



## War crimes

A war crime is a **violation of a rule of international humanitarian law** that creates direct criminal responsibility under international law. The law of war crimes extends not only to international armed conflict, but to non-international armed conflicts as well. The law of war crimes does not cover the initiation of war (*jus ad bellum*); here the crime of aggression applies.

### A. Historical development

#### I. International humanitarian law (laws of war – *jus in bello*)

Laws of war were first codified in the 19<sup>th</sup> century. Two areas of law need to be distinguished:

- **the law of Geneva:** The primary purpose of the law of Geneva is to **protect persons not or no longer taking part in hostilities**.

In 1864, the first Geneva Convention was adopted. The most important rules applicable today under the law of Geneva were established by the four **Geneva Conventions** of 1949 and the two **Additional Protocols** of 1977. Geneva Convention **I** protects **the sick and wounded** in armed forces **at land** in wartime. Geneva Convention **II** regulates the protection of the sick and wounded in warfare **at sea**. Geneva Convention **III** regulates the status and protection of **prisoners of war**. Geneva Convention **IV** for the first time comprehensively codified the protection of **civilians** in wartime. Additional **Protocol I** contains additional rules for the protection of persons in **international** armed conflict; while Additional **Protocol II** establishes comprehensive regulations **for non-international armed conflicts**.

- **the law of The Hague:** The so-called law of The Hague emerged alongside the law of Geneva. Intended mainly to **protect soldiers**, it prohibits **means and methods** of warfare that are particularly **atrocious or dangerous**.

The starting point for this development was the St. Petersburg Declaration of 1868. **The Hague Regulations of 1899 and 1907** are of particular importance in that they adopted comprehensive rules regarding permissible methods of warfare. The treaty parties recognized that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." The law of The Hague was expanded by the **Gas Protocol** of 1925, the Convention for the Protection of **Cultural Property** in the Event of an Armed Conflict of 1954, the Convention on the Prohibition of the Development, Production, and Stockpiling of **Bacteriological (Biological)** and **Toxin Weapons** and on their Destruction of 1972, the Convention on Prohibitions or Restrictions on the **Use of Certain Conventional Weapons** which may be Deemed to Be Excessively Injurious or to have Indiscriminate Effects of 1980, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of **Chemical Weapons** and their Destruction of 1993.

The fundamental separation into the law of Geneva and the law of The Hague continues to this day, despite growing substantive **similarities and overlaps**.

In addition, **customary international law** exists that is not codified in the conventions.<sup>1</sup>

#### II. International Humanitarian Law and Criminal Sanctions

Every State is forbidden to wage war or armed conflict in a manner that violates international humanitarian law. The duty of States is not limited to refraining from violations. They must

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<sup>1</sup> See e.g. the so-called Martens Clause, adopted in the preamble to Hague Convention IV in 1907.



also ensure that individuals under their control adhere to the provisions of international humanitarian law. Here, criminal law can function to deter individuals from violating international humanitarian law and punish those violations that do occur.

At the state level, criminal sanctions on violations of the laws of war have a long history. Many states have adopted codes of military justice and claimed the right to try and punish members of enemy forces, after hostilities ceased, for violations of the laws of war. As a rule, the crimes were defined in domestic law. The Geneva Conventions were the first treaties to require criminalization of certain violations under domestic law (*grave breaches*).

Today, it is firmly settled that violations of international humanitarian law may also entail individual criminal responsibility **directly under international law** (*cf.* Session 1 – History of international criminal law). Determining which violations of international humanitarian law create individual criminal liability is one of the principal challenges facing the law of war crimes. No definitive international codification exists so far. Art. 8 (2) of the ICC Statute, for example, lists many important crimes, but is not exhaustive, and other crimes can exist under customary international law.

## B. Structure of War Crimes

### I. Categories of War Crimes

The ICC Statute's organizing principle (Art. 8(2)) is the **distinction** between crimes in **international** and in **non-international** armed conflict. However, as the laws applicable to international and non-international conflicts increasingly converge, it makes more sense to categorize the different crimes from a substantive point of view. Particularly useful is a distinction between **protection of persons and property** on the one hand (essentially the law of Geneva), and **prohibited means and methods of warfare** on the other hand (essentially the law of The Hague).

### II. Elements of War Crimes

#### Material Element (objektiver Tatbestand)

##### Individual Act

Specific violation of  
international  
humanitarian law

**committed**

##### Contextual Element/International Element

- (1) During an (international or non-international) **armed conflict** at the time when and at the place where the alleged crimes were committed; and
- (2) with a **sufficient nexus** to the armed conflict.

**Elements of Crimes for Art. 8 of the ICC Statute:** “the conduct took place in the context of and was associated with an armed conflict.”



## Mental Element (subjektiver Tatbestand)

In principle: **Intent and knowledge** both with regard to the individual act and the contextual element.

### III. Protected interests

The law of war crimes protects **fundamental individual rights** in armed conflict. This is particularly clear in the grave breaches provision of the Geneva Conventions. In addition, like the other core crimes under international law, the law of war crimes protects values that transcend individual rights.

As a rule, war crimes can only be committed against **specific protected persons**. Who these are, depends on which violation of humanitarian law is called into question. It should be noted that war crimes can only be committed **against the enemy's population**.

## C. Overall Requirements in Detail

### I. Armed Conflict

An armed conflict exists whenever there is a resort to **armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state**.

- An **international armed conflict** exists, first of all, where armed force is employed between states (**inter-state conflict**). Here, international humanitarian law applies from the moment of the “first shot”. Furthermore, an **intra-state conflict**, i.e. an armed conflict that is limited to one state's territory, **can take on an international character** if a foreign state intervenes in that conflict either by sending its own troops or by exercising **overall control** over one of the parties to the conflict.<sup>2</sup>
- A **non-international armed conflict** (intra-state conflict) exists when there is protracted armed violence either between governmental authorities and organized armed groups or between such groups within a state. The application of international humanitarian law to these cases constitutes an infringement of the sovereignty of the state affected and is thus only justified if the intra-state conflict is comparable to an inter-state conflict. For this reason, international humanitarian law applies only if the conflict meets a **minimum threshold**: The belligerent parties must consist of **organized** armed groups, and there must be **protracted** armed violence, i.e. the conflict must be of a certain intensity.

### II. Nexus Requirement

It is not sufficient that the crime in question was committed while an armed conflict was going on. In addition, the crime must also be sufficiently linked to the armed conflict, i.e. it must have a **functional relationship** to the armed conflict. This so-called nexus requirement

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<sup>2</sup> For more details, see G. Werle, *Principles of International Criminal Law*, marginal nos. 837 et seq.



is satisfied if the crime is “closely” or “obviously” related to the armed conflict, or in other words, if the armed conflict plays “a substantial part in the perpetrator’s ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”<sup>3</sup>

It is, however, not necessary that the armed conflict be causal in a strict sense to the crime, or that fighting is actually taking place at the time and scene of the crime; nor does the perpetrator have to be associated with a belligerent party.

**Recommended reading:** Gerhard Werle: *Principles of International Criminal Law*, (2005), marginal nos. 773-823, 833-847, 854-856.

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<sup>3</sup> See *Prosecutor v. Kunarac et al.*, ICTY (Appeals Chamber), judgment of 12 June 2002, para. 58.