

Getting Away With Murder?

Respected Countries and the War Crimes Issue

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"If we had lost the war we would have all been prosecuted as war criminals."

- Robert S. McNamera speaking of World War II

Human beings have been fighting wars with each other for their entire existence. If the twentieth century brought us one significant change in warfare it is that the scale of war and destruction has increased remarkably. This is for the most part due to changes in technology which allow countries to both wage wars farther afield from their own territory and interests, and also dramatically increase the numbers of people killed and the efficiency of this killing. Although there may be less wars in our technologically advanced time, which also brings us methods of preventing war and protecting ourselves, the wars that do exist take place on a more global scale. Out of this new age in warfare has also come the concept of the rules of war. Through a series of international treaties and documents such as the Geneva Conventions, Rules of Aerial Warfare, and Laws and Customs of War on Land, countries have come together to identify actions in warfare which should be considered illegal and punishable. It is in some ways ironic that in an age where more people are exposed to the horrors of the war and have been killed with vicious weapons, we as an international society have, at the same time, begun to contemplate controlling war. However, despite the irony, this new age in war and its inherent brutality makes it all the more necessary to have these protocols. Unfortunately, despite these developments on paper to prevent war crimes and crimes against humanity

it is clear that the current system does not adequately identify, stop and punish those who commit these crimes.

One disparity which has come to light in regards to the identification and punishment of war crimes is the gap between the punishments and investigations against the losing side of a conflict and those against the victorious or superior power. Two of the most high profile trials of war criminals in the last century have been the Nuremberg trials after World War II and the prosecution of Slobodan Milosovic and other officials from the ex-Yugoslavia. Many smaller regimes or obviously aggressive powers such as Nazi Germany have been accused of war crimes, yet for the most part, Western powers, and especially the United States, escape scrutiny under international law. Of course, this is not to say that the crimes committed by the United States and other internationally established powers during war are nearly as bad as those committed by Nazi Germany or others who have been charged with war crimes. We should prosecute the losing side when they have committed such crimes, but at the same time also maintain a standard among the bigger powers of the world which is morally superior.

The main problem in this area of war crimes committed by these states is one of accountability. It is often unclear who should be held responsible for crimes committed, and how they should be prosecuted. As such, the question which this research paper will address is as follows: when war crimes are committed by an internationally respected power, who should be held accountable and why are these people or groups

rarely punished? There are many different kinds of war crimes committed, and each have different questions attached to them and different groups and individuals are responsible for each. As such, three defined subsets of war crimes will be explored independently: individual war crimes, strategy-induced crimes and blind eye complacency crimes. By looking at these different subsets of war crimes, a more clear picture of why they are going unpunished and what needs to be done internationally and internally to prevent crimes can be obtained.

Despite international laws and agreements set out to define war crimes and crimes against humanity, there is an inherent ambiguity concerning what exactly constitutes a war crime, and even if some war crimes are justified for a greater benefit such as the bombing of Japan to save lives in an invasion. This is one of the central problems which on the whole makes this debate ambiguous and hard to define. Clearly when something is hard to define it will be hard to come to conclusions. As citizens, academics, or governments we must come to grips with the question of whether a crime has been committed before action can be taken against it. This often proves to be very difficult. We are told that war is hell. How do we as people far removed from this hell measure and define varying degrees of hell? Soldiers and military officials often have to put aside their humanity to think rationally and make important decisions in a war which would cost many human lives. As such it makes it incredibly difficult for us to judge in this situation when things cross the line. In the fog of war how can we determine what is accept-

able hell for our purposes, and define the point it becomes unacceptable and criminal hell? This ever-present vagueness is exaggerated further when you take into account that through committing a potential war crime, further loss of life could be prevented among your own soldiers.

Regardless of the inherent vague nature of war crimes and the uncertainty in defining them, there have been international laws accepted to govern these issues. For the purpose of this study it is important to outline two of the leading documents which define this issue. The Geneva Conventions are often cited as the leading documents in this area and are especially important because the United States ratified them. However, the U.S. did not ratify the additional protocols added in 1977 which prohibit the use of any weapons or methods that cause “superfluous injury or unnecessary suffering” and any that “cause widespread, long-term and severe damage to the natural environment.”¹ Another important document in the definition of war crimes and specifically bombing, which I will focus on, is The Rules of Aerial Warfare from the Hague in 1923. It states that the bombing of civilian populations for the purpose of “terrorizing” or bombing areas which are not direct military targets are prohibited.² These rules were drafted but never formally adopted by the United States.³ Although these two examples of international documents concerning war crimes are not completely accepted by the United

¹ The Red Cross, [http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079? OpenDocument](http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument)

² The Red Cross, <http://www.icrc.org/ihl-nat.nsf/0/aa559087dbcf1af5c1256a1c0029f14d?OpenDocument>

³ *International Law On The Bombing of Civilians*, <http://dannen.com/decision/int-law.html>

States and are often not followed, they provide a helpful guideline for a definition accepted by the international community.

Individual War Crimes

The first category of war crimes which I have identified in my research are individual war crimes. This category encompasses crimes committed by an individual soldier or a small group of troops. In these cases the crime is limited in how far it goes up the chain of command and is an isolated incident. Central to this type is that the crime is committed by an individual or a group without any sort of institutional backing. A recent example of this category is the incident in Fallujah, Iraq where a US marine shot a wounded Iraqi in a mosque who he believed to be faking his death. Not only is this murder (with which he is charged) but also a violation of the Geneva Convention for not properly treating the wounded. However, from all accounts, this crime was simply that of an individual. Kevin Sites, the embedded journalist who recorded the incident, explained on his weblog, this incident was relatively isolated and the Marine's superiors were shocked by what they saw.⁴

Another famous incident which was officially regarded as a case of individual war crimes was the My Lai massacre in the Vietnam war. In this case, after experiencing

⁴ Sites, Kevin, http://www.kevinsites.net/2004_11_21_archive.html#110107420331292115

hidden attacks on their group over the previous days, the members of Charlie Company, led by Lieutenant William Calley, attacked the village of My Lai and massacred, raped and tortured the inhabitants including the elderly, women, children and babies. When reports of this tragedy came home to the United States through the extensive reporting of Seymoure Hersh, the American public was shocked and outraged.⁵ While these crimes were committed by a group, it still falls under the individual war crimes category because the crimes are ultimately individual acts not condoned by any official strategy. In the end, only some members of the company including Lt. Calley were convicted of crimes, but none of them received very harsh sentences.⁶ Despite my attempt to make clean sub-categorizations of war crimes in this paper, the controversy surrounding My Lai makes it difficult to classify. Although I have put it under individual war crimes, there are many who would claim otherwise. The debate contests whether My Lai was an isolated issue as is often claimed, or whether similar incidents were happening accross Vietnam which were simply going undetected. Through sources such as transcripts of the Dellums Comittee Hearings on War Crimes in Vietnam, it has become widely accepted that crimes committed by soldiers in Vietnam where relatively prevalent.⁷ Bertrand Russell, a philosopher and activist for exposing war crimes in Vietnam, argues that these were not simply individual crimes but an example of how it was possible for the military to “hide and disguise terrible crimes” by claiming that “anyone

⁵ Hersh, Seymour, *My Lai 4*

⁶ Hersh, Seymour, *My Lai 4*, 186.

⁷ Citizens Comission of Inquiry, *The Dellums Committee Hearings on War Crimes in Vietnam*.

killed is automatically Vietcong.”⁸ In addition, George Herring argues that while My Lai was unique in the scale of the massacre, the relationship between the Vietnamese people and American soldiers demonstrated in this episode was typical for the war.⁹ In this way the My Lai incident and other allegedly similar crimes in Vietnam could also be looked at from the perspective of strategy crimes or blind-eye complacency crimes.

Despite the ambiguity of categorization in such cases as Vietnam, it is important to analyze why individual war crimes are committed and why they continue to happen. When individuals commit crimes in the war zone it is clearly a matter of individual responsibility; however, many often blame the environment that they are engaged in for inducing such acts. A war is a brutal and violent, and soldiers get accustomed to such a reality and may lose sight of what is the right and moral thing to do. In many situations these conditions are compounded by other factors which make the possibility of crimes a reality. In my focus on crimes in Vietnam the type of war which was being fought - a guerilla war - provided a situation where soldiers could not discern enemy from non-combatant.¹⁰ As in the case of My Lai, soldiers became irrational after losing others in their group to enemies who could not be identified effectively. In addition, changing commanding officers and rotating tours of duty made those fighting feel detached.¹¹ Further to this, as many including Seymour Hersh have pointed out, U.S. soldiers felt a

⁸ Russell, Bertrand, *War Crimes in Vietnam*, 103.

⁹ Anderson, David, *Facing My Lai*, 104.

¹⁰ Anderson, David, *Facing My Lai*, 97.

¹¹ Anderson, David, *Facing My Lai*, 161.

lack of attachment to the conflict and did not know what they were dying for. This moral ambiguity which the system imposed provided confusion and subsequently led to cases of individual war crimes.¹²

Through the example of war crimes in Vietnam, we can use the lessons learned to determine how individual crimes happen in similar conflicts and what could be done to stop them. While these crimes are ultimately individual in nature and therefore, most of the responsibility lies on the shoulders of the individuals involved, there are things that can and have been changed since Vietnam to protect against this. While other forms of war crimes feature the involvement of the international community in their trial and prevention, the burden for preventing individual crimes on the battlefield largely lies within the military apparatus and purpose of a war. Through maintaining strong military leadership and purpose with effective training and practical rules of engagement, the likeliness of individual crimes in the field can be decreased. In addition, a clearly defined purpose of the conflict by both the military and government will improve morale and lead to more control of forces on the ground. While individual war crimes do continue, as evidenced by some ongoing individual crimes by U.S. soldiers in conflicts such as Iraq, there have been improvements in this area since Vietnam and the U.S. armed forces have become much more sensitive to these issues.¹³

¹² Hersh, Seymour, *My Lai 4*, 187.

¹³ Anderson, David, *Facing My Lai*, 154.

Strategy-Induced Crimes

The second area of war crimes which will be defined is strategy-induced crimes. In this category, the crimes which are committed happen as either a direct or indirect result of the strategies and tactics employed during a war. One main area which is often regarded as a borderline war crime which has been used by internationally respected powers in war is the bombing of population centers. Two cases relevant to this issue are the allied bombing campaigns of World War Two especially in Japan and the use of chemical weapons in Vietnam. In the case of the bombing of Japan in World War II there are two somewhat distinct issues - the main bombing campaign which involved firebombing and destroyed many cities, and the infamous use of nuclear weapons. If looked at from the perspective of their adherence to laws concerning the bombing of civilian populations, the bombing campaigns against Japan would be considered war crimes. The Firebombing of Tokyo and the Nuclear bombs killed countless Japanese civilians and were employed as a technique to bring the population into submission by bombing cities instead of military related targets. It is debatable whether this form of "terrorizing" the population is justified to achieve a military goal¹⁴ and also whether it is right to use new more destructive weapons technologies to ones advantage without moral consideration.¹⁵ While the bombing of Japan is often defended in that it pre-

¹⁴ Raunch, Jonathan, "Firebombs over Tokyo".

¹⁵ Schaffer, Ronald, *Wings of Judgment*, 67.

vented immense casualties that would result from an invasion, Robert McNamara, future U.S. Secretary of Defense and an official during World War II, takes a stance between the opposing sides. He argues that “proportionality must be a guideline in war” and that the bombing of Japan was not proportional to their objectives.¹⁶

In the Vietnam conflict not only are there many allegations of individual war crimes against U.S. soldiers, but there is also a great deal of debate over the bombing tactics and new aerial weapons used in the conflict. In the Vietnam war, the U.S. strategy made extensive use of new forms of chemical weapons deployed from the air such as napalm, white phosphorus and defoliation agents such as Agent Orange. Napalm and white phosphorus are brutal weapons which when used against human targets cause a great deal of suffering and often a slow death. To justify the use of these weapons it was said that they were the most effective way to succeed in the war against an elusive enemy. However, this does not necessarily give the moral right to use these weapons. If these weapons are not banned as chemical weapons, then they should be banned under treaties which prohibit weapons which cause “unnecessary suffering.”¹⁷ Along with these incendiary chemical weapons, defoliation agents such as Agent Orange were used in the Vietnam country-side to aid visibility for air-strikes or destroy crops. While effective, there has been controversy over the long-term effects of the

¹⁶ Morris, Errol, The Fog of War.

¹⁷ Neilands, J.B. *Harvest of Death*, 168.

chemical on the environment, crops, and people exposed to it.¹⁸ When viewed in terms of the environmental damage that this does and the long-term suffering, this also constitutes a war crime under international law.

It is clear that these strategies used by the United States in World War II and Vietnam do constitute war crimes be they intentional, such as bombing the civilians of Japan, or unintentional, such as the environmental effects of Agent Orange. This then once again raises the important question - how can otherwise moral countries commit these crimes, and why are they allowed to get away with it? Obviously there are clear incentives to using such strategies in a conflict. Namely that they are very often effective. There is a very strong argument to be made that the bombing of Japan while killing countless actually saved lives in the end - both Japanese and American. However, even if this incentive in employing these strategies does exist, is it morally right to use them? Countries such as the U.S. who are respected members of the international community have a moral standard which they should abide by to set an example for the rest of the world.

Clearly there is a gap between the moral standard that international powers should be held to and what they are able to get away with. Robert McNamera shockingly acknowledged that if the Allied Forces had lost World War II, military officials including himself would have been tried as war criminals.¹⁹ By saying this he identifies

¹⁸ Glaberson, William, "In Vietnam and America, Some See A Wrong Not Righted".

¹⁹ Morris, Errol, The Fog of War.

the main and somewhat obvious reason why powerful countries like the U.S. are never on trial for war crimes. This is simply that they usually win or come out of a conflict on top. Just as many say that history is written by the winners, those who win also can turn a blind eye to their own crimes while demonizing their enemy. The Nuremberg trials were an important step in tearing down the barriers and prosecuting war criminals, but they also failed in that they did not look at any possible crimes committed by the Allies. While there is no completely effective way to deal with this issue, a combination of internal and international pressures can have a positive effect. As evidenced by protests and public discontent during the Vietnam war, public opinion can have a strong influence on policy in regards to a war. If the public is aware of war crimes and the strategies employed by their military positive change is possible. In addition to internal pressure it is important that the international community puts pressure on all countries that commit such crimes even if they are otherwise respected countries. Through institutions such as the International Criminal Court and international treaties on war crimes, progress can be made towards establishing a standard by which all countries should abide. Yet despite these suggestions, the problem remains. When an internationally respected country commits crime it is very difficult realistically to persecute the officials responsible for it without severe political repercussions.

Blind-Eye Complacency Crimes

The final category of war crimes which international respected countries often commit yet overlook are blind eye or complacency crimes. This is the most vague and hard to define of all three categories because it deals with crimes committed either unintentionally or due to negligence. This area covers situations where crimes occur because those who should stop them either are complacent and do not notice or deliberately turn a blind eye to them. In many of these cases it is not easy to identify where the responsibility lies, and who is at fault for allowing these crimes to happen. There are many examples of this kind of criminal negligence in war. One interesting subset is the question of supporting another government who in turn uses your support to commit crimes either in war or peace. There are countless examples of internationally respected governments supporting dictatorships or harsh regimes including the U.S. support of the Diem government in South Vietnam. With U.S. economic and military aid Diem's regime put into effect "policies of terror" to stifle movements among the population.²⁰ Bertrand Russell makes the claim that this support of a regime committing crimes and atrocities constitutes a war crime on the part of the U.S. government which should instead take the moral high ground and oppose such regimes.²¹

²⁰ Van Luu, Nguyen, *U.S. War Crimes in Vietnam*, 70.

²¹ Russle, Bertrand, *War Crimes in Vietnam*, 123.

Another interesting case of complacency crimes is the responsibility of chemical companies who provided the U.S. government with chemicals such as Agent Orange for use in Vietnam. Some have wondered whether the chemical companies should have refused to produce these weapons knowing their harmful effects and how they would be used.²² In 2004 a new lawsuit was brought forward against a group of chemical companies by victims who claim long-term health issues from exposure to Agent Orange in Vietnam.²³ The chemical companies in turn maintain that there is still no solid scientific evidence that it was because of an appropriate use of Agent Orange that these people have been harmed. They also contend that regardless of any harm done, it is not their responsibility to have prevented it as the government ordered them to produce these chemicals for the war. Are these companies responsible for not fully realizing the harmful capacity of these chemicals for deployment? Are they negligent by simply complying with what the government asked them to produce? As evidenced by ongoing court cases, these questions have not yet been answered in any satisfactory way.

There are many cases of individual crimes being overlooked deliberately or because of flaws in the system such as the current Abu Gharib torture scandal in Iraq. In these cases, watchdog groups and investigative reporting such as that of Seymour Hersh can be effective in bringing these situations to the public attention. Yet, as the two cases examined from Vietnam demonstrate, there is a larger grey area in which more

²² Nielands, J.B. *Harvest of Death*, 201.

²³ Glaberson, William, "In Vietnam and American, Some See a Wrong Not Righted".

difficult questions of international diplomacy and corporate responsibility arise. In these areas, the line of responsibility is less clear and hard to define because one must prove the negligence of those who are removed directly from the actual crime. An analogy of this would be to ask if you are responsible for giving a man a gun he uses to murder someone? Some would say yes, some would say no, while others at the same time would say yes, but only if you were aware that the man was unstable. In many of these situations such as funding the Diem government it is a case of giving an unstable man a gun. The problem lies in demonstrating proof that those who gave the gun knew that the man was unstable and would use it in such a way. This onus of proof is the biggest obstacle in stopping such crimes and charging those who committed them.

The Big Picture

By looking at these three categories of war crimes in relation to the United States, it becomes evident that the issue is not very well defined. When people accuse internationally respected powers such as the United States of committing war crimes, it is a very broad umbrella of issues and each has its own nuance. At each level identified, there are different people who must be held responsible and different methods of preventing the crimes. For individual crimes it is the individual who committed the crime who is responsible, but changes can be made in the military and political systems to produce a situation less encouraging of such crimes. For strategy-induced crimes the

responsibility lies at a higher level of command and requires much more international and domestic pressure and consequences to produce a change in policy. Lastly with blind-eye complacency crimes both the responsibility and solutions are very unclear and are subject to a great deal of debate.

Throughout the discussion of internationally respected countries and especially the United States committing war crimes, it must be noted that this is not an outright condemnation of the United States. Indeed, the reason that this issue is so contested is that countries such as the U.S. are internationally respected powers who are, on the whole, moral and justified in their actions. When these crimes come to light it is hard to find a proper solution for prosecuting them due to the international standing of the countries and individuals involved. While officials from the ex-Yugoslavia can be put on trial for war crimes, and justly so, it would be very politically difficult to put anyone from the American government on trial for admittedly lesser offenses, when they represent a country which is generally a force of positive change in the world. In this way, it is clear that trials and prosecution is not the answer to the problem. Rather, it is important to find proactive solutions within the country and internationally that demand accountability and a watchful eye to prevent such crimes from staining the moral authority of a state in the international community.

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