Spotlight

Recklessness, War Crimes, and the Case of Afghanistan

Zunaira Inam

Associate Research Analyst

Institute of Regional Studies, Islamabad

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Introduction

The recent news of the Australian troops perpetrating alleged war crimes on civilians and combatants within Afghanistan sparked a major outrage and uproar all over the world. Australia has been part of the of the US-led military coalition in Afghanistan since 2001. It is also a state party to the Rome Statute since 2002. As such, it is bound by the International Humanitarian Law (IHL). The principle of complementarity in Article 17 of the Rome Statute specifies that the International Criminal Court (ICC) "will only exercise its jurisdiction if a State fails to genuinely investigate and prosecute a situation in which crimes against international humanitarian law have been committed."[1] Essentially, it implies that until and unless Australia is unable or unwilling to prosecute, the jurisdiction remains with the state in question.

This alarming report has reasserted the reality of the gross injustices, torture, and killings that are occurring in all conflict zones, including Afghanistan. It also sheds light on the miscarriage of justice within the international system where in certain circumstances the ICC does not have jurisdiction, it cannot force compliance by states and sometimes the crime cannot be proven due to the limited scope of the Rome Statute.

The Retrogressive Provisions of the Rome Statute

It cannot be denied that the ICC is a remarkable innovation and demonstrated the willingness of countries to have amicable relations. However, the foundation of the ICC is the Rome Statute and a few provisions within the Rome Statute can be viewed as retrogressive. Certain provisions of the statute lead to uncertainties. I will only limit my critique to Article 30 of the statute, regarding *mens rea*.

Mens Rea

The Rome Statute highlights the mental element of crimes in Article 30, stating that a crime consists of intent and knowledge. Article 30 of the Rome Statute provides:

"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
a. In relation to conduct, that person means to engage in the conduct;
b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[2]

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[1] Rome Statute of the International Criminal Court pmbl, art. 17, July 17, 1998, 2187 U.N.T.S. 90
[2] Rome Statute of the International Criminal Court pmbl, art. 30, July 17, 1998, 2187 U.N.T.S. 90

However, the issue arises specifically in cases of war crimes due to the omission of recklessness as sufficient *mens rea* under this article. It would seem that recklessness should be enough to demonstrate criminal responsibility. Undoubtedly, in cases of genocide or crimes against humanity, recklessness would fail to be sufficient *mens rea* due to the severity of these crimes, which could not have been committed without intent and knowledge. However, in crimes of lesser severity, which include war crimes, it stands to reason that recklessness be included within the Article. Hypothetically, a person could bombard a town without taking into consideration the high civilian casualty risk. This person could then be acquitted by the ICC on the basis that they acted recklessly but did not have intent to kill the civilians. This provides an undue level of flexibility to the military to operate. This issue with the statute can be illustrated with the example of the Kunduz Hospital bombing in Afghanistan.

Recklessness and War Crimes

The bombing of a hospital in Kunduz, Afghanistan on 3rd of October 2015 killed 42 people[3]. The US military held an inquiry and declared that 16 of the military personnel involved would be 'disciplined'. Furthermore, they announced that since the violations were not committed with an 'intent', the military personnel would not be charged with criminal charges.[4] This presents the question: can recklessness be sufficient to prove war crimes? It also highlights the limit of international criminal law in its ability to provide justice to the victims of the horrendous results of conflict and war. Academics have posited that there is evidence for a recklessness standard in customary international law. In certain examples of cases at Nuremberg and the International Criminal Tribunals for Yugoslavia and Rwanda, the court did rely on 'recklessness' as a way to prove war crimes.[5] At the International Criminal Tribunals for Yugoslavia (ICTY), the Appeals Chamber observed in the Blaškić case:

"A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime."[6]

There are two precise definitions of war crimes, in the Rome Statute, that are relevant to this discussion:

First:

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[3] Kunduz Hospital Attack (2018, May 7). *Medicins Sans Frontiers.*
Retrieved from https://www.msf.org/kunduz-hospital-attack

[4] Kunduz hospital bombing 'not a war crime' says Pentagon (2016, April 29). *BBC*
Retrieved from https://www.bbc.com/news/world-us-canada-36174047

[5] Adams, A 2018, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape', *European Journal of International Law*, Volume 29, Issue 3, August 2018, Pages 749–769

[66] *Prosecutor v. Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000

"Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;"[7]

Second:

"Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[8]

The first provision addresses violations of the principle of distinction, which is regarding the intentional killing of civilians. The second provision addresses the principle of proportionality. The first war crime is a violation of the principle of distinction: intentionally killing civilians. The second war crime is a violation of the principle of proportionality: causing disproportionate collateral damage.

If we apply the first definition of war crimes from the Rome Statute to the Kunduz bombing, the issue is that the attack was not intentionally directed against the civilian population. What really complicates matters, however, is that the word 'intentionally' is mostly understood in common law countries as the same as purpose or knowledge, based on the circumstances. However, in certain cases, criminal lawyers trained in civil law jurisdictions tend to give the phrase 'intentionally' a broader definition. This definition would not only encompass 'purpose and knowledge' but would also include recklessness.

In the case of the Kunduz bombing, what would be the difference if the standard of recklessness was applied to the case? Could the US military personnel be prosecuted for an intentional attack against civilians, in the case that 'intentional' includes mental states such as recklessness. The bombing of the hospital that led to the deaths of 42 individuals would definitely be a strong case for recklessness, however, it cannot be the only factor to consider. The prosecutors will have to take into consideration the level of information available to the soldiers, their motivations, the structure of decision making, the chain of command, the perceived threat, and the level of control the soldiers actually had over the situation. Recklessness cannot be under-inclusive as it will not have credibility in the view of the victims. However, it can also not be over-inclusive as it will be considered illegal by the soldiers, which is the main group that International Criminal Law tries to control.

The issue with equating intent with recklessness is that any case of collateral damage would be considered a violation of the principle of distinction. This is due to the fact that in the case of collateral damage, civilians are killed with full knowledge that they will die due to the actions of the attacker. However, this is allowed as far as the collateral damage inflicted is not disproportionate and the attack was intended for a legitimate military target. This would be an

[7] Rome Statute of the International Criminal Court pmbl, art. 8, July 17, 1998, 2187 U.N.T.S. 90
[8] Ibid.

issue as the attacker in any hypothetical situation would be aware and have knowledge that civilians will be killed during the attack. Essentially, all cases of disproportionate collateral damage would automatically be considered as violating the principle of distinction without putting the onus of proof on the prosecutor. This would also be a careless way to handle such sensitive cases.

The best option would be to codify a new crime which would declare that a war crime can also consist of recklessly attacking civilians. The word 'recklessly' should be used explicitly as opposed to 'intentionally'. This would hold the military personnel up to a higher standard and they could be prosecuted for choosing or being unable to live up to it. The creation of a new war crime would also demonstrate that there is a clear difference in the morality of killing civilians intentionally or killing them recklessly.

As the law stands now, was this a war crime? Unfortunately, no. The issue being that the killing was not intentional, it was accidental. Considering this with the lens of criminal law, it was reckless and even negligent but there was no intention or purpose. This does highlight the grim reality that even though IHL is offering protection to civilians, it still allows for them to be killed.

Conclusion:

The Kunduz hospital bombing never went to trial in the ICC and had it even been subject to the ICC jurisdiction, it would not have been deemed a war crime. This was due to the fact that there was no intent to kill civilians and it serves as a stark reminder of the limitation that exists within international criminal law. There are uncountable horrors and realities of war that will fail to be addressed by the statute of the ICC. Furthermore, IHL actually allows civilian casualties in certain situations, as long as the laws of proportionality are kept in consideration. Hence, it is almost certain that civilians will be killed, maimed or will suffer immense losses of lives and property due to the ravages of war and, sadly, in most cases, no crime will ever be proven or charged. Additionally, any investigation by the ICC faces severe challenges, even before we include the issues or loopholes within the provisions of the statute. The ICC does not have a police force. Hence, it relies on the member states to cooperate with the court during investigations.

The ICC finally agreed in 2020 to open an investigation into the war crimes committed in Afghanistan and the actions of the Taliban, the Afghan government and US troops since May 2003 are expected to be examined.[9] It is extremely important, for the institutionalization of human rights in Afghanistan, that the NATO member countries participate and cooperate with the investigation on war crimes in the country. Additionally, the lives and dignity of the Afghan people cannot be violated at will and the international legal system must work towards ensuring those safeguards.

[9] I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S. (2020, March 5). *The New York Times*