that they have become obligations absolute (Abid-Ali, 2010:91).

In fact, the humanitarian rules regulating the means and methods of fighting in international law are revealed rules. Where they came with a new emphasis on customary rules established to criminalize serious violations of international humanitarian law (Muhammed, 2020:133).² In addition, the jurists of international law have agreed that the major humanitarian charters, including the humanitarian conventions and other international charters such as declarations of human rights and declarations of the United Nations and its reports, represent jus covenants that have supremacy under the principle of international legal gradation. This is what the Nuremberg Tribunal adopted concerning the rules governing the methods and means of warfare related to the Hague Regulations. Accordingly, it is binding even on countries that have not formally joined it (Abid-Ali, 2010:94).

Also, the Committee for Determining Responsibilities that arose in the aftermath of World War I indicated the possibility of invoking the Martens Clause contained in the Fourth Preamble to the Hague of 1907, to punish all acts that constitute a violation of the laws and customs of war, and concerned with the controls of the conduct of hostilities in terms of means and methods of fighting during armed conflicts, which constitute serious violations of international humanitarian law and contravene with the aforementioned law. Especially those related to the customs of war of means and methods that are preemptory rules, as it is not permissible to excuse with non-join the aforementioned treaties since the custom associated with international humanitarian law is one of the main sources in international law and the international humanitarian law (Al-Awjali, 1997:273; Greppi, 1999:531).

² Islamic law has played a major role in establishing humanitarian rules to limit serious violations of humanitarian law, especially in the rules concerned with fighting rules. As the Sunnah of the Prophet set the controls that regulate fighting in international conflicts, then it was the turn of the Commander of the believers, Ali bin Abi Talib, peace be upon him, to complete and organize those controls in the non-international armed conflicts that afflicted the Islamic state during his government. International norms have played an important role in revealing these rules in the international humanitarian law conventions at present.

Distinguishing Dangerous Violations from the Others Similar Ones

By examining the articles of international humanitarian law, including The Hague and Geneva laws, as well as the provisions of special international regulations, and the statute of the International Criminal Court, we can distinguish between dangerous violations and other violations of international humanitarian law.

Dangerous Violations and Serious Violations

Before starting to explain the concept of serious violations of international humanitarian law and before listing a set of definitions for the aforementioned term, it must be recalled that the First Additional Protocol of 1977 annexed to the Geneva Conventions of 1949 for the protection of victims of international armed conflicts, and in its article (5/85) considered the serious violations of the protocol and the Geneva Conventions As "war crimes", it reads, "The serious violations to the conventions and this appendix are considered war crimes, without prejudice to the implementation of these conventions". Where, the four Geneva Conventions of 1949 and the First Additional Protocol of 1977 have included, exclusively, what constituted serious violations of their provisions, i.e. constituted war crimes (Far, 1996:197) . Contrary to the dangerous violations, the serious violations are specifically represented in the emergence of new and innovative weapons in international law, especially cyberattacks and cases of digital espionage, and the new methods of fighting that have occurred to the international community. Jurisprudence has always defined serious violations as "every violation of the Geneva Conventions and their protocols by the belligerents or others that are not required by military necessity" (Al-Asadi, 2010:48). Others define the serious violations based on the enumeration method of acts that constitute a serious violation of international humanitarian law as acts whose commission constitutes a violation of Geneva law and its principles, such as torture, assassination, exile, inhuman treatment, killing, ill-treatment of prisoners, and indiscriminate sabotage without the required by a military necessity." (Al-Shukri, 2008:79) Also, someone defined them as intentional acts that contravene the Geneva Convention and the customs of war and were committed by the warring parties (Al-Qahwaji, 2001:78-79).

It should also be noted that the intended violations in the four Geneva Conventions of 1949 are serious only, as the true meaning of this term includes a basic principle that all war crimes are bad, but some are worse than others (Turns, 1995:804-830).

Based on the above, we reached a set of results through which we can distinguish between dangerous violations and serious violations, the most important of which are:

- 1- All the serious and dangerous violations of the rules of international humanitarian law are considered war crimes, whenever they are related to armed conflicts, as, the dangerous violation is not considered a war crime always, dangerous violations may be crimes of genocide when there is a criminal intent on the one hand and when they are committed with weapons of mass destruction on the other hand, especially if they were committed in peacetime as they constitute a threat to international peace and security under the Charter United Nations.
- 2- The principle of dangerous gradation is subject to the classification of degrees of violation in international humanitarian law, as dangerous violations of international humanitarian law are among the most crimes of the aforementioned law. To clarify this, the use of internationally prohibited means of war, as one of the types of dangerous violations, leads to the serious violation, represented by the killing of civilians, thus, which is considered a serious violation.

- 3- This difference between serious and dangerous violations does not mean that both systems have no similarities, as there are many commonalities, especially with the principle of responsibility and punishment, as both types require accountability before the international criminal courts. In addition to that, they are subject to what international crimes are subject to, such as the principles concerned with non-impunity, and the principle of extradition.

Dangerous Violations and Minor Violations

Minor violations are all acts contrary to the Geneva Conventions of 1949 and Protocol I of 1977, for which the convention parties must take administrative, disciplinary, or penal measures against the perpetrators, by national laws(Nasseri, 2011:43).

These violations are distinguished from other violations of international humanitarian law, in that they relate exclusively to forms of violations of the rules of international humanitarian law, which do not amount to a serious or dangerous violation of the aforementioned law. For example, a fighter's seizure of a loaf of bread belonging to another in the territory on which the armed conflict is based, as this constitutes a violation only, and not a dangerous or serious violation, according to Article 46 of The Hague Regulations related to the laws and customs of the land war. Because it does not result in death or serious material harm to the life of the person, although the rule that he violated protects important values based on the ownership of the victims(Saadallah, 2014:293).

It is also distinguished by the obligation that requires states to take any legislative measure that requires appropriate repression and, on the other hand, to punish the perpetrator of these violations or those who are complicit with them, as the dangerous violations are considered war crimes (United Nations International Law Commission, 1989).

disciplinary or punitive administrative measures are taken against Minor violations by the contracting parties, while grave and serious violations are expressly stipulated in the Geneva Conventions,(Al-Zamili Amer, 2001:137) and some call minor violations of international humanitarian law the term international misdemeanors (Al-Zamili Amer, 2001:138).

We conclude from all that minor violations are distinguished from other dangerous violations, as the latter are considered war crimes under the provisions of international conventions, including the conventions and statutes of special and permanent international criminal courts. Because they bear an international criminal nature and that they violate a mandatory rule of international law.

Therefore, it can be said that international humanitarian law includes many legal rules, one of which is criminal, the violation of which leads to the occurrence of a criminal act, the perpetrators of which are subject to penal punishment before the international criminal courts, and these violations are either serious or dangerous, and the second category leads to the occurrence of an illegal act Compensation is required without the perpetrator being subjected to penal punishment in most cases.

Conclusion

Finally, the researcher has achieved some findings and recommendations; the important ones are:

Findings

- 1- Dangerous violations of the rules of international humanitarian law are considered war crimes according to international humanitarian law and international criminal law.
- 2- Dangerous violations of the rules of international humanitarian law are distinguished by characteristics that make them subjective and featured from international crimes before the international criminal courts on the one hand, and crimes of international humanitarian law, on the other hand.
- 3 - One of the most important features or characteristics that characterize dangerous violations of the rules of international humanitarian law is the nature of dangerousness and the nature of the interest protected from criminalization, and the mandatory nature of the prohibition of such violations, as well as the dual nature of the ban in its customary and consensual parts.
- 4- The most important characteristic that distinguishes dangerous violations of international humanitarian law from other violations is represented, first, in the dangerousness and seriousness of the crime, and second, in the procedures before the international criminal courts regarding the violations mentioned, this means the nature of compulsory extradition, as well as the nature of the penalty resulting from the commission of these violations. Moreover, the rules of these violations represent the rules that govern dangerous violations of the rules of international humanitarian law, and they are rules established to criminalize violations of international humanitarian law, while the serious violations are only criminal rules that reveal rules that preceded them in criminalization, namely, the rules that govern serious violations.

Recommendations

- 1- It is recommended the need to reconsider the penalties imposed for violations of international humanitarian law, especially serious violations of the aforementioned law.
- 2- It is suggested to establish a virtual working group to assist the Public Prosecutor in investigating dangerous violations of international humanitarian law, especially violations related to modern means of warfare, as the Public Prosecutor should have the authority to request assistance from those who are most qualified and experienced in the investigation of cybercrime.
- 3- It is proposed to abrogate Article 124 of the Statute of the International Criminal Court, as it constitutes an obstacle to punishment for war crimes, especially dangerous violations of the rules of international humanitarian law.
- 4- We recommend the Iraqi legislator take serious steps to confront the new serious violations of international humanitarian law, confront cyberattacks, by adopting the teaching of international cyberspace and the risks arising from it as a branch of international law, in academic institutions, especially in the law faculties.

References

- Abid-Ali, H. (2010). *International Humanitarian Law*. Baghdad: Al-Sisban Library.
- Al-Asadi, A.-J. (2010). Standards that Determine the Characteristic of Danger in International Crimes. *Legal Studies and Research* , 29.
- Al-Awjali, S. (1997). *Provisions of Criminal Responsibility For International Crimes in National Law* [Ph.D.]. Ain Sham University.
- Al-Ithawi, A. (2007). *Research In International Criminal Law: Vol. Part 1*. Algeria: Homa Publishing House.
- Al-Qahwaji, A. (2001). *International Criminal Law: International Crimes and International Criminal Courts*. Lebanon: Al-Halabi.

- Al-Saadi, H. , A. (2002). Individual Criminal Responsibility For International Crime. Alexandria: University Press.
- Al-Shukri, Y. , A. (2008). International Criminal Justice (1st ed.). Amman : Dar Al-Thaqafa.
- Al-Zamili Amer. (2001). Lectures on International Humanitarian Law . Cairo: International Committee of The Red Cross.
- Far, H. , A.-W. (1996). International Crimes and The Authority to Punish Them (1st ed.). Egypt: Dar Al-Nahda Al-Arabia.
- Greppi, E. (1999). The evolution of individual criminal responsibility under international law. *International Review of the Red Cross*, 81(835). doi: 10.1017/s1560775500059782
- Muhammed, J. , T. (2020). Violations of Humanitarian Rules in The Taff Incident [Master]. University of Kerbala.
- Nasseri, M. (2011). The Effectiveness of Punishment For Violations of International Humanitarian Law. Alexandria: Dar Al-Fikir .
- Saadallah, O. (2014). Encyclopaedia of International Humanitarian Law. Algeria: Dar Huma.
- Suleiman, A. (1992). Basic Introductions to International Criminal Law. Algeria: University Press.
- Turns, D. (1995). War Crimes without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts. *African Journal of International and Comparative Law*, 7(4), 804–830.
- United Nations International Law Commission. (1989). Report of the International Law Commission on the work of Its Forty-First Session, 2 May- 12 July 1989, Official Records of the General Assembly, Forty-Fourth Session. Supplement No. 10. New York.
- United Nations Security Council. (n.d.). Resolutions Adopted By the Security Council 2005. Retrieved from un.org/securitycouncil/content/resolutions-adopted-security-council-2005