

PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: WAR CRIMES

What Is A 'War Crime'?

A war crime is one type of international crime. Other international crimes include [crimes against humanity](#) and [genocide](#). These international crimes are sometimes called 'atrocities crimes'.

War crimes are grave and serious violations of International Humanitarian Law (also known as the law of armed conflict), the body of law regulating the conduct of hostilities and protection of victims during armed conflict. All war crimes consist of substantive elements, outlining the necessary conduct/mental state for the crime, and a contextual or nexus element.

How Are War Crimes Different From Other Crimes?

Under customary international law, a nexus with an armed conflict is an [essential contextual element](#) of a war crime. This element distinguishes war crimes from other international crimes, like crimes against humanity and genocide, which could take place during peacetime. The specific context of war also necessitates distinctions between persons and types of conflict, which further distinguishes war crimes from more common peacetime crimes. For example:

	War Crime of Murder*	War Crime of Willful Killing	Culpable homicide amounting to murder	Culpable homicide not amounting to murder
Conduct	1. The perpetrator killed one or more persons 2. Such persons were <i>hors de combat</i> , or were <i>civilians</i> or personnel not taking direct part in hostilities	1. The perpetrator killed one or more persons 2. Such persons were <i>protected</i> under one or more of the Geneva Conventions	Doing an act that causes death	Doing an act that causes death
Mental state	The material elements were committed with intent and knowledge	The material elements were committed with intent and knowledge	Act is done with the <i>intention</i> to cause death	Act is done with the <i>knowledge</i> that it is likely to cause death, but <i>without any intention</i> to cause death
Context	Took place in or was associated with a <i>non-international</i> armed conflict	Took place in or was associated with an <i>international</i> armed conflict	-	-

*For the purpose of this primer, the international criminal offences listed were taken from the ICC's [Elements of Crimes](#) document, and the domestic offences listed were taken from the [Indian Penal Code](#) (Sections 300 and 304).

In practice, war crimes are codified in various sources of law, including the statutes of the ad hoc tribunals ([ICTY](#) and [ICTR](#)), Article 8 of the [Rome Statute](#) of the International Criminal Court, and many domestic criminal codes, such as [South Korea](#).

Can Someone Who Does Not Directly Participate In Violence Be Held Responsible For A War Crime?

War crimes are punishable offences and elicit individual criminal responsibility. Perpetrators can be found responsible both directly and indirectly. International criminal law (ICL) includes modes of liability commonly found in domestic jurisdictions, such as direct perpetration, aiding and abetting, and indirect perpetration.

It also includes the legal principle of superior or command responsibility, which has no direct corollary in most domestic law.

High-ranking State and non-State actors who knew – or should have known – about the commission of war crimes can be held responsible based on the principle of command responsibility, even if they did not directly participate in the conduct. This concept is especially important in the context of conflict. Since most military/armed groups operate within rigid hierarchical structures, commanders have unique responsibility for the actions of their subordinates.

Command responsibility addresses liability through *omission*. Prosecutors must prove that the commander knew or, 'owing to the circumstances at the time' (RS, art. 28a.i), should have known about the commission of war crimes and failed to take all 'necessary and reasonable' (RS, art. 28a.ii) steps to prevent them. There must be a link between the omission and the act, i.e: the war crime must be the result of the commander's failure to curb their subordinate's actions.

Who Can Investigate or Prosecute War Crimes?

Any court with competent jurisdiction can investigate and prosecute war crimes. This includes international tribunals, such as the International Criminal Court, and national courts in States that have criminalized war crimes in domestic law.

To learn more about bringing a case before such courts, see our [Toolkit on Justice Avenues for International Crimes](#).

Are War Crimes The Same As 'Grave Breaches' Of The Geneva Conventions?

The [Geneva Conventions](#) impose an active duty on all States to ensure alleged offenders are held accountable. They create a treaty basis for the prosecution of 'grave breaches' of the conventions.

'Grave breaches' are [defined as specific acts](#) that endanger protected persons or property, such as willful killing and torture (GC I, Art. 50). Most Asian states have criminalized grave breaches in domestic law. States are obliged to investigate and prosecute grave breaches. They must bring alleged offenders on their territory before their own courts, or hand them over to another State party seeking trial. States must also criminalize breaches in domestic law and provide for their prosecution, notwithstanding their nationality or the territory the offence was committed in (GC I, Art. 49).

Since all States – including Asian States – are party to the Geneva Conventions, these obligations could be read as enabling a potential legal framework for universal criminal jurisdiction. In practice, the prosecution of grave breaches in national courts poses many challenges, such as legal co-operation, and the non-uniform application of international law.

Initially, war crimes and grave breaches were [distinct concepts](#). Put briefly, war crimes were criminalized in international law whilst grave breaches referred to a specific set of violations that elicited state obligations for domestic criminalization. However, over time, the two concepts have become blurred.

While 'grave breaches' – unlike war crimes – are traditionally understood to apply only to serious IHL violations in international armed conflicts, the development of customary law and rulings of the International Court of Justice (for example, [Nicaragua v. USA \(Merits\)](#) 1986, para. 218) and some [domestic courts](#) have held grave breaches applicable to non-international armed conflicts as well. Furthermore, several countries now exercise jurisdiction over atrocity crimes (i.e: war crimes, crimes against humanity, and genocide) regardless of territory, thus allowing for the domestic prosecution of both war crimes and grave breaches under [universal jurisdiction](#).

However, [few Asian states exercise universal jurisdiction](#) over atrocity crimes, making the grave breaches regime more helpful. For example, in [Japan](#), the PGB Act criminalized grave breaches of the Geneva Conventions, but other international crimes are prosecuted by existing domestic legislation. To learn more about avenues for the prosecution of atrocity crimes in specific Asian states, see our [jurisdictional brief](#) series.