

# War Crimes 2026

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## 2024-26 – Awful years

Extensive death and injury of civilians across 14 conflicts an increase from 2023 which itself had seen a rise of 72 percent compared to 2022, largely due to Israel-Hamas war. Heavy use of high-yield explosive weapons in urban areas— including in Gaza, Lebanon, Myanmar, Sudan, Syria, and Ukraine

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## WAR CRIMES – ARTICLE 8 -ICC Statute

- **Can be individual or isolated acts-**
  - *no need to be widespread or systemic (crimes against humanity) and*
  - *no requirement of special intent (genocide).*
- **Need for armed conflict-** must take place in the context of or be associated with armed conflict.



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## Potential Perpetrators

- Military or similar personnel
- Members of Government – *Tokyo*,  
Failure to prevent...election to continue in government
- Party officials and administrators  
Civilians – *Zyklon B* case

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## Bomber Harris – aim of allied bombing

- The aim is the destruction of German cities; the killing of German workers; and the disruption of civilised life throughout Germany. It should be emphasised that the destruction of houses, public utilities, transport and lives; the creation of a refugee problem on an unprecedented scale.....are accepted and intended aims....

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## Armed Conflict

- ‘Armed conflict’ is said to exist once fighting breaks out between armed forces of two states or when armed forces of one state invade the territory of another, irrespective of the scale of the fighting, or indeed, in the case of an invasion, whether any ‘declared war’ .
- Nowadays the applicability of humanitarian law is triggered by the existence of factual circumstances irrespective of whether or not there has been an actual declaration of war.

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## International and Non-international Armed Conflicts

- These four conventions were almost exclusively concerned with international 'armed conflicts' (wars between states). The only provisions in relation to non-international armed conflicts were contained in common article 3.
- Customary rules of IHL – found in ICRC study
- Effective or overall control test

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## Non-international armed conflict

- In non-international violent disputes, an armed conflict is said to exist once the violence reaches a certain level of intensity and organization. It is difficult to define these levels with precision.

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## IHL can be divided into 2 parts

- Those rules governing international armed conflicts (including wars of national liberation). These are found in the 1907 Hague Conventions and Rules, the four Geneva Conventions of 1949 and Protocol I of 1977.
- Those rules governing non-international armed conflicts. These are found in common article 3 and Protocol II of 1977.

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## 'Hague Law' and 'Geneva Law'

- 'Hague Law' refers to the rules governing how damage/injury may be inflicted on the enemy (conduct of hostilities). Examples are the prohibition on the use of 'dum-dum bullets' and on poisonous gas.
- 'Geneva Law' refers to rules designed to protect civilians and those no longer participating in conflict.

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## Breaches of IHL can be divided into two kinds:

- Breaches of IHL can be divided into two kinds:
- (1) simple breaches
- (2) grave breaches.
- Simple breaches are less serious; they are intended to be punished primarily by a country's own court or court-martial system.
- Grave breaches cover the most serious breaches of the Geneva Conventions. All states have criminal jurisdiction to try those accused of 'grave breaches' whatever their nationality, or whatever the crimes were committed. This is known as 'universal criminal jurisdiction'.

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## Grave Breaches – Art 8 (2)(a)

- Wilful killing;
- Torture or inhuman treatment, including biological experiments;
- Wilfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages

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## Key concepts and Principles

- **Armed Conflict**
- **Military necessity** *balanced with*
- **Principle of humanity**
- **Principle of Distinction**
- **Precaution**

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## Key principles

- **Principle of Proportionality**
- **Unnecessary suffering**
- **Humane treatment**

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## Art 8(2)(e) –war crimes

**Intentionally directing attacks against the civilian population or civilian objects**

**Attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission**

...as long as they are entitled to the protection given to civilians or civilian objects

**Rape and sexual violence**

**Conscription and enlisting child soldiers**

**Ordering displacement of civilian population** (unless security of civilians involved or imperative military reasons demand)

Killing or wounding treacherously a combatant adversary

Declaring no quarter be given

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## Wilful killing

- Killed same as caused death/murder
- Can be act or omission
- Intent to kill or cause greivous bodily harm
- Wilful encompasses reckless acts

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## Art. 8(2)(a)(ii) Torture or inhuman treatment

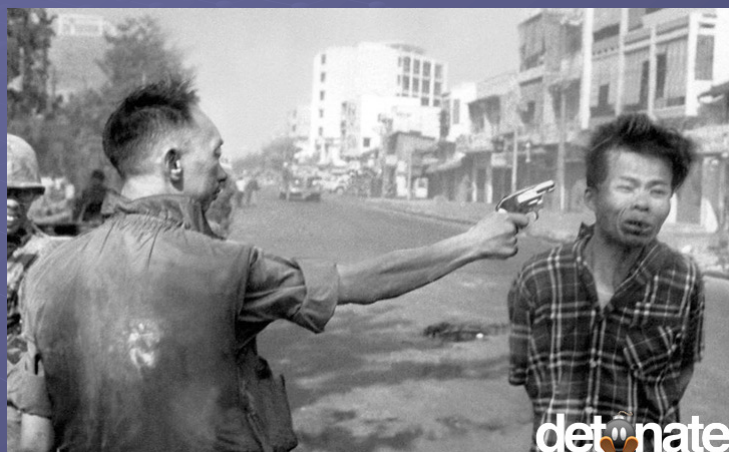
- ICC incorporates purposive element of Torture Convention
- No need for official capacity
- Deliberate act or omission
- No precise threshold level of suffering or pain

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## IHL and human rights



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## Art. 8(2)(a)(vi) wilful deprivation of fair trial

- Right to counsel
  - Right to prepare defence
  - To be informed of charges
  - Independent and impartial court
  - Right to interpreter
  - Length of trial a factor
- See judicial guarantees in Geneva Conventions/Additional Protocols

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## Military Necessity

- **All combat activity must be justified on military grounds; activity that is not militarily necessary is prohibited.**
- **Military necessity cannot be invoked as an excuse to suspend the application of IHL.**

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# Art 8(2)(a)(iv) Extensive destruction of property

- Not justified by military necessity

Covers only measures that are lawful in accordance with laws of war

- Such property protected by one or more Geneva Convention of 1949

Thus this war crime only covers property specifically protected

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## Distinction

A distinction must always be drawn between combatants and non-combatants.

Combatants have the right lawfully to take part in armed conflict. They may kill other combatants

Non-combatants have no right to take part in armed conflicts and may not be made the objects of attack.



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## Proportionality

Must weigh military advantage of targeting lawful military objective against collateral damage most likely to be caused

When attacks will result in collateral damage, this must not be excessive to the direct and concrete military advantage to be gained

Weigh collateral damage against military necessity, taking into consideration principle of humanity



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Libyan rebels during clashes with army forces loyal to Muammar Gaddafi on the outskirts of Bin Jawad 2011



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2012 Damascus suburbs have been the scene of clashes between troops and the armed opposition – combatants, fighters or civilians?



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Collateral Damage: incidental damage to protected persons (e.g. civilians) or protected objects which is unavoidable during lawful attack against military objective ???



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### HUMANITY

Forbids the infliction of suffering, injury or destruction not actually necessary for legitimate military purposes

Applicable to military purposes and choice of weapons – cannot use weapons which cause unnecessary suffering or superfluous injury

Important when a commander applies the principle of proportionality

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## Art 8(2)(b)(iv)

- Intentionally launching attack *in the knowledge* that it will cause incidental loss of life to civilians or damage to civilian objects or widespread, long-term and severe damage to natural environment which is clearly excessive in relation military advantage

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## Important questions/issues

- Targeting
- Choice of weapons
- Methods of combat
- Rules of Engagement
- Command responsibility / liability

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## Protected Objects

- **Ref. Articles 52-56, AP I**

Generally those objects used for civilian purposes which do not effectively contribute to the war effort and whose destruction does not offer a definite military advantage

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## Protected Persons

Generally those person not taking part in the hostilities, including:

- *Wounded & sick soldiers (Art 13, GC I)*
- *Shipwrecked members of armed forces (Art 13, GC II)*
- *Prisoners of war (Art 4 GC III)*
- *Civilians (Art 4, GC IV)*
- *Medical and religious personnel*



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## Military Objectives (Art 52, AP I)

Those objects which:

- by their nature, location, purpose or use, make an effective contribution to military action

AND

- their total or partial destruction, capture or neutralization
- must offer a definite military advantage in the circumstances at the time.

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## ISAF 2009 :Strains

- It was no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective because the alliance have decreed that drug traffickers and narcotics facilities are inextricably linked to the Opposing Forces and thus may be attacked”
- (SACEUR Gen Brantz Craddock 2009)



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## ISAF-Strains

- “...the guidance violated International Law...”  
(COM ISAF Gen David McKiernan 2009)



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## ISAF-Lessons learned.

- General Craddock's rejection of a requirement for intelligence was flawed as a matter of law.
- Drugs and insurgency are NOT inextricably linked.
- It is never about 'linkage' it is about:
  - Are you a member of an armed group
  - Are you a Civilian directly participating in hostilities.



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## Slippery Slope

- The word 'military' has to be interpreted with enough latitude to include strategic, psychological and political advantages...

(W.Hays Parks, 1990)



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## Art 8(2)(b)(iii) Attacks on UN and humanitarian workers

- No result required
- Ignorance of law no excuse
- 1994 Convention on Safety of UN Personnel
- Complex provisions
- Chapter VI or VII provisions of UN Charter



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## Art8(2)(b)(xxii) – Sexual Crimes

- Rape
- Sexual slavery
- Enforced prostitution
- Forced pregnancy
- Enforced sterilisation
- Any other form of sexual violence constituting grave breach of GCs

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## Rape

- Case law not uniform
- Coercive circumstances do not need show of physical force
- No definition of rape under IHL
- Protection under Art 27(2) GC IV, Art 75(2)(b) AP I and Art 76(1) API

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## 2017 Ntaganda - prohibitions of rape and sexual slavery

- While most prohibitions appear in contexts of protecting civilians or hors de combat...the ***Chamber does not consider those explicit protections to exhaustively define, or limit, the scope of the protections***
- Such conduct is prohibited ***at all times against all persons***

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## What is command/superior responsibility?

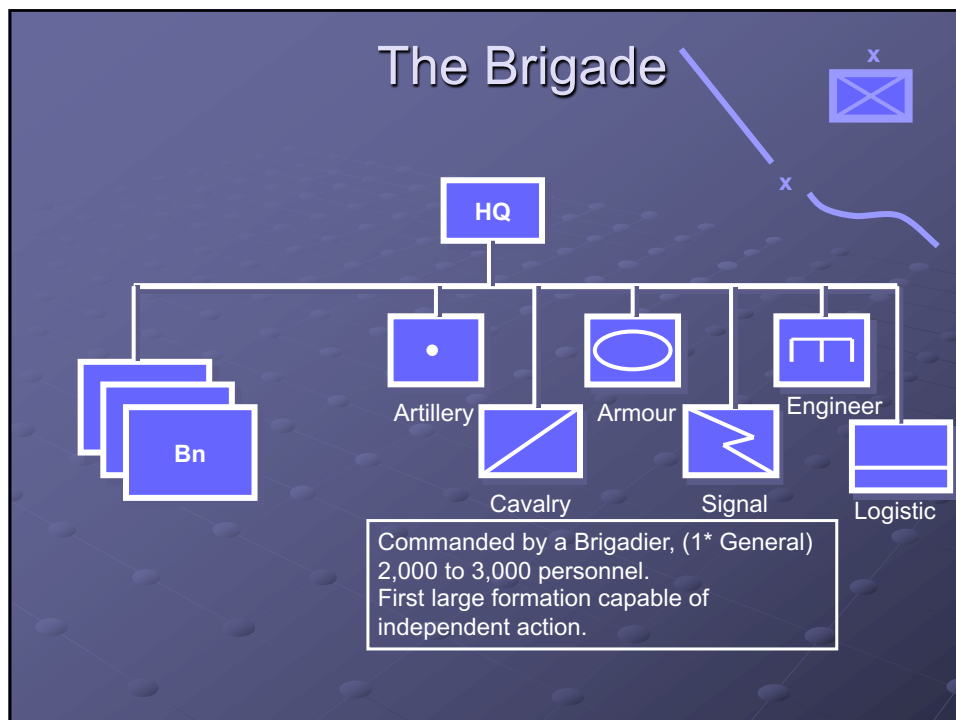
- Doctrine whereby a person in authority may, in certain circumstances, be held criminally responsible for acts committed by subordinates because of a failure to prevent them from committing such acts or a failure to punish them after the acts have been committed.
- The superior is punished for the dereliction of his/her duty in failing to prevent or punish the subordinates.
- Primary purpose - ensure compliance by the superior with laws and customs of war (IHL).

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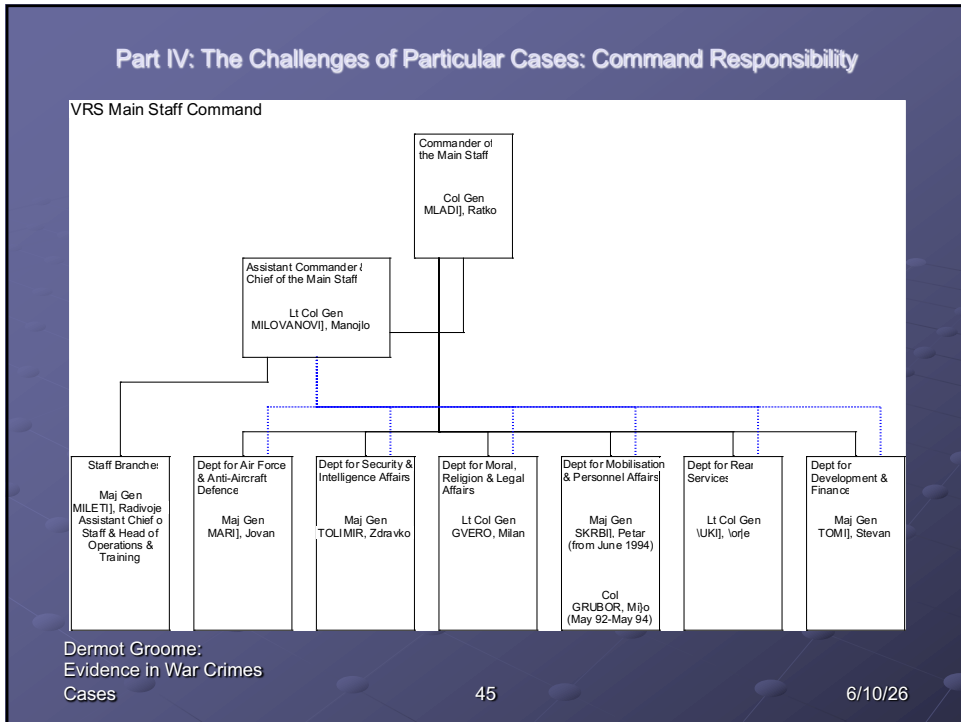
## Yugoslav and Rwanda Tribunals

- Article 7(3) ICTY/Article 6(3) ICTR Statute
- Proof that his/her subordinate is criminally responsible for the crime + elements:
  - Existence of a superior-subordinate relationship
  - Superior knew or had reason to know that subordinate was to about to commit a crime or had done so
  - Superior failed to take necessary and reasonable measures to prevent or punish the commission of crimes by subordinates

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## Article 28 ICC Statute

- A military commander shall be criminally responsible for acts by forces 'under his or her **effective** command and control, or **effective** authority and control'
- Where he knew or should have known...
- Failed to take **all** necessary and reasonable measures...to prevent/investigate

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## Requirements for superior responsibility – Art 28

- A crime within the jurisdiction of the Court must have been committed
- Requirements:
  1. Existence of a superior-subordinate relationship – **effective authority and control**
  2. The superior '**knew**' (**must have known**) or '**consciously disregarded**' information that subordinates were about to or had committed crimes; and
  3. The superior failed to take necessary and reasonable measures to prevent the crimes or punish the perpetrators thereof. (*Delalic/Celebici* case)
  4. Causal link from failure of commander to criminal conduct

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## What is reasonable for remote commanders?

operated on CAR territory at the height of the 2002-2003 CAR Operation”.<sup>341</sup> In finding that Mr Bemba did not adopt all “necessary and reasonable measures” it arrived at this conclusion “in light of his extensive material ability to prevent and repress the crimes”.<sup>342</sup> Nevertheless, while the Trial Chamber’s finding in this respect has to be read alongside its earlier findings as to the extensiveness of Mr Bemba’s control over the MLC forces in the CAR,<sup>343</sup> **the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba’s ability, as a remote commander, to take measures.**

*Bemba Appeal Judgement (2018), para.171*