War Crimes

Chapter · April 2018

CITATION
1

READS
3,749

1 author:

Alexander Schwarz
University of Leipzig
20 PUBLICATIONS **1** CITATION

SEE PROFILE

War Crimes

Alexander Schwarz

Content type:
Encyclopedia Entries
Article last updated:
September 2014

Product: Max Planck Encyclopedia of Public International Law [MPEPIL]

Subject(s):

Geneva Conventions 1949 — War crimes

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Concept and Definition

1 The term and concept of 'war crimes' is not used uniformly. A wider approach defines war crimes as all acts constituting a violation of the laws or customs of war, irrespective of whether the conduct is criminal (Werle and Jessberger [2014] 391 ; US Army Military Manual, § 499, FM 27–10; JS Pictet, ed, Geneva Convention I [1957] 351). The present contribution is based on a definition of war crimes in *stricto sensu*: A war crime is any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law (Humanitarian Law, International). This definition requires at least two conditions qualifying a conduct to a war crime. First, a violation of international humanitarian law, and second, the criminalization of the conduct under treaty or customary international law (Cassese [2013] 67). The applicability of the rules of international humanitarian law implies that a war crime must be satisfactorily connected to an armed conflict (Armed Conflict international; Armed Conflict, Non-International; Belligerency). The second condition requires that customary or international treaty law must provide legal norms entailing individual criminal responsibility for the perpetration of such a violation.

2 In contrast to crimes against humanity and genocide, crimes which are established as independent crimes under international law, the concept of war crimes is based on the accessoriness between the primary rules concerning prohibited acts under international humanitarian law and secondary rules concerning the punishment of war crimes. This structure underlies the dynamic character of the concept of war crimes, as it can be subject to change (Bothe in Cassese/Gaeta/Jones [2002] 381). While, within the classical understanding of international law, violation of its rules by State officials or individuals only engage collective State responsibility, the concept of war crimes goes beyond that principle and imposes liabilities upon individuals as well. War crimes can be prosecuted directly by International Criminal Tribunals or indirectly by national courts. The decision depends on whether the jurisdiction of the international court is primary or complementary to national courts (see International Criminal Law). As will be shown, war crimes are not only restricted to international armed conflicts, they can also be committed during non-international armed conflicts.

B. Historical Evolution of Legal Rules

1. Early Developments

3 The origins of war crimes can be found in the traditional laws of war, today called international humanitarian law; these laws regulate the conduct of armed conflicts whose rules were derived from international conventions and customary international law. The evolution of war crimes is part of the progressive development and codification of international humanitarian law by promoting individual criminal responsibility for serious violations committed under its norms. The idea of individual criminal responsibility—that individuals under international law should be responsible for serious violations of the laws of war and not only the belligerent State—is not an invention of the 20th century; it has developed in stages and goes back to the practice of trial and punishment for those guilty of such violations in the medieval period (La Haye 104). One of the earliest examples of an international prosecution in Medieval Europe is the 1474 trial of Peter von Hagenbach in Breisach, Germany, which convicted von Hagenbach of murder, rape, perjury, and other crimes against the 'laws of God and man' (Schwarzenberger 465). Von Hagenbach led a regime of brutality and terror and committed numerous violent acts against the inhabitants of Breisach and neighboring territories. A large coalition (France, Bern, Austria and the towns and knights of the Upper Rhine) put these atrocities to an end and installed an ad hoc tribunal consisting of 28 judges from the allies. Even though the Hagenbach trial differed extensively from contemporary developments of International Criminal Tribunals, it is often cited as the 'first reported international war crime trial' (Bassiouni [1992] 197).

4 At the request of the United States President Abraham Lincoln, Francis Lieber, a Columbia University professor of law, prepared the Lieber Code of 1863 ('Instructions for the Government of Armies of the United States in the Field'), a text which represents the first attempt to codify the laws of war. These instructions, applicable to the Union army during the American Civil War, established the principle of individual criminal responsibility for comprehensive violations listed in the text, such as pillage, rape, or abuse of prisoners (see Art. 44 Instructions for the Government of Armies of the United States in the Field). Codified as a municipal law instrument, the prosecution of war criminals was limited to American Soldiers and only binding to them. Prior to the 19th century, the regulation of the laws of war was a matter of national legislation (Meron 1). Nonetheless, the codification had an enormous influence on the future evolution of the laws of war and the principle of criminalizing violations of the laws and customs of war.

5 As a result of the Hague Peace Conferences (Hague Peace Conferences [1899 and 1907]), the Hague Conventions of 1899 and 1907 were the first multilateral agreements regulating the conduct of war. However, they neither clarified nor limited the principle of individual criminal responsibility and focused only on the rights and obligations of States as the classical subjects of international law.

6 In 1919, the judicial prosecution of individuals who had committed war crimes during World War I was reflected by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that analysed the applicable legal norms and listed 32 offences involving serious violations of the laws and customs of war (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties [1920] 14 AJIL 95).

7 The Versailles Peace Treaty (1919) (Treaty of Peace between the Allied and Associated Powers and Germany [signed 28 June 1919, entered into force 10 January 1920] 225 CTS 188) was the first international convention to provide specific regulation of individual criminal responsibility for violations of international humanitarian law. Art. 227 Versailles Peace Treaty included the indictment and trial of the former Emperor of Germany and Art. 228 (1) recognized 'the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.' To fulfill this provision the Versailles Peace Treaty obliged the government of the German Reich to hand over the accused persons (Art. 228 (2)) and to support the prosecution of the Allies (Art. 230). However, no international tribunal was established. Instead, the allied powers relinquished their right to prosecute war criminals and accepted the compromise offered by the German government to hold the trials before the German Reich Supreme Court in Leipzig (Bassiouni [2008] 34 ; Mc Cormack [1997] 49). In the end, only 13 proceedings against alleged war criminals reached the trial stage, nine trials came to a judgment of which none was fully executed (Werle and Jessberger [2014] 4). This disastrous beginning of the prosecution of war crimes was completed by the fact that the German Emperor was granted asylum in the Netherlands and was never held individually accountable for his acts.

8 The crucial historical moment for the prosecution of war crimes was probably the recognition of individual criminal responsibility in a statement by the International Military Tribunal of Nuremberg ('IMT') that pointed out in 1946: '[E]nough has been said to show that individuals can be punished for violations of International Law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' (*Judgment of the International Military Tribunal for the Trial of German Major War Criminals [Nuremberg 30th September and 1st October 1946]* 65). It was also the Charter of the IMT that defined war crimes in Art. 6 (b) as 'violations of the laws or customs of war.' In consideration of this provision, the IMT held that violations of the Hague Regulations of 1907 and the Geneva Conventions of 1929 'were already recognized as war crimes under international law' (*Judgment* 253). On the important question of how the Hague and Geneva Regulations had generated customary international law, the tribunal did 'not [find] necessary to decide' and simply stated that 'by 1939 these rules laid down in the convention were recognized

by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter' (*Judgment* 254). Even though this finding was not entirely justified, it is beyond controversy that the testimony of the IMT constituted a crucial stepping stone in the recognition of individual criminal responsibility for war crimes committed under international law. In contrast to the aftermath of World War I, the IMT and the International Military Tribunal for the Far East in Tokyo ('IMTFE') prosecuted officials for their perpetration of war crimes during World War II (International Military Tribunals). Despite that, the problem of victor's justice remained unresolved given that the practice of selective prosecution of the vanquished was continued by these tribunals.

2. The Grave Breaches Regime of the Geneva Conventions

9 After World War II, to ensure the respect of the laws of war, the Geneva Conventions I-IV (1949) for the protection of war victims listed certain serious violations of the Conventions as 'grave breaches', providing individual criminal responsibility to persons committing such breaches (see Arts 49–51 Geneva Convention I, Arts 50–52 Geneva Convention II, Arts 129–31 Geneva Convention III, Arts 146–48 Geneva Convention IV). As a consequence, under the Geneva Conventions the signatory States are compelled to provide penal sanction for such acts under domestic law and to try perpetrators of grave breaches or to extradite them to another State at its request (aut dedere aut iudicare) (JS Pictet, Commentary vol 4 [1958] 591). In each of the Conventions, grave breaches are defined by an exhaustive list of acts applicable in international armed conflicts. Art. 85 (5) Additional Protocol I codified that the grave breaches of the Geneva Conventions and of the Protocol 'should be regarded as war crimes' (Geneva Conventions Additional Protocol I). Due to the universal recognition of the Geneva Conventions by all States (195 of 195), they are generally considered to reflect customary international law (O'Connell in Fleck [2013] 27, margin 126). However, Additional Protocol I, which extends the definition of grave breaches, has not enjoyed the same universal acceptance as the four Geneva Conventions (173 of 195, Sep 2014). The regime of grave breaches of the Geneva Conventions restricts the scope of individual criminal responsibility by the distinction of acts constituting an ordinary violation of the laws of war and those constituting serious violations (grave breaches). Only the latter should amount to war crimes and entail individual criminal responsibility for the perpetrators of those acts. Hence, not any ordinary violation of the Geneva Conventions qualifies as a war crime (Dinstein in Dinstein and Tabory [1996] 4). The list of 'grave breaches' in the Geneva Conventions and its Additional Protocol I is primarily concerned with, and must be directed against, persons or property protected under the Conventions, such as prisoners of war, the sick or wounded, or civilians, and entails individual criminal responsibility not only for committing but also for ordering grave breaches to be committed.

10 The concept of grave breaches raises the question of the relationship between the two categories: war crimes and grave breaches. A general response has already been given by the wording of Art. 86 (5) Additional Protocol I, which states that grave breaches shall be regarded as war crimes. According to this, grave breaches are nothing more than a treaty-based type of war crime. The peculiarity indeed consists of their character as 'secondary rule' through which violations of certain primary rules of international humanitarian law entail individual criminal responsibility in International Law (Abi-Saab 114). By introducing the regime of grave breaches, the difficult duty of identifying customary or treaty rules establishing breaches of the *ius in bello* as war crimes has been simplified by the constitution into a proper category of particularly serious violations. That does not mean that that the range of war crimes under customary international law is confined to such 'grave breaches'. On the other hand, not every 'grave breach' of Additional Protocol I is necessarily a war crime under customary international law (eg, apartheid).

3. The International Criminal Tribunals for the Former Yugoslavia and Rwanda

11 After the time of the Cold War, the first decisive development concerning the prosecution of individuals for violations of the laws of war was the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as the International Criminal Tribunal for Rwanda (ICTR), both of which were created as ad hoc tribunals by the United Nations Security Council and find their legal basis in Chapter VII and Art. 25 UN Charter.

12 The Statute of the ICTY, which is restricted to the former Yugoslavia (Yugoslavia, Dissolution of), did not use the term 'war crimes' but included two categories of them: Art. 2 ICTY Statute penalizes 'grave breaches of the Geneva Conventions against persons or property protected under the provisions of the relevant Geneva Convention' committed in an international armed conflict; Art. 3 ICTY Statute penalizes 'violations of the laws or customs of war', amended by an illustrative list that contains elements of the Hague Rules of Land and Warfare as well as certain provisions of Additional Protocol I of the Geneva Conventions. Art. 3 ICTY Statute, as interpreted by the Tribunal, serves as a 'general provision covering all violations of humanitarian law' not qualified as grave breaches, acts of genocide, or crimes against humanity regardless of whether the violation occurs within the context of an international or non-international armed conflict (*Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal]* ['Interlocutory Appeal Decision'] ICTY-94–1-AR72 [2 October 1995] para. 89; Wolf 26). In the Tadić Case, the Appeals Chamber ultimately concluded that 'all of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules of the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife' (Interlocutory Appeal Decision paras 128–37, 134). This interpretation of the Appeals Chamber in the Tadić case signalled a breakthrough for the applicability of individual criminal responsibility for serious violations of humanitarian law in non-international armed conflicts.

13 The Statute of the ICTR covers, according to the nature of the conflict in Rwanda, war crimes committed in a non-international armed conflict. Art. 4 ICTR Statute therefore includes 'violations of Article 3 common to the Geneva Conventions and of Additional Protocol II' (Geneva Conventions Additional Protocol II [1977]). In its first judgment in the Akayesu Case, the ICTR adopted the view of the Appeals Chamber in the *Tadić Case* and concluded that 'the violation of these norms entail, as a matter of customary international law individual responsibility for the perpetrator.' (*Prosecutor v Akayesu [Judgment]* ICTR-96–4-T [2 September 1998] para. 616). Even at this early stage, it is already evident that both courts considerably developed and substantiated the law of war crimes by their far-reaching jurisprudence.

14 The creation of the two ad hoc tribunals also strengthened the idea of a permanent international criminal court. Finally, the adoption of the ICC Statute in 1998 consolidated some of the crucial and still controversial conclusions achieved by the jurisprudence of the ICTY and the ICTR (International Criminal Court (ICC)). Particularly with regard to the contentious question of to what extent the jurisdiction of the ICC will encompass war crimes committed in non-international armed conflicts, the influence of the Tadić case cannot be overstated. This inter alia led to the adoption of a substantive list of war crimes committed in non-international armed conflicts into Art. 8 ICC Statute. Thus, the ICC Statute is, after the ICTR Statute, the second international instrument that explicitly recognized the criminal liability of individuals for war crimes committed in non-international armed conflicts. Some of the acts included in Art. 8 ICC Statute have been criminally sanctioned for the first time at the international level.

C. Serious Violations of International Humanitarian Law

15 Not any violation of international humanitarian law amounts to a war crime. In the *Tadić Jurisdiction Decision*, the Appeals Chamber of the ICTY defined certain preconditions that must be met to comply with the requirements of a war crime following to Art. 3 ICTY Statute:

(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be satisfied; (iii) the violation must be serious; (iv) and the violation of the rule must give rise, under customary or conventional law, to the individual criminal responsibility of the person violating the rule (*Interlocutory Appeal Decision* para. 94).

16 Corresponding to the first two conditions, a war crime is based on a violation of a rule of international humanitarian law that is either customary in nature or based on treaty law (Henckaerts and Doswald-Beck [2005] 572). The necessary linkage clarifies that the law of war crimes as substantive law is not independent but accessorial to the primary rules of international humanitarian law (Werle and Jessberger [2014] 404). Consequently, war crimes must be interpreted in light of the rules of international law, and only if it is established that the act constitutes an infringement of an applicable norm of international humanitarian law can the act in question amount to a war crime.

17 According to the third condition (iii), the violation of international humanitarian law must additionally be serious in nature, which implies a 'breach of a rule protecting important values' and that the breach 'must involve grave consequences for the victim' (Interlocutory Appeal Decision para. 94). To illustrate this, the Appeals Chamber in its decision gives an example for a non-serious violation: 'the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Art. 46 (1) Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory' (para. 94).

18 A qualification must be made to this approach insofar as acts can amount to war crimes by breaching important values, even when they do not physically endanger persons or objects directly, as Art. 85 (3) Additional Protocol I demands for the grave breaches of the Additional Protocol I defined therein (see Dörmann *Elements of War Crimes* [2003] 130). In other words, not all acts in order to amount to war crimes, necessarily include a general result requirement (Henckaerts and Doswald-Beck [2005] 569). This means that, for instance, in case of the failure of a weapon system, a crime—like unlawful attacks against persons or objects protected, as codified in Art. 8 (2) (b) (i) ICC Statute—would also be committed even when the intended target was not hit. This is suggested by the fact that the Preparatory Committee for the Rome Conference refused by majority the general requirement of such a result (Dörmann *War Crimes* [2003] 381). Whether a crime has to result in concrete harm or damage depends on the definition of the specific war crime as can be seen from the wording of Art. 8 (2) (b) (vii) Rome Statute that explicitly adds a result requirement by asking for 'resulting in death or serious personal injury'.

D. Criminalization of Violations of International Humanitarian Law

19 Not every (serious) violation of international humanitarian law amounts to a war crime. Essential to the identification of war crimes is that the violation of international humanitarian law (primary rule) has to be criminalized by treaty or customary international law (secondary rule); only then can individual criminal responsibility for the prohibited conduct be entailed and the relevant act be classified as a war crime. To establish which violations of international humanitarian law entail individual criminal responsibility, different possibilities can be taken into consideration.

20 First individual criminal responsibility can be derived from the grave breaches regime of the Geneva Conventions of 1949. The special feature of these provisions lies in the fact that they explicitly entail individual criminal responsibility for the violation of the listed rules. Therefore, the determination whether the breach of those rules creates criminal responsibility for the individual is easily possible without the need for additional requirements. Unfortunately, the same is not usually

the case for other rules of international humanitarian law. Apart from the grave breaches regime, the relevant international treaties on international humanitarian law do not entail individual criminal responsibility and an international legally binding list of criminalized breaches of international humanitarian law does not exist.

21 Further international criminal tribunals entail criminalization of prohibited acts under their jurisdiction in various degrees. Art. 3 ICTY Statute, for instance, criminalizes all violations of the 'laws and customs of war' which applies to all primary rules falling under this scope (Ambos [2014] 161). By contrast, the list of 51 war crimes codified in Art. 8 (2) ICC Statute is exhaustive and criminalizes only the prohibited acts listed therein. Consequently, violations of international humanitarian law, which have been criminalized or termed as war crimes by the Statute of an international criminal court, may be justifiably regarded as war crimes under the jurisdiction of the relevant international court (Cassese [2013] 68).

22 Additionally individual criminal responsibility for war crimes can be derived from customary international law providing criminal sanctions for serious violations of international humanitarian law. According to Art. 38 (1) (b) ICJ Statute ([adopted 26 June 1945, entered into force 24 October 1945] 145 BSP 832) the existence of customary international law requires a general State practice (*usus*) and a belief of States that such practice depends on the nature of the rule, accepted as law (*opinio iuris*). Filling the gap left by treaty law, customary international law today plays an important role for the development of international humanitarian law. Reflecting the work of international courts and international criminal tribunals in the assessment of State practice, the question of whether or not a violation of international humanitarian law amounts to a war crime under customary international law can only be answered by taking into account the different sources of State practice that contributes to the existence of customary international law: (i) military manuals; (ii) national legislation; (iii) judicial decisions (Interlocutory Appeal Decision para. 99); (iv) official pronouncements of States (*Case concerning Military and Paramilitary Activities in and against Nicaragua [Nicaragua v United States of America] [Merits]* [1986] ICJ Rep 14, 100 para. 190); and (v) the general criminal principles of criminal justice common to domestic legal systems (*List and others [Hostages Case]* paras 634–35). In fact, numerous international criminal or military courts have classified breaches of international humanitarian law as war crimes.

E. General Requirements

1. Nexus to an Armed Conflict

23 An essential element of any war crime is that the relevant conduct must be satisfactory connected ('nexus') to an armed conflict (*Prosecutor v Mucic et al [Judgment]* ICTY-IT-96–21-T [16 November 1998] para. 193; *Prosecutor v Semanza [Judgment]* ICTR-97–20-A [20 May 2005] para. 369). Consequently, acts unconnected to an armed conflict are not considered to be war crimes.

(a) The Nexus Requirement

24 The nexus requirement entails the fundamental distinction between ordinary offences under domestic law, such as murder, and the qualification of war crimes, such as the killing of a prisoner of war (Cottier in Triffterer [2008] 293). At the same time the nexus requirement distinguishes war crimes from other international crimes (Ambos [2014] 141).

25 Pursuant to the ICTY jurisprudence, the prohibited act needs neither be committed in the course of fighting nor inside the area of actual combat, as long as the 'crimes were closely related to the hostilities' (*Interlocutory Appeal Decision* para. 70; *Prosecutor v Tadić [Opinion and Judgment]* ICTY-94–1 [7 May 1997] para. 573). Rather, the crucial aspect is the existence of a *functional relationship* between the prohibited conduct and the armed conflict (Interlocutory Appeal Decision para. 69). Drawing on the ICTY *Kunarac* Appeals Chamber's judgment 'the armed conflict need not

to have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, the manner in which it was committed or the purpose for which it was committed.' (*Prosecutor v Kunarac [Judgment]* ICTY-96–23 and ICTY-96–23/1-A [12 June 2002]; 'Kunarac Appeal Judgment' para. 58). To be more explicit: the crime must be, at a minimum, significantly influenced by the armed conflict and not just occasionally committed by taking advantage of the disorder caused by the conflict (Ambos [2014] 141). Thus in a case-by-case study, it has to be clarified if the armed conflict created the situation for the crime to be perpetrated. In order to prove the existence of the nexus element, several criteria have been deemed relevant by international criminal courts and tribunals:

> the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties (Kunarac Appeal Judgment para. 59; *Prosecutor v Boškoski and Tarčulovski* [Judgment] ICTY-IT-04–82-T [10 July 2008], para. 239; *Prosecutor v Katanga et al* [Decision on the Confirmation of Charges] ICC-01/04–01/07 [30 September 2008] para. 382).

26 These factors are not conclusive requirements for war crimes, but they serve as an indication that can help to identify the 'nexus'.

27 The nexus element is also included in the Elements of War Crimes of the ICC Statute assuming that 'the conduct took place in the context of and was associated with an (international) armed conflict'. With regard to the mental requirements of the nexus element, the ICC Elements of War Crimes stipulates that the perpetrator must only be aware of the factual circumstances that established the existence of an armed conflict (Introduction Art. 8 Elements of Crimes). In contrast, there is no requirement to the perpetrator for a legal evaluation of these circumstances, such as the nature of the conflict as international or non-international, and no requirement for awareness by the perpetrator of the facts that established the armed conflict (Ambos *Verbrechenselemente* [2001] 407 ; La Haye 113).

(b) Armed Conflict

28 In international law, a positive definition of 'armed conflict' does not exist. However, common Art. 2 Geneva Conventions of 1949 entails that all four Conventions shall apply in cases of declarations of war and partial or total occupation (Occupation, Belligerent). International humanitarian law traditionally distinguishes between international and non-international armed conflicts. This distinction is crucial because it decides which rules of international humanitarian law apply after the outbreak of an armed conflict in a given situation. Art. 8 ICC Statute also differentiates between war crimes committed in international and non-international armed conflict. Following the ICTY jurisprudence, the existence of an 'armed conflict' requires that there is a resort to armed forces between States or non-State actors (*Interlocutory Appeal Decision* para. 70). Whether a situation amounts to an international or a non-international armed conflict depends decisively on the parties involved. While international armed conflicts (also called inter-State conflicts) occur between two or more States, non-international armed conflicts occur between States and organized (non-State) armed groups or between such groups within a State. Art. 1 (2) Additional Protocol II specifies for non-international armed conflicts that 'internal disturbances and tensions' do not amount to an armed conflict. From this provision, it follows that in contrast to an international armed conflict in which the intensity of the armed violence is irrelevant, the sufficient intensity of the armed violence is a constitutive prerequisite for the existence of a non-international armed conflict (Kleffner in Fleck [2013] 45, margin 202). The required intensity has to be established on the basis of objective criteria laid down in Additional Protocol II of the Geneva Conventions. In addition to the *intensity requirement*, the parties of a non-international armed conflict must in contrast to an international armed conflict, develop a certain degree of organization

to reach the threshold for the applicable rules of non-international armed conflict (*organizational requirement*). While the rules applicable in international armed conflict are highly developed and extensively codified by the four Geneva Conventions and its Additional Protocol I, the law of non-international armed conflict is more summary in nature and regulated by Art. 3 common to the Geneva Conventions I–IV and Geneva Conventions Additional Protocol II (1977).

(c) War Crimes in Non-International Armed Conflicts

29 Traditionally, war crimes could only be committed within the scope of an international armed conflict. This can be illustrated by the International Committee of the Red Cross (ICRC) that stated in 1993: 'according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict' (Preliminary Remarks of the ICRC, 25 March 1993). At that time, there were still differences of opinion about the question of whether violations of Additional Protocol II, regulating non-international armed conflicts, could also constitute war crimes. It could be seen as a real innovation that, for the first time, the ICTR Statute in 1994 expressly extended jurisdiction over individuals accused of violating common Art. 3 Geneva Conventions regulating non-international armed conflict. Correspondingly, the Appeals Chamber decision of the ICTY in the *Tadić Case* stated that 'war crimes' as provided in Art. 3 ICTY Statute also apply in internal armed conflicts according to general international law (Interlocutory Appeal Decision paras 126–32). Today, it is widely recognized by firmly established case-law and national legislation that serious violations of the laws and customs of war applicable in non-international armed conflicts can also amount to war crimes, on condition that the respective conduct is criminalized (Cassese [2013] 66). Confirmed by the wording of Art. 8 (2) (c) and (e) ICC Statute that incorporated a notable number of serious violations of humanitarian law committed in non-international armed conflicts into the list of war crimes under its jurisdiction, this development is also in line with the so-called *assimilation thesis* which is relevant to customary international law and reflects the constantly changing structure of International Criminal Law with the effect that today war crimes can be committed in international armed conflicts as well as in non-international armed conflicts (Ambos [2014] 117; Kress [2000] 105–09 ; Zimmermann in Triffterer [2008] 476 margin 237).

30 Apart from that, during times of war, it is not only war crimes that can constitute crimes against international law. Rather, acts committed in the course of armed conflict may also constitute a crime against humanity or genocide (Dinstein [2010] 266).

2. Perpetrators of War Crimes

31 Under contemporaneous international law, war crimes can only be committed by individuals and not by legal persons. Neither organizations nor States can be held responsible for war crimes before international criminal tribunals. There is, however, the possibility that forms of collective perpetration of war crimes may be punished under international criminal law (eg, joint criminal enterprise) (see criminal responsibility, modes of). Numerous post-World War II tribunals widely recognized that not only combatants but also civilians can be held responsible for committing war crimes (*Prosecutor v Musema [Judgment and Sentence]* ICTR-96–13-A [27 January 2000], paras 274 et seq; *Prosecutor v Semanza [Judgment and sentence]* ICTR-97–20-T [15 May 2003], para. 358; Robinson, War Crimes in Cryer [2010] 286).

32 Pursuant to the ICTY Prosecution in the *Delalic Case*, 'it is not even necessary that the perpetrator be part of the armed forces, or be entitled to combatant status in terms of the Geneva Conventions, to be capable of committing war crimes during international armed conflict.' (*Prosecutor v Delalić et al* (Celebići Case Appeal Judgment) IT-96–21-A [20 February 2001] para. 325). In contrast, the Trial Chamber in the *Akayesu* judgment as well as the Trial Chamber II in *Prosecutor v Kayishema and Rizindana* of the ICTR initially seemed to assume that individuals who do not belong to the armed forces could be held responsible for war crimes only when there is a close relationship between them and the armed forces similarly to 'individuals who were legitimately

mandated and expected as public officials or agents or persons otherwise holding public authority or de facto representing the Government to support or fulfill the war efforts' (*Prosecutor v Akayesu [Judgment]* ICTR-96–4-T [2 September 1998], para. 640; *Prosecutor v Kayishema and Ruzindana [Judgment]* ICTR-95–1-T [21 May 1999] paras 173–76). Thereinafter, the Appeals Chamber in the *Akayesu Case* set aside the judgment of the latter and declared 'that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Art. 3 under the pretext that they did not belong to a specific category.' (*Prosecutor v Akayesu [Judgment]* ICTR-96–4-A [1 June 2001] para. 443). In view of the fact that the close connection between the act and the armed conflict (nexus) remains indispensable, the additional restriction of the Trial Chamber rules is inappropriate, or at least, unnecessary. While the nexus requirement fulfils a delimiting function in regard to ordinary crimes, there are no indications that the group of persons which potentially can commit war crimes should be limited to a specific status. Other authors believe that instead of proving the link between the acts of the perpetrator and the armed conflict, it is necessary to prove the link between the perpetrator and one of the belligerent parties of the armed conflict. According to this, the individual civilian can only be held responsible for war crimes when he is sufficiently linked to a party of the conflict (R Arnold 'The Liability of Civilians under International Humanitarian Law's War Crimes Provisions' (2002) 5 YIHL 344–59). Such a view over-stresses the understanding of the above-mentioned nexus requirement. Moreover, the restriction of war crimes to the particular status of individuals seems to be inconsistent with the wordings of the common Arts 49/50/129/146 of the four Geneva Conventions (1949) requiring the Member States to prosecute and punish all 'persons' who commit grave breaches (Ambos [2014] 146). Accordingly, the Elements of Crimes of the ICC Statute do not provide an explicit note for the category of perpetrators as there was no dissent during the negotiations at the Rome Conference that war crimes can be committed by both members of armed forces and civilians (Dörmann, Elements of War Crimes [2003] 391).

3. Victims of War Crimes

33 Generally, members of armed forces as well as civilians may be potential victims of war crimes. The crucial factor in determining conduct as a war crime is that the act harms persons who are protected under international humanitarian law. Furthermore, war crimes may be committed against other non-military targets, such as private property.

(a) Protected Persons under the Geneva Conventions

34 The Geneva Conventions consistently refer to 'protected persons' as a category of persons that is particularly in need of protection against serious violations and who can therefore become victims of grave breaches of the Conventions (see protected persons). According to the different purposes of the Geneva Conventions applicable in international armed conflict, each convention entails the protection status for different categories of persons. Geneva Convention I protects the 'wounded and sick on land' (Art. 13 Geneva Convention I), Geneva Convention II the 'wounded, sick and shipwrecked members of armed forces at sea' (Art. 12 Geneva Convention II) (Naval Warfare), Convention III the 'prisoners of war' (Art. 4 Geneva Convention III) and Convention IV 'civilians and inhabitants of occupied territories' (Art. 4 Geneva Convention IV, Art. 48 ff. Additional Protocol I) (Civilian Population in Armed Conflict; Occupation, Belligerent). These provisions are supplemented by Additional Protocol I of the Geneva Conventions (Art. 85 (2)–(4) Additional Protocol I) that stipulates the protection of persons that took part in hostilities and fell into the hands of the enemy (Arts 11, 45), the wounded, sick and shipwrecked of the adversary (Art. 10), medical and religious personnel (Arts 12, 15, 16), refugees and stateless persons (Art. 73) and persons who are *hors de combat* (Art. 41). Civilians as well as the civilian population are protected persons in both international and non-international armed conflict (Gasser/Dörmann in Fleck [2013] 234, margin 502). Prosecutions for war crimes based on the violations of these Conventions require that the victim belongs to one of the categories of 'protected persons' (Schabas [2010] 210).

(b) Victims in International Armed Conflicts

35 The rules of the Geneva Conventions regarding protected persons were classically conceived for international armed conflicts between States or in the words of the Geneva Conventions, 'parties to the conflict'. Therefore, a former approach in international armed conflict determining whether a person belongs to one party to the conflict was traditionally linked to the nationality of the person (Dinstein in Heintschel von Heinegg/Epping [2007] 149). Geneva Convention IV relative to the protection of civilian persons in time of war in Art. 4 (1), explicitly states that 'Persons protected are those (…) in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. According to this, during proceedings at the ICTY, it was argued that war crimes can only be committed against individuals of a different nationality than that of the offender, with the result that Bosnian Serbs could not be considered 'protected persons' under Geneva Convention IV because their prosecutors were also Bosnian nationals (*Prosecutor v Tadić [Opinion and Judgment]* ICTY-94–1 [7 May 1997] paras 118, 595). The Appeals Chamber of the ICTY replied that the nationality approach does not comply with 'modern inter-ethnic armed conflicts such as that in the former Yugoslavia' and that 'new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance … to a party to the conflict and, correspondingly, control by this party over persons in a given territory may be regarded as the crucial test' (*Prosecutor v Tadić [Judgment]* ICTY-94–1 [15 July 1999] para. 166). The requirement of nationality was correctly criticized by international criminal courts because it has turned out to be impractical for victims who belong to an ethnic or religious group that differs from that of the offender but who shares the same nationality (Ambos [2014] 149; Werle and Jessberger [2014] 430). Therefore in determining protected status for persons involved in international armed conflicts only an extensive interpretation of Art. 4 (1) GV ('of which they are not nationals') meets the Conventions humanitarian purpose of protection (Ambos in Haase/Müller/Schneider [2001] 336 et seq) (Humanity, Principle of). The abandonment of the nationality approach by the ICC (*Prosecutor v Katanga et al [Decision on the Confirmation of Charges]* ICC-01/04–01/07 [30 September 2008] para. 289) has led in the meanwhile, to suggestions to extend the scope of Art. 4 (1) Geneva Convention IV to other criteria like the religious orientation of the participants when this aspect can be a decisive one for the conflict (Ambos [2014] 149; Werle and Jessberger [2014] 430).

(c) Victims in Non-International Armed Conflicts

36 The nationality approach of international armed conflicts does not affect the application of the concept of war crimes in internal armed conflicts. The law of war crimes, applicable in internal armed conflicts, is aimed at members of armed forces or (non-State) organized armed groups opposite to their counterparts who share the same nationality (La Haye 119).

37 Common Art. 3 Geneva Conventions, applicable in armed conflicts of a non-international character, provides protection for 'persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other clause'. Art. 4 of Additional Protocol II contains guarantees to 'all persons who do not take a direct part or have ceased to take part in hostilities'. The question of what exactly constitutes direct participation in hostilities is still one of the most controversial issues in international humanitarian law. In the absence of detailed regulation in existing treaty law, the International Committee of the Red Cross (ICRC) explored the concept of direct participation and published its findings in 'Interpretive Guidance' (Melzer). Regardless of the controversy, the decisive element for concluding whether a person is a potential victim of war crimes is that he did not participate directly in hostilities at the time of the targeting (*Prosecutor v Tadić [Opinion and Judgment]* ICTY-94–1 [7 May 1997] para. 615). Contrarily, they may be targeted as long as they participate in hostilities (Gasser in Fleck [2013] para. 517).

F. War Crimes under the ICC Statute

38 Art. 8 ICC Statute, with an enumeration of 51 war crimes, is currently the most comprehensive provision in international treaty law regulating the law of war crimes. The codification takes into account recent developments by customary international law as well as case law from previous international criminal tribunals such as the ICTY and the ICTR. This is reflected in the fact that the Rome Statute for the first time provides an explicit codification of war crimes committed in non-international armed conflicts which has so far led to a considerable extension of the notion of war crimes (Ambos Internationales Strafrecht [2011] 275; Cassese [2013] 80). Beyond that, the recognition of new war crimes was codified in the Rome Statute, such as the recruitment of child soldiers (Arts 8 (2) (b) (xxvii), 8 (2) (e) (vii) ICC Statute) and attacks on peacekeepers (Art. 8 (2) (e) (iii) ICC Statute). Further, the statute marks a great advance in respect to the codification of gender-based crimes and sexually violent crimes, such as 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' (Art. 8 (2) (b) (xxii)).

1. Structure

39 The structure of Art. 8 ICC Statute classifies war crimes into four main categories: two of them are applicable to international armed conflict and two to non-international armed conflict. War crimes applicable to international armed conflict are regulated in Art. 8 (2) (a) ICC Statute, which criminalizes 'grave breaches of the Geneva Conventions of 12 August 1949' and in Art. 8 (2) (b) ICC Statute criminalizing 'other serious violations of the laws and customs applicable in international armed conflict'. War crimes applicable to non-international armed conflict are regulated in Art. 8 (2) (c) ICC Statute, which criminalizes 'serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949', and in Art. 8 (2) (e) ICC Statute criminalizing 'other serious violations of the laws and customs applicable in armed conflicts not of an international character' primarily based on the Hague Regulations of 1907 and Additional Protocol II to the Geneva Conventions of 1977. Thus, the Rome Statute defines war crimes by reference to the nature of conflict as well as by reference to their humanitarian law source. This approach continues, despite the increasing convergence of the laws applicable to international and non-international armed conflict (*assimilation thesis*) to follow the traditional 'two-box approach' differentiating between crimes of both types of conflict. By this method, the drafters have failed to abolish the antiquated separation of the two conflict regimes and neglected to create a uniform body of crimes applicable to all conflicts (Cassese [2013] 82; Ambos [2014] 120). In this context it is important to consider the specific thresholds and elements that apply to the respective nature of the armed conflict (international or non-international).

2. Context Element

40 In contrast to customary international law as well as the statutes of the ICTY and the ICTR, the ICC provides a particular contextual element for war crimes. Art. 8 (1) ICC Statute determines that the ICC 'shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' Notwithstanding, the expression 'in particular' reveals that 'the statutory requirement of either large-scale commission or part of a policy is not absolute' (Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I, 13 July 2006, para. 70) and can neither be seen as an element of the crime nor as a strict requirement (Ambos Internat. Strafrecht [2011] § 7, margin 233; Cottier in Triffterer, Art. 8 margin 9). Given the fact that a jurisdictional threshold for war crimes has already been addressed in the provision on complementarity in Art. 17 (1) (a) ICC Statute, the limiting character of Art. 8 (1) has proven to be more important for the Office of the Prosecutor (Schabas [2010] 201). The provision rather serves as a practical guideline by referring to criteria the Prosecutor should take into account when determining whether there is a basis to proceed with an investigation or not (Cottier in Triffterer, Art. 8 margin 9). With regard to the limited resources of the ICC, the provision also serves to prevent

the Court from being overburdened with isolated cases (Wolf 28). As a consequence, an individual and isolated act, such as murder committed during armed conflict, can potentially amount to a war crime.

3. Threshold

41 It is notable that Art. 8 ICC Statute includes two different thresholds for the existence of a non-international armed conflict. While Art. 8 (2) (d) ICC Statute refers to the 'classical' threshold of common Art. 3 Geneva Conventions, Art. 8 (2) (f) ICC Statute 'applies to armed conflicts that take place in the territory of a State when there is *protracted* armed conflict between governmental authorities and organized armed groups or between such groups.' This compromise seems to be due to the fact that a majority of delegations at the Rome Conference were against the adoption of the high and restrictive threshold contained in Art. 1 (2) Additional Protocol II of the Geneva Conventions. Instead, the wording included in Art. 8 (2) (f) was obviously influenced by the jurisdiction decision in the Tadić case (see Interlocutory Appeal Decision para. 70). This leads to the situation that under current international humanitarian law three different types of non-international armed conflicts are distinguished with an increasing threshold: the conflict according to common Art. 3, as applied by Art. 8 (2) (d) ICC Statute (lowest threshold), the conflict according to Art. 8 (2) (f) ICC Statute (medium threshold), and the type of conflict according to Art.1 (2) AP II (highest threshold) (Cottier in Triffterer 291; Ambos [2014] 133–34).

G. Classifications of War Crimes

42 In international legal doctrine, a commonly accepted classification of war crimes does not exist. War crimes can be classified in accordance to the two traditional types of conflict as it arises in the structure of Art. 8 ICC Statute: war crimes committed in international armed conflicts and war crimes committed in non-international armed conflicts. With regard to the already mentioned *assimilation thesis*, such a distinction today appears increasingly antiquated. The same applies for a classification of war crimes according to their legal source, such as the 1907 Hague Resolutions, Additional Protocol I, and other treaties concerning international humanitarian law. For the sake of comprehensibility and clarity, it seems appropriate to classify the different types of war crimes into four main categories according to the content of the criminalized conduct. These are: (1) crimes in relation to protected persons; (2) crimes in relation to protected goods, such as private property; (3) crimes in relation to unlawful methods of warfare; and (4) crimes in relation to unlawful means of warfare. In the following, this structure, which is similar to that of the German International Crimes Code (VStGB), will be applied.

1. Crimes in Relation to Protected Persons

43 Under the law of international armed conflict including the four Geneva Conventions and its Additional Protocol I, any willful direct attack against 'protected persons' (ie wounded and sick, shipwrecked persons, prisoners of war, civilians and inhabitants of occupied territories), not justified by military necessity (proportionality), amounts to a war crime. Offences against protected persons thereby include willful killing; the cause of great suffering or serious injury to body or health; torture; cruel inhuman or degrading treatment including biological, medical or scientific experiments, mutilation, and taking hostages. These acts constitute war crimes under the ICC Statute (see Art. 8 (2) (a) (i), (ii), (iii), (viii), (b) (x)).

44 The protection of civilians from violence and direct effects of military operations in armed conflict is one of the cornerstones of international humanitarian law while attacks may only be directed against combatants. In Art. 50 Additional Protocol I, civilians are defined as 'any person who does not belong to one of the categories of persons referred to in Art. 4 (A) (1), (2), (3) and (6) of Geneva Convention III and in Art. 43 of Additional Protocol I'. In other words, a civilian is a person

who is not a member of the armed forces or of a *levée en masse*. Art. 43 Additional Protocol I, applicable in international armed conflicts, provides all members of the armed forces of a party the legal status of a combatant. As such, only combatants have the right to take a direct part in hostilities and therefore to kill, harm, or destroy (so-called 'combatant's privilege') as long as their conduct is in accordance with the limitations of international humanitarian law. At the same time, combatants are legitimate targets of attacks by the armed forces of the adversary. In contrast, civilians have no right take a direct part in hostilities and shall, under all circumstances, be protected from military operations. Therefore, direct attacks against the civilian population or against individual civilians are, as long as they do not take a direct part in hostilities, considered a grave breach by Art. 85 (3) (a) Additional Protocol I. The Rome Statute in Art. 8 (2) (b) (i) accordingly classifies 'intentionally directing attacks against the civilian population as such or against civilians not taking direct part in hostilities' as war crimes.

45 The use of civilians as a shield to render certain points or areas immune from military operations is prohibited by Art. 28 Geneva Convention IV and Art. 51 (7) Additional Protocol I. Such conduct is defined as a war crime under Art. 8 (2) (b) (xxiii) ICC Statute.

(a) Principle of Distinction

46 On its basis, the Member States must at all times distinguish between the civilian population (Civilian Population in Armed Conflict) and combatants as well as between civilian objects and military objectives. Consequently, indiscriminate attacks, meaning attacks 'of a nature to strike military objectives and civilians or civilian objects without distinction' (Art. 51 (4) Additional Protocol I), constitute war crimes in international law. This follows from Art. 85 (3) (b) Additional Protocol I, classifying an indiscriminate attack directed in the knowledge that such an attack will cause excessive loss of life injury to civilians or damage to civilian objects (as defined in Art. 57 (2) (a) (iii) Additional Protocol I) as a grave breach and therefore as a war crime (Art. 85 (5) Additional Protocol I). Violations of the principle of distinction are insufficiently regulated under the Rome Statute: While intentional direct attacks against the civilian population as such are war crimes under Art. 8 (2) (b) (i), the launching of an indiscriminate attack accidently affecting the civilian population or civilian objects unfortunately was not included in the list.

(b) Principle of Proportionality

47 In armed conflicts, the killing or wounding of protected persons, such as civilians, or the destruction of civilian objects is not forbidden under all circumstances. As already mentioned, civilians lose their protection status when they take a direct part in hostilities, with the consequence that during this time they may be a legitimate target of attack. In addition, the incidental killing or wounding of civilians or the destruction of civilian objects, occurring as a consequence of a legitimate military attack, is lawful when such casualties are unavoidable and proportionate to the military advantage of the attack. The principle of proportionality requires that the incidental casualties among civilians or civilian objects (so-called 'collateral damage') are in balance with and not 'excessive' to the anticipated concrete and direct military advantage. Accordingly, a military attack is prohibited 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' (Art. 51 (5) (b) Additional Protocol I; Art. 57 (2) Additional Protocol I). The principle of proportionality is part of customary international law applicable in both international and non-international armed conflict (Henckaerts and Doswald-Beck [2005] 46). A violation of the principle is implicitly branded as a war crime by Art. 8 (2) (b) (iv ICC Statute criminalizing the intentional launching of 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'.

2. Crimes in Relation to Protected Objects

48 In international armed conflict the principle of distinction, as codified in Art. 48 Additional Protocol I, also applies for the distinction between military and civilian objects. Therefore, States must at all times distinguish between civilian and military objects and are prohibited from directing attacks against civilian objects. These are defined by a negative definition in Art. 52 (1) Additional Protocol I as all objects which are not military objectives. According to Art. 52 (2) Additional Protocol I military objectives are 'limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage'. Consequently, for classifying a military object, at least two cumulative requirements have to be met: (1) the object must effectively contribute to military action; and (2) the capture, destruction or neutralization of the object must offer a definitive military advantage. If one of the prerequisites has not been met, the object may not be legitimately targeted as military object.

49 Invariably, the protection status of civilian objects can be maintained only as long as they do not turn into military objects. This would be the case, for instance, if a school is misused as a stockpile of weapons by adversary combatants. In this context, Art. 52 (3) Additional Protocol I provides that in case of doubt whether an object that is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used.

50 Under the ICC Statute 'intentionally directing attacks against civilian objects' (Art. 8 (2) (b) (ii) ICC Statute) amounts to war crimes in international armed conflict. Additionally, the ICC Statute goes beyond the text of the Additional Protocol I and lists various civilian objects as protected: Art. 8 (2) (b) (ix) and (e) (iv) ICC Statute entails protection status in international and non-international armed conflict for 'buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected'. Art. 8 (2) (b) (v) ICC Statute further protects in international armed conflicts 'towns, villages, dwellings or buildings which are undefended'.

51 Rules protecting personal property can be found in the Hague Regulations of 1907. According to their Art. 46, the personal property of civilians shall be protected. This obligation is part of customary law (Henckaerts and Doswald-Beck [2005] 25). Art. 147 Geneva Convention IV stipulates that unlawful and wanton destruction or appropriation of property on a large scale, which cannot be justified by military necessity, is a grave breach. Accordingly, Art. 8 (2) (a) (iv) ICC Statute classifies the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' as a war crime. A similar wording is used by Art. 8 (2) (3) (xiii) for non-international armed conflicts that defines the destruction of the property of an adversary as a war crime 'unless such destruction be imperatively demanded by the necessities of the conflict'. Art. 8 (2) (b) (xvi) ICC Statute directly sanctions the pillaging of towns and places in international armed conflict. The same is regulated for non-international armed conflicts in Art. 8 (2) (e) (v) ICC Statute. The expropriation of property is further criminalized by Art. 8 (2) (a) (iv) ICC Statute.

3. Crimes in Relation to Unlawful Methods of Warfare

52 Unlawful warfare in general, is the use of weapons or methods of warfare which are not consistent with the basic rules of international humanitarian law determining how hostilities have to be conducted (Warfare, Methods and Means; Humanitarian Law, International).

53 According to Art. 35 (1) Additional Protocol I, 'in any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.' This customary rule was confirmed by the ICJ in its *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion) when it pronounced that 'methods and means of warfare,

which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited' (Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para. 95). The reasoning behind this rule is the guiding principle of military necessity which allows only the use of those methods and means of warfare which are in an adequate proportion to the military purposes of the attack ('limited warfare') (Oeter in Fleck [2013] 116). This principle implies that the belligerent parties in an armed conflict must respect both, the principle of distinction between civilians and combatants as well as between military and civilian objects (Art. 48 Additional Protocol I) and the prohibition of causing superfluous injury or unnecessary suffering (Art. 35 (2) Additional Protocol I). Accordingly, Art. 8 (2) (b) (i), (ii), (ix) and (xxiv), as well as Art. 8 (2) (e) (i), (ii) and (iv) ICC Statute criminalize the direct attacks on civilians and civilian objects.

54 As one of the basic principles of humanitarian rules on warfare, the principle of proportionality (requiring the incidental casualties are not excessive in relation to the military advantage) has to be respected by any military operation. Art. 8 (2) (b) (iv) ICC Statute therefore prohibits disproportionate incidental damages.

55 The declaration that 'no quarter will be given' was already prohibited and defined as a war crime in the Report of the Commission on Responsibility in the aftermath of World War II. This unlawful method of warfare today is codified as a war crime for both international and non-international armed conflicts by the ICC Statute (Art. 8 (2) (b) (xii) and Art. 8 (2) (e) (x) ICC Statute).

56 As a method of warfare affecting people not involved in hostilities the willful starvation of civilians as well as the use of civilians as a human shield constitutes war crimes by Art. 8 (2) (b) (xxv) and Art. 8 (2) (b) (xxiii) ICC Statute.

57 Further, methods of warfare which cause excessive damage to the environment are taken into consideration by Art. 35 (3) of Additional Protocol I, which states that 'methods or means of warfare which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment' are prohibited. The violation of this customary rule (Henckaerts and Doswald-Beck [2005] 152) is defined as a war crime by Art. 8 (2) (b) (iv) ICC Statute.

4. Crimes in Relation to Unlawful Means of Warfare

58 Means of warfare encompasses weapons, weapon systems, and platforms applied for the purposes of attack. Art. 35 (2) Additional Protocol I prohibits the use of weapons, projectiles, and materials of war that are likely to cause 'superfluous injury' or 'unnecessary sufferings'. Art. 51 (4) (b)–(c) Additional Protocol I further prohibits indiscriminate attacks including those 'which employ a method or means of combat which cannot be directed at a specific military objective; or attacks which employ a method or means of combat the effects of which cannot be limited as required by the Protocol and which consequently are of a nature to strike military objectives and civilians or civilian objects without distinction'. The criterion of 'superfluous injury' in Art. 35 (2) implicitly refers to the principle of proportionality: the physical injury of civilians is limited to the employments of weapons which are absolutely necessary to attain the intended military objective. Art. 51 (4) concerns the principle of distinction in so far as no weapon should be used where its destructive power may result in indiscriminate effects (making a distinction between combatants and civilians impossible). According to these general principles of international humanitarian law, which form part of customary international law, the use of special types of weapons, such as weapons of mass destruction, and nuclear, biological, and chemical weapons, whose destructive nature makes them intrinsically unable to avoid unnecessary injury, is wholly or partially restricted by multilateral treaties (weapons, prohibited).

59 With regard to the structure of war crimes presented above, it has to be established which weapons are prohibited and criminalized under customary international law to that extent that their

use entails individual criminal responsibility and consequently can be classified as war crimes in international law. Despite the indiscriminate nature of nuclear weapons, the existence of a comprehensive ban on their employment under customary law is still controversial (Nuclear Weapons and Warfare). In contrast, the use of chemical weapons is, according to the 1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ('CWC'), entirely prohibited (Chemical Weapons and Warfare). Due to the high ratification rate of the CWC (190 States as of September 2014), the prohibition of the use of chemical weapons inter alia forms part of customary international law (Henckaerts and Doswald-Beck [2005] 259; Dinstein in Bardonnet [1995] 151). The fact that the signatory States of the CWC are compelled to provide penal sanctions for the non-observance of the convention by their Art. 7 (1) (a) points in favor of recognizing individual criminal liability for the use of chemical weapons in international law (Werle and Jessberger [2014] 518). Accordingly, in this view the use of chemical weapons in armed conflict amounts to war crime.

60 During armed conflict the use of biological weapons is prohibited by several international treaties, foremost by the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare ('Geneva Protocol') (Biological Weapons and Warfare) and the Biological Weapons Convention of 1972. Therefore under customary law the use of any bacteriological weapon is absolutely prohibited (Henckaerts and Doswald-Beck [2005] 256; Oeter in Fleck [2013] p. 165, margin 440). The same concerns the criminalization of their use under customary law, with the result that the employment of such weapons amounts to war crimes.

61 During the drafting process of the ICC Statute the inclusion of biological, chemical, and nuclear weapons as war crimes under the ICC Jurisdiction was highly controversial. The finally achieved compromise only codified the employment of poison or poisoned weapons (Art. 8 (2) (b) (xvii) ICC Statute), poison gas (Art. 8 (2) (b) (xviii) ICC Statute) as well as certain types of ammunition, such as dum-dum bullets (Art. 8 (2) (b) (xix) ICC Statute), as war crimes in international armed conflicts. At the first Review Conference in Kampala the criminalization of those weapons was extended to non-international armed conflicts (Coalition Report [2010] 21). Although the ICC Statute contains no explicit prohibition of biological and chemical weapons and the drafting history of the Statute concerning the employment of such weapons confirms this finding, some authors hold the view that Art. 8 (2) (b) (xvii) ICC Statute ('employing poison or poisoned weapons') also covers at least certain biological and chemical weapons as 'poison' in international armed conflicts (Cottier in Triffterer 413; Detter, Law of War [2000] 252 ; Doermann [2003] 346).

62 Instead of a comprehensive list of prohibited weapons, the drafters of the Statute designed Art. 8 (2) (b) (xx) ICC Statute to serve as a 'catch-all' clause which defines as a war crime the employment of 'weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict'. Indeed, the applicability of this norm additionally requires that such means of warfare shall initially be included in 'comprehensive prohibition' concluded by a future State Conference, which so far is still lacking. As an expression of the insufficient prohibition of weapons under the ICC Statute, Art. 8 (2) (b) (xx) explicitly recalls the already existing possibility of including further weapons under the ICC jurisdiction by an annex at a future Review Conference.

H. Assessment

63 After the breakthrough of the International Military Tribunal of Nuremberg, the jurisprudence of the ICTY and the ICTR substantially developed the international criminal system by the creation of rules and regulations concerning the law of war crimes, particularly the recognition of customary war crimes committed in non-international armed conflicts. The adoption of Article 8 into the Rome Statute made important contributions to codify the essential elements of the concept of war crime.

64 While there is no doubt that the evolution of the law of war crimes has made a great leap forward in recent years, the huge achievements of the ICC Statute should not be taken to conclude that the codification of war crimes therein equates to a satisfactory level of coverage. The ensuing risk of the specification of legal norms is usually their restrictive scope of application (Pictet, Commentary [1958] 39). Such a risk also stems from the fact that in contrast to the Statutes of the ICTY and the ICTR, the catalogue of war crimes in Art. 8 ICC Statute is exhaustive which follows from the wording 'namely' of the introductory notes of each category of war crimes in the Statute. Although an exhaustive regulation appears commendable with regard to the principle of legality (Nulla poena nullum crimen sine lege), such a stringent approach sets narrow limits for further developments of the law by judicial decisions and makes it difficult in view of the high hurdles existing for subsequent amendments of the Statute (two-thirds majority required), to respond to new developments in customary international law (Ambos [2014] 120).

65 In order to consolidate the positive developments of the law of war crimes, member States should use their review possibilities for further improvements of the Statute and extend the list of war crimes by issues that were not taken sufficiently into consideration so far. In this context, the inclusion of a 'comprehensive prohibition' of specific weapons (as explicitly announced by Art. 8 (2) (b) (xx) ICC Statute), such as nuclear, biological, and chemical weapons within the ambit of war crimes in Art. 8 ICC Statute is of great significance. Another important step for narrowing the impunity gap would be the explicit prohibition of launching an indiscriminate attack affecting the civilian population or civilian objects. Unfortunately, during negotiations at the 2010 Kampala Review Conference those issues haven't played a decisive role and were not considered satisfactorily.

66 With a view to the harmonization of international humanitarian law the existing gaps of the ICC Statute relating to war crimes committed in non-international armed conflicts should be bridged as soon as possible. Particularly in cases where customary international law or international treaty law provides a broader scope of war crimes than codified in Art. 8, this broader scope should not be defeated by the ICC Statute. This is the case, for example with the prohibition of 'starvation of civilians as a method of combat' under Art. 14 (2) AP II that constitutes a war crime under customary international law (Kress [2000] 134) but unfortunately has no equivalent in Art. 8 (2) (e) ICC Statute.

67 With respect to the enforcement of war crimes and their ongoing legal evolution it is indispensable that Member States on national level implement the provisions of the ICC Statute as a minimum standard within their national legislation. This demand seems far from being reached taking into account a report which was made during the Kampala Review Conference pointing out that only 44 of the former 111 Member States enacted adequate implementing legislation, and in some cases they had enacted legislation that was flawed (Coalition Report [2010] 36–37). The deterrent effect of international criminal justice is largely based on the fact that all Member States secure strong national laws and are subject to the same standard.

Select Bibliography

JS Pictet The Geneva Conventions of 12 August 1949: Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field vol 1 (ICRC Geneva 1952).

JS Pictet (ed) The Geneva Conventions of 12 August 1949: Commentary: Geneva Convention relative to the Protection of Civilian Persons in Time of War vol 4 (ICRC Geneva 1958).

G Schwarzenberger *International Law as Applied in International Courts and Tribunals* vol 2 *The Law of Armed Conflict* (Steven and Sons London 1968).

MC Bassiouni *Crimes against Humanity in International Criminal Law* (Kluwer The Hague 1992).

Y Dinstein ‘Ratification and Universality’ in Bardonnet (ed) *La Convention sur l’Interdiction et l’Élimination des Armes Chimiques* (Nijhoff Dordrecht 1995) 151–66.
Y Dinstein and M Tabory (eds) *War Crimes in International Law* (Kluwer The Hague 1996).
TLH McCormack ‘From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Regime’ in TLH McCormack and GJ Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law The Hague 1997).
T Meron *War Crimes Law Comes of Age: Essays* (Clarendon Press Oxford 1998).
K Ambos ‘Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis—From Nuremberg to the Hague’ in GK McDonald and O Swaak-Goldman (eds) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* vol 1 Commentary (Kluwer Law The Hague 2000).
H Ascensio E Decaux and A Pellet (eds) *Droit international pénal* (Pedone Paris 2000).
C Kress ‘War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice’ (2000) 30 IsrYHR 103–78.
G Abi-Saab ‘The Concept of “War Crimes”’ in Sienho Yee and Wang Tieya (eds) *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge London 2001) 99–118.
K Ambos ‘Verbrechenselemente sowie Verfahrens- und Beweisregeln’ (2001) 54 Neue Juristische Wochenschrift 405–10.
K Ambos ‘Zur Bestrafung von Verbrechen im internationalen, nicht-internationalen und internen Konflikt’ in J Haase E Müller and P Schneider (eds) *Humanitäres Völkerrecht* (Nomos Baden-Baden 2001) 325–53.
A Cassese P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* vols 1–2 (OUP Oxford 2002).
K Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP Cambridge 2003).
K Dörmann ‘War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes’ (2003) 7 Max Planck UNYB 341–407.
JM Henckaerts and L Doswald-Beck (eds) *Customary International Humanitarian Law* (CUP Cambridge 2005).
Y Dinstein ‘The System of Status Groups in International Humanitarian Law’ in W Heintschel von Heinegg and V Epping (eds) *International Humanitarian Law Facing New Challenges* (Springer Berlin 2007) 145–56.
WA Schabas *An Introduction to the International Criminal Court* (3rd edn CUP Cambridge 2007).
C Bassiouni (ed) *International Criminal Law: International Enforcement* (3rd edn Nijhoff Leiden 2008).
M Divac Öberg ‘The Absorption of Grave Breaches into War Crimes Law’ (2008) 91 IRRC 873 163–83.
E La Haye *War Crimes in Internal Armed Conflicts* (CUP Cambridge 2008).
S Oeter ‘Methods and Means of Combat’ in D Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edn OUP Oxford 2008) 119–236.
O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd edn Beck München 2008).
N Melzer (ed) *Direct Participation in Hostilities and International Humanitarian Law* (ICRC Geneva 2009).
Coalition for the International Criminal Court, Report on the First Review Conference on the Rome Statute, Executive Summary (2010) <http://www.coalitionfortheicc.org/documents/RC_Report_finalweb.pdf> (25 March 2014).
R Cryer and others *An Introduction to International Criminal Law and Procedure* (2nd edn CUP Cambridge 2010).
Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn

CUP Cambridge 2010).
WA Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010).
W van der Wolf (ed) *War Crimes and International Criminal* Law (International Courts Association The Hague 2010).
K Ambos *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (3rd edn Beck München 2011).
A Cassese *Cassese's International Criminal Law* (3rd edn OUP 2013).
D Fleck (ed) *The Handbook of International Humanitarian Law* (3rd edn OUP Oxford 2013).
JK Kleffner 'Scope of Application of International Humanitarian Law' in D Fleck (ed) *The Handbook of International Humanitarian Law* (3rd edn OUP Oxford 2013) 43–78.
ME O'Connell 'Historical Development and Legal Basis' in D Fleck (ed) *The Handbook of International Humanitarian Law* (3rd edn OUP Oxford 2013) 1–42.
K Ambos *Treatise on International Criminal Law*: *The Crimes and Sentencing* vol 2 (OUP Oxford 2014).
G Werle and F Jessberger *Principles of International Criminal Law* (3rd edn OUP Oxford 2014).

Select Documents

Charter of the [Nuremberg] International Military Tribunal (8 August 1945) 82 UNTS 284.
Charter of the International Military Tribunal for the Far East (19 January 1946) 4 Bevans 20.
Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1920) 14 AJIL 95.
Hague Convention respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277.
Hague Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations respecting the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) (1898–99) 187 CTS 429.
Elements of Crimes (9 September 2002) Doc ICC-ASP/1/3 (Pt. II-B).
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I).
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II).
Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).
Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III).
Hostage Case, *United States v List (Wilhelm) and others*, Trial Judgment, Case No 7, (1948) 8 LRTWC 34, 19 February 1948, Nuremberg Military Tribunal [NMT].
Instructions for the Government of Armies of the United States in the Field (F Lieber 1863) in D Schindler and J Toman (eds) *The Laws of Armed Conflicts* (4th edn Nijhoff Leiden 2004) 3–20.
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.
Prosecutor v Akayesu (Judgment) ICTR-96–4-T (2 September 1998).
Prosecutor v Akayesu (Judgment) ICTR-96–4-A (1 June 2001).
Prosecutor v Boškoski and Tarčulovski (Judgment) ICTY-IT-04–82-T (10 July 2008).
Prosecutor v Delalić (Celebići Case Appeal Judgement) IT-96–21-A (20 February 2001).

Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94–1-AR72 (2 October 1995).
Prosecutor v Tadić (Judgment) ICTY-94–1 (15 July 1999).
Prosecutor v Tadić (Opinion and Judgment) ICTY-94–1 (7 May 1997).
Prosecutor v Tadić (Sentencing Judgment) ICTY-94–1-T (14 July 1997).
Prosecutor v Katanga et al (Decision on the Confirmation of Charges) ICC-01/04–01/07 (30 September 2008).
Prosecutor v Kunarac (Judgment) ICTY-96–23 and ICTY-96–23/1-A (12 June 2002).
Prosecutor v Mucic et al (Judgment) ICTY-IT-96–21-T (16 November 1998).
Prosecutor v Semanza (Judgment) ICTR-97–20-A (20 May 2005).
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (signed 17 June 1925, entered into force 8 February 1928) 94 LNTS 65.
Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) [1919] 225 CTS 188 (Versailles Peace Treaty).
UN ILC 'Draft Statute for an International Criminal Court' (1994) GAOR 49th Session Supp 10, 29.
UNSC 'Statute of the International Criminal Tribunal for Rwanda' UNSC Res 955 (1994) (8 November 1994) SCOR 49th Year 13.
UNSC 'Statute of the International Criminal Tribunal for the Former Yugoslavia' UNSC Res 827 (1993) (25 May 1993) SCOR 48th Year 29.
The War Office (ed) The Manual of Military Law (His Majesty's Stationery Office London 1929).