

# War Crimes



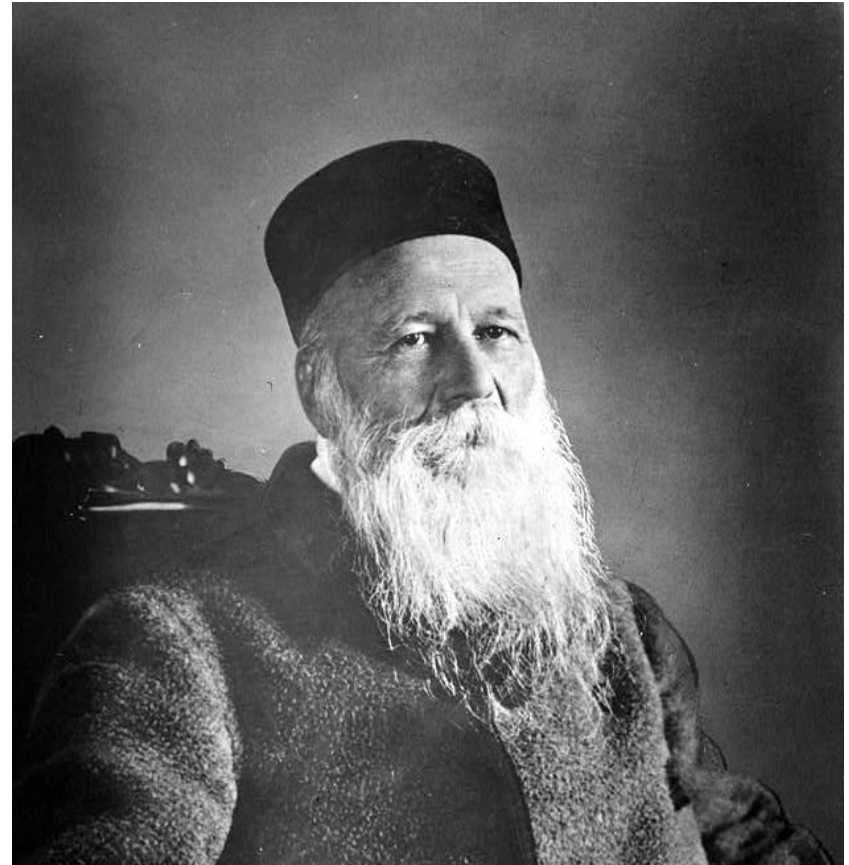
# The Effort to Humanize War

That “*Law is silent in war*” is not true anymore:

Entire branches of International law - including International Humanitarian Law (IHL) and Human Rights Law - regulate war and its consequences.

## Ius in bello v. Ius ad bellum

- Difficulties in applying IHL categories/principles in contemporary/asymmetric conflicts
- Even the moment when the war begins is blurred (aggression?)



Red Cross Committee founder:  
Henry Dunant (1828-1910) Awarded  
the First Nobel Prize in 1901



# International Humanitarian Law (IHL)

IHL as the branch of international law limiting the use of violence **in** armed conflicts by:

- a) **sparing those who do not or no longer directly participate in hostilities;**
- b) **restricting the use of force to the amount necessary to achieve the aim of the conflict, which - independently of the causes fought for - can only be to weaken the military potential of the enemy.**

➤ **Tensions between military and humanitarian considerations**



# Basic principles of IHL

- The distinction between civilians and combatants
- The prohibition to attack those *hors de combat*
- The prohibition to inflict unnecessary suffering: “The right of belligerents to adopt means of injuring the enemy is not unlimited”(The Hague Regulations 1907)
- The principle of necessity
- The principle of proportionality



# The 1949 Geneva Conventions and 1977 Additional Protocols:

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949
- Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949
- Geneva Convention (III) Relative to the treatment of Prisoners of War, 1949
- Geneva Convention (IV) for the Protection of the Civilian persons in Time of war, 1949
- Additional Protocol (I) to the Geneva Conventions, International Armed Conflicts, 1977
- Additional Protocol (II) to the Geneva Conventions, non-International Armed Conflicts, 1977



# The Grave breaches

- The Geneva Conventions of 1949 expressly criminalize certain violations of specific provisions and require States to take appropriate action under domestic law: these provisions are the *grave breaches*
- Grave breaches:
  - Art. 50 GC I -for the amelioration of the wounded and sick in armed forces in the field.
  - Art. 51 GC II -for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea.
  - Art. 130 GC III -relative to the treatment of prisoners of war.
  - Art. 147 GC IV -relative to the protection of civilian persons in time of war.
  - Art. 85 AP I- for International armed conflicts



# Obligations for States

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

- Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.....



# Evolution of War crimes

- The Geneva Conventions of 1949 were the first treaties to require criminalization of certain violations of IHL under domestic law.
- Today, it is firmly settled that violations of IHL may also entail individual criminal responsibility **directly under international law: these are the WAR CRIMES**
- Determining which violations of IHL create individual criminal liability is one the principal challenges facing the “law of war crimes”.



# From IHL to ICL: War crimes under ICL

- > International Law development: Individual criminal liability, parallel to State responsibility, under international criminal law, for the (most serious) violations of IHL
  - While IHL provisions are directed at States, war crimes also entail the criminal responsibility of individuals
  - International Criminal Law shall be seen as an enhanced level of protection and as a mean of deterrence: violations will be criminally prosecuted



# Article 6(b) of the Nuremberg Charter

- “War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to slave labour or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.



# Art. 8 ICC Statute

- No definitive international codification exists so far. **Article 8 (2) of the ICC Statute** lists many important crimes. However, it is only exhaustive as regards jurisdiction of the ICC. **Other war crimes can exist under customary international law.**
- The ICC has jurisdiction over War Crimes **in particular** when committed as part of a plan or policy or as part of a large-scale commission
  - ✓ Only a Jurisdictional limitation

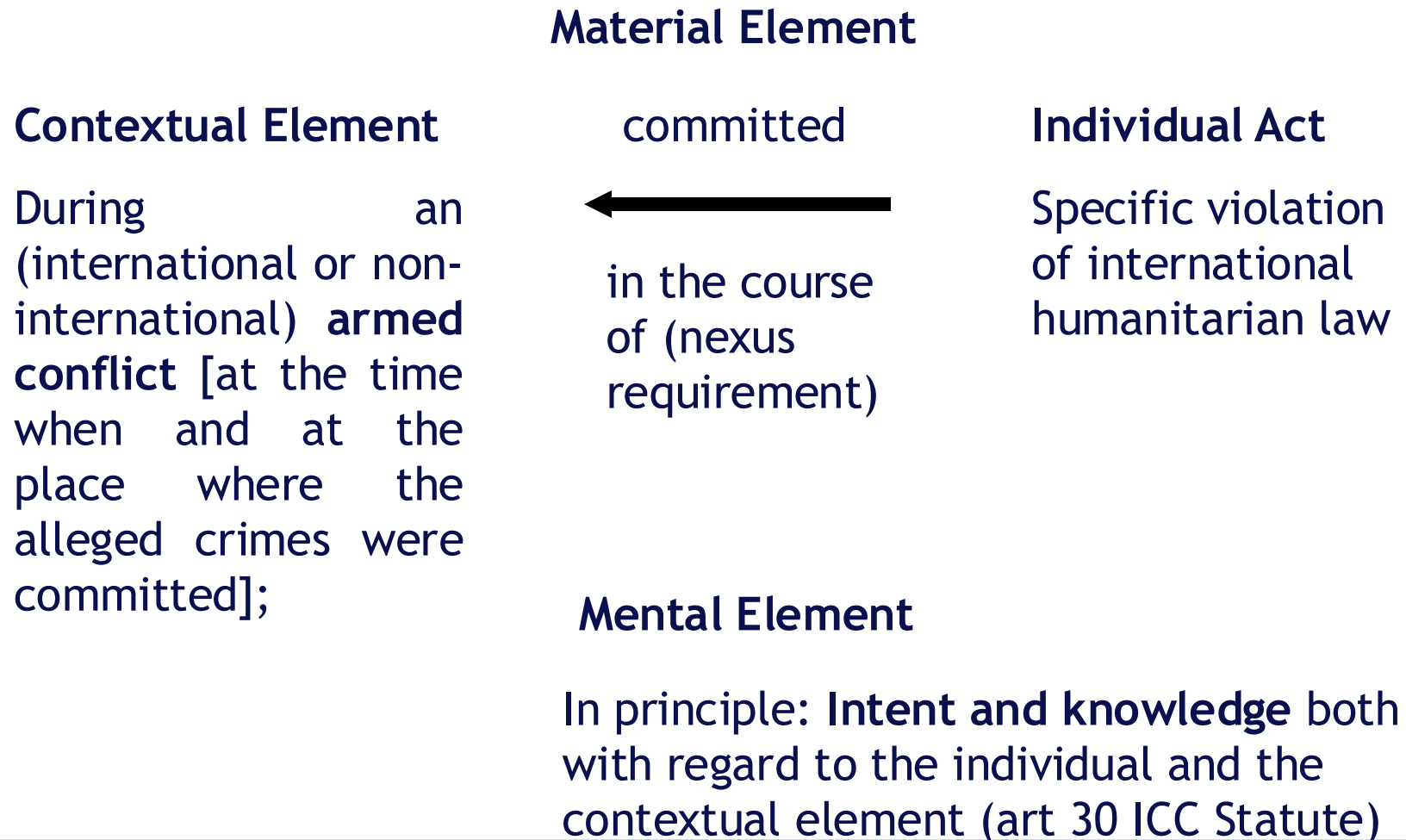


# Structure of Art. 8 ICC Statute

- Traditional division between international and non-international armed conflicts > Common Article 3 to the four Geneva Conventions of 1949 and Additional Protocol II of 1977 are the only provisions specifically for internal armed conflicts
- **4 subparagraphs of Art. 8:**
  - **International**
    - 2(a): Grave breaches of the GC
    - 2(b): Other serious violations of the law and customs of war
  - **Non-international**
    - 2(c): Serious violations of Common Art. 3 GC
    - 2(e): Other serious violations of the laws and customs of non-international conflict



# Elements of War Crimes



# Nexus Requirement

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“It is necessary that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned **because of** the conflict at issue.”

The conduct must be “**closely**” or “**obviously**” or “**evidently**” related to the armed conflict.

“The existence of the armed conflict must play 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”.



# Open issues on the nature of the conflict

- *Traditionally* the concept of International Armed Conflict (IAC) is a conflict between two or more States
- A Non-International Armed Conflict (NIAC) is one between a State and an armed group (of the same nationality) within the territory of that State
  - BUT... a conflict between a State and an armed group can occur in the territory of another State: is it an IAC or NIAC?
  - Two options:
    - ✓ The “geographical element”: IAC
    - ✓ The “status of the parties” element: NIAC



## Distinction IAC/NIAC is not that relevant anymore with regard to the war crimes regime

Conflicts of a different nature may take place at the same time in a single territory

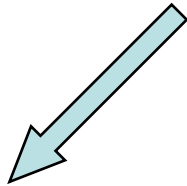
Situation of mixed (or parallel) armed conflicts on the same territory (ICC decision on Palestine)

- ICRC study of 2005 on Customary IHL led to the conclusion that most of the rules on the conduct of hostilities - initially designed to apply solely to international armed conflicts - are also applicable as customary rules in non-international conflicts, thus considerably expanding the law applicable in those situations.

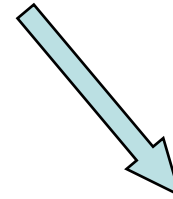


# Categories of War Crimes

- **Traditional** distinction between war crimes in international and non-international armed conflict (approach followed in the **ICC Statute**)
- **BUT better:** distinction from a substantive point of view - assimilation of internal and international war crimes



- crimes dealing with the protection of persons and property
- (essentially the law of Geneva)



- crimes dealing with prohibited means and methods of warfare (essentially the law of The Hague)

# War Crimes Against Persons

## Individual Acts

- killing and wounding persons not involved in combat
- offenses of mistreatment
- sexual violence
- humiliating and degrading treatment
- compelled service in military forces and operations of war (int'l conflict)
- slavery
- forced labor (int'l conflict)
- punishment without regular trial
- unlawful confinement (int'l conflict)
- delay in repatriation (int'l conflict)
- hostage-taking
- deportation or forcible transfer
- transfer of a party's own civilian population (int'l conflict)
- use of child soldiers



# War Crimes Against Persons

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## Victims include:

- Persons protected under the Geneva Conventions (International conflict)
- Persons protected under Art. 3(1) of the Geneva Conventions I to IV (Non-international conflict)



# War Crimes Against Property

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## War crimes against property and other rights:

- offenses of expropriation
- offenses of destruction
- encroachment on other rights



# Prohibited Methods of Warfare

## Individual Acts

- attacks on civilian populations
  - terror against a civilian population
  - attacks on civilian objects
  - attacks on specially protected objects
  - attacks on persons and objects using the emblems of the Geneva Conventions
  - attacks causing disproportionate incidental damage
  - starvation of the civilian population
  - use of human shields
  - Nuclear/chemical/biological/non conventional weapons
- Note that there are differences between international and non-international armed conflicts under customary law and under the ICC Statute)



# Starvation in Gaza

- ICC Warrant of Arrest 21 November 2024 includes it.
- HRW: Starvation Used as Weapon of War in Gaza, civilians Deliberately Denied Access to Food, Water:  
[www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza](https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza)
- Gaza starvation could amount to war crime, UN human rights chief tells BBC [www.bbc.com/news/world-middle-east-68679482](https://www.bbc.com/news/world-middle-east-68679482)
- Gaza: starvation and bloodbath:  
[https://www.eeas.europa.eu/eeas/gaza-starvation-and-bloodbath\\_en](https://www.eeas.europa.eu/eeas/gaza-starvation-and-bloodbath_en)
- Famine expert Alex de Waal on Israel's starvation of Gaza  
<https://www.thenewhumanitarian.org/interview/2024/01/18/israel-icj-gaza-famine-starvation-de-waal>



# How to attribute individual criminal responsibility in ICL

The Different Forms of Participation in Art. 25 (3) and 28 ICC Statute

- I. Commission
- II. Instigation and Ordering
- III. Assistance
- IV. Contribution to a group crime
- V. Inchoate Crimes
- VI. Command Responsibility



# Command or Superior responsibility

- Military commanders or civilian superiors can be made criminally liable for the crimes of their subordinates as a consequence of their **failure to act** (no committing, no ordering, no planning, no assisting....)
- Superiors are responsible for the crimes committed by their subordinates if they culpably violated their duties to **control, prevention and punishment** under IHL



# Command responsibility

- Is an original creation of international criminal law
- Military origin, extended to the civilian context
- Expansion of criminal liability
- Rooted in the hierarchical organizational structure that typically characterizes crimes under international law
- When evidence of direct criminal responsibility on the part of the superior is absent



# Development of the doctrine

## Ancient (military) origins of the doctrine

- Sun Tzu Chinese military manual, 500 BC
- Japanese general Yamashita trial after the II WW in Japan
- First codification in Article 86(2) of Additional Protocol 1 to the Geneva Conventions of 1977
- ICTY/ICTR Tribunals





## General Tomoyuki Yamashita

November 8, 1885 - February 23, 1946) was an Imperial Japanese Army general during World War II. Named "The Tiger of Malaya".

At the forefront of the invasion of Malaya and Singapore, which fell in 70 days. British Prime Minister, Winston Churchill called it the "worst disaster" and "largest capitulation" in British military history.

After the war, following a trial in Manila, he was found guilty of war crimes and executed by hanging in 1946 for his troops' conduct during the Japanese defense of the occupied Philippines in 1944.



# The defense

American lawyer Harry E. Clarke, a colonel in the United States Army at the time, served as the chief counsel for the defense. In his opening statement, Clarke asserted:

“ *The Accused is not charged with having done something or having failed to do something, but solely with having been something....American jurisprudence recognizes no such principle so far as its own military personnel are concerned....No one would even suggest that the Commanding General of an American occupational force becomes a criminal every time an American soldier violates the law....one man is not held to answer for the crime of another.*



# Article 86(2) I Additional Protocol 1977 to the Geneva Conventions

*“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superior from **penal or disciplinary** responsibility, as the case may be, if they knew or had information which should have enabled them to conclude in the circumstances at that time, that he was committing or was going to commit such a breach and if they did not take **all feasible measures within their power to prevent or repress the breach**”.*



# Art. 7(3) ICTY and 6(3) ICTR Statutes

The AP definition was reproduced in the ad hoc Tribunals' Statutes, but now only penal responsibility.

*“The fact that any of the acts referred to [...] was committed by a subordinate does not relieve his superior of **criminal responsibility** if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.*



# Article 28 ICC St.

- "In addition to other grounds": thus it is a mode of liability to be coordinated with Article 25(3) ICC St.
- Letters a) and b): clearly applies to civilian superiors, BUT with some restrictions (narrower than the command responsibility for the military commander)
- No strict liability or liability for position: mens rea requirement
- The crime must be committed “as a result” of superior’s failure to exercise control properly over the subordinates : is it a causal nexus required?



# Elements of superior responsibility

1. A superior-subordinate relationship
2. The superior must know or negligently fail to know that the subordinate is about to commit or has committed a crime (under international law)
3. The superior must fail to take the necessary and reasonable measures to prevent the commission of the crime or initiate criminal prosecution of the perpetrator



# 1) The superior-subordinate relationship

- No longer only military superiors but also civilian superiors, who exercise *similar control*
- According to the jurisprudence the core is the position of **effective control** on the part of the superior with regard to the subordinate: “the material ability to prevent and punish the commission of te offences [of the subordinates]” (ICTY, Celebici judgment, Appeals Chamber, 20 Feb 2001, para. 196)
- It is not necessary that the control is based on legal authority: de facto control is sufficient: decisive factor are factual circumstances
- The capability of exercising control must be embedded in a hierarchical structure with a certain degree of stability and organization: control merely based upon the personal relationship between individuals does not suffice (“substantial influence” does not suffice)



## 2) Mental element

- ✓ The superior knew, or
- ✓ Should have known about the crime
  - Mental element lowered than general rule established by article 30 ICC St. : negligence
  - The standard of negligence required is still open to debate: some presumptions of knowledge have been used by the ad hoc Tribunals
  - Art. 28 ICC St. specifies: “owing the circumstances at the time”...
  - Crucial to determine whether the superior in the proper exercise of his duties would have gained knowledge of the commission of the crime by his subordinates
  - The standard for civilian superiors is narrower: “consciously disregarded information which clearly indicated ... that the subordinates were committing or about to commit such crimes”.



### 3) Failure to take necessary measures

Depending on the actual circumstances of the case, it may be required that the superior takes:

- ✓ Preventive measures, or

- ✓ Repressive measures

- To be responsible the superior must actually have the opportunity to prevent the crime or repress it: “within his or her power”.

- According to the jurisprudence it is not possible to generalize as to what measures are required

- In any case they must be necessary and reasonable measures: the measures that would have served, from an objective ex ante point of view, to prevent the commission of the crime



# Superior responsibility in recent ICC AW

*Arrest warrant for Vladimir Putin*

*Arrest warrant for Benjamin Netanyahu:* “With regard to the crimes, the Chamber found reasonable grounds to believe that Mr Netanyahu, ..., Prime Minister of Israel at the time of the relevant conduct, and Mr Gallant, ..., Minister of Defence of Israel at the time of the alleged conduct, each bear criminal responsibility for the following crimes as **co-perpetrators for committing the acts jointly with others: the war crime of starvation as a method of warfare**; and the crimes against humanity of murder, persecution, and other inhumane acts.

The Chamber also found reasonable grounds to believe that Mr Netanyahu and Mr Gallant each bear criminal responsibility as **civilian superiors for the war crime of intentionally directing an attack against the civilian population**.

<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>

