

Animating The U.S. War Crimes Act

Beth Van Schaack[†]

DRAFT: Forthcoming in the U.S. Naval War College's INTERNATIONAL LAW STUDIES (2021)

NOT FOR CITATION

Introduction

War crimes are historically conceptualized as falling within two main categories: those concerned with the conduct of hostilities (including breaches of the rules governing the means and methods of warfare) and those concerned with custodial abuses against protected persons. The latter are commonly assumed to be easier to prosecute because the abuse is unjustifiable and often incontestable, and legal actors are not required to contend with the proverbial fog of war or to gain access to battlefield evidence.¹ Nor do they require finders of fact to calculate whether any incidental harm to civilians was excessive in relation to the concrete and direct military advantage anticipated, as demanded by the intertwined principles of distinction and proportionality.² Indeed, the norm of humane treatment for persons deprived of their liberty is fundamental to international humanitarian law (IHL)—and human rights law for that matter—and brooks no derogation.³

Nonetheless, all war crimes are challenging to prosecute for a range of reasons, including the technicality of some constitutive elements, the difficulties of amassing sufficient available evidence to meet applicable burdens of proof, the vagaries of unreliable or unavailable witnesses, and the often-impenetrable khaki wall of silence. Adding to these ubiquitous challenges, the United States has erected a number of idiosyncratic structural barriers in the way in which it has incorporated the prohibitions against war crimes into its domestic legal frameworks, both military and civilian. The shortfalls in the former are comprehensively discussed in an important recent paper by Geoff Corn and Rachel VanLandingham.⁴ Here, I will address problems with our federal war crimes statute as it appears in Title 18, the U.S. penal code.⁵ My concerns encompass the

[†] Leah Kaplan Visiting Professor in Human Rights at Stanford Law School. Tracey Begley, Gene Fidell, Nathaniel Hurd, Michael J. Matheson, Fausto Pocar, Nicole Rangel, Kathy Roberts, Gabor Rona, Matthew Stibbe, Dan Stigall, and Rachel VanLandingham, provided very helpful feedback on this paper, although all errors remain mine. I am deeply indebted to Chris Moxley, Stanford Law '22, for his invaluable research assistance.

¹ Stephen Wilkinson, *The Challenges of Establishing the Facts in Relation to 'Hague Law' Violations*, in *WAR CRIMES AND THE CONDUCT OF HOSTILITIES: CHALLENGES TO ADJUDICATION AND INVESTIGATION* 313 (Fausto Pocar et al. eds., 2013).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3, *See generally* Paola Gaeta, *Serious Violations of the Law on the Conduct of Hostilities: A Neglected Class of War Crimes*, in *WAR CRIMES AND THE CONDUCT OF HOSTILITIES: CHALLENGES TO ADJUDICATION AND INVESTIGATION* 20 (Fausto Pocar et al. eds., 2013).

³ U.N. Hum. Rts. Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 13(a) (2001) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right . . . is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation.”).

⁴ Geoff S. Corn & Rachel VanLandingham, *Strengthening War Crimes Accountability*, 70 AM. UNIV. L. REV. 309 (2020). Because there is concurrent jurisdiction in federal courts over crimes committed by U.S. service personnel, some of these proposals will impact military justice as well.

⁵ War Crimes Act of 1996, Pub. L. No. 104-192 (1996), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/04/16/act-pl104-192.pdf>. The statute was first codified at

formulation of the *in personam* jurisdictional provisions, the way the statute has been interpreted by the Department of Justice and other authoritative sources, and a number of substantive complications and shortfalls. Together, these deficiencies have rendered the War Crimes Act a dead letter since its enactment in 1996.

My recommendations for reform are directed at both Congress and the Executive Branch who should, within their respective spheres of competency, work to: (1) better conform the War Crimes Act to U.S. obligations under the 1949 Geneva Conventions and enable the United States to prosecute war crimes committed anywhere in the world regardless of the nationality of the victim or perpetrator, (2) withdraw and repudiate controversial Office of Legal Counsel (OLC) memoranda advancing a crabbed interpretation of the concept of “protected persons” when it comes to individuals in the custody of a High Contracting Party (HCP) to the Conventions, (3) restructure the statute to obviate the need to undertake a complicated conflict classification exercise, (4) enact a superior responsibility statute that would apply to war crimes and other international crimes within U.S. jurisdiction, and (5) re-penalize the war crime of “outrages upon personal dignity, in particular humiliating and degrading treatment,” which is prohibited by Common Article 3 but was decriminalized upon the passage of the Military Commission Act of 1996.

Addressing these problems through legislative fixes, new legal interpretations, and policy pronouncements would bring the United States into better compliance with its treaty obligations and the rules adopted and applied by its NATO and other allies. It would likewise enable the United States to prosecute a wider range of war crimes committed in all armed conflicts, whether international or non-international, and regardless of the nationality of the accused or victim. In this regard, it would signal U.S. intolerance for deliberate harm to individuals who find themselves in the custody of a state to which they are not nationals and ensure that superiors do not escape legal censure when they know, or should have known, that their subordinates are committing, or have committed, abuses and they fail to take the necessary steps to prevent and punish these breaches. Finally, having a more coherent war crimes regime will bolster the United States’ complementarity arguments vis-à-vis international and foreign courts that might seek to assert jurisdiction over U.S. persons.

This Chapter addresses these concerns in three parts. To lay a foundation for the analysis of the U.S. War Crimes Act, it sketches the way in which war crimes find expression in IHL, including in treaties to which the United States is a party and in customary international law (CIL). It then provides a quick legislative history of the War Crimes Act of 1996 with reference to evolving positions advanced by various executive branch agencies and the statute’s advantages and shortfalls. It closes with a set of discrete drafting and policy recommendations to address the latter, focused on expanding the jurisdictional reach of the legislation, strengthening the United States’ implementation of the Conventions’ “protected persons” regime, obviating the need to engaged in conflict classification, enabling the prosecution of superiors whose subordinates commit war crimes, and prosecuting a wider range of war crimes, including one that has proven particularly useful to European prosecutors.

War Crimes Under International Law

18 U.S.C. § 2401(b), later renumbered as 18 U.S.C. § 2441 by § 605(p) the Economic Espionage Act of 1995, Pub. Law 104-294 (Oct. 11, 1996).

As long as humankind has waged war, there have been rules in place governing acceptable behavior in armed conflict, giving lie to Cicero’s claim that *silent enim lēgēs inter arma*—in war, the law falls silent.⁶ Although the history of the law of war is often told from the perspective of international conferences held in The Hague and Geneva, all human cultures have endeavored to regulate this seemingly inherent aspect of our shared humanity. Recorded history confirms that the ancient Israelites, Greeks, and Romans, for example, distinguished between combatants and civilians and made only the former the lawful object of attack.⁷ Certain Islamic traditions dictated that captured combatants and civilians should be humanely treated.⁸ Likewise, in ancient combat, certain weapons or tactics were prohibited if they caused excessive damage.⁹ In 1139, for example, the Second Lateran Council condemned the use of the crossbow against fellow Christians (specifically excepting those deemed to be “infidels”), foreshadowing subsequent efforts to ban the use of weapons viewed as unnecessarily cruel or inhumane.¹⁰

One of the first comprehensive codifications of the laws of armed conflict is found in the Lieber Code, drafted during the American Civil War by Professor Francis Lieber of Columbia College and promulgated by President Abraham Lincoln to govern the Union forces.¹¹ Though only applicable to this specific conflict, the Code provided inspiration first for other states to issue similar regulations and ultimately for the first multilateral treaties on the laws of war, including the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949. Many of the provisions in the Lieber Code, along with antecedent rules tracing back to the earliest era of recorded history, are now contained in a web of bilateral and multilateral treaties, making IHL one of the most codified areas of international law.¹² A rich body of customary international law—painstakingly documented by the International Committee of the Red Cross (ICRC)—supplements this extensive treaty regime.¹³

The codification of IHL historically evolved along two parallel tracks. The first, originating from a series of international conferences in The Hague and elsewhere, concerns the means and methods of warfare and seeks to limit the tactics of war and prohibit the use of certain weapons designed to cause superfluous injury (“Hague Law”).¹⁴ One of the most important treaties to

⁶ 14 CICERO, *Pro T. Annio Milone Oratio*, in PRO MILONE—IN PISONEM—PRO SCAURO—PRO FONTEIO—PRO RABIRIO POSTUMO—PRO MARCELLO—PRO LIGARIO—PRO REGE DEIOTARIO 16-17 (N.H. Watts trans., Harvard Univ. Press 6th prtg. 1979) (n.d.).

⁷ See generally 1 ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR (2011); LAWRENCE H. KEELEY, WAR BEFORE CIVILIZATION: THE MYTH OF THE PEACEFUL SAVAGE (1996).

⁸ AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS 138 (2011).

⁹ 3 ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR 53-56 (2011).

¹⁰ Arnold Blumberg, *The Medieval Crossbow: Redefining War in the Middle Ages*, WARFARE HISTORY NETWORK, <https://warfarehistorynetwork.com/2021/04/18/the-medieval-crossbow-redefining-war-in-the-middle-ages/>.

¹¹ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863), https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf.

¹² See Int’l Comm. Red Cross, Treaties, State Parties and Commentary Database, <https://ihl-databases.icrc.org/ihl>.

¹³ See Int’l Comm. Red Cross, Customary IHL Database, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>. But see John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443 (June 2007) (raising concerns about the ICRC’s methodology for identifying customary rules, particularly when it comes to identifying state practice).

¹⁴ See Manley O. Hudson, *Present Status of the Hague Conventions of 1899 and 1907*, 25(1) AM. J. INT’L L. 114 (1931).

emerge from this effort was undoubtedly the 1907 Convention Respecting the Laws and Customs of War on Land, which contains a detailed set of regulations in its annex.¹⁵ The fundamental principle of the *jus in bello* is found in Article 22, which states that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” The regulations go on to forbid the deployment of poisoned weapons; the killing or wounding of those belligerents who are *hors de combat* (i.e., those who have laid down their weapons and no longer present a threat); means of warfare “calculated to cause unnecessary suffering;” the destruction or seizure of enemy property unless “imperatively demanded by the necessities of war;” and attacks on undefended towns or buildings.¹⁶

The second track, originating from a series of treaties sponsored by the ICRC in Geneva, establishes protections for individuals uniquely impacted by or vulnerable in war, especially those who do not—or who no longer—participate directly in hostilities: the wounded and the sick in the field (Geneva Convention I), the wounded and sick at sea (Geneva Convention II), prisoners of war who are subject to detention but entitled to combatant immunity (Geneva Convention III), and civilians and other actors in the battlespace not covered by one of the previous instruments (Geneva Convention IV).¹⁷ Each treaty contains a precise definition of the persons protected. GCIV, for example, applies to: “those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁸ Geneva Convention IV in particular reflects the fact that prior law-of-war treaties, such as the 1899 and 1907 Hague Conventions, were concerned only with the treatment of detained combatants and had, in the words of the ICRC’s commentary, proven “insufficient in view of ... the problems relating to the protection of civilians in enemy territory and in occupied territories.”¹⁹

The four Geneva Conventions primarily govern international armed conflicts (IACs), in the sense of conflicts between nation-states, and oblige their parties to criminalize so-called “grave breaches” of the treaties when they are committed against protected persons in these circumstances. Grave breaches of the Fourth Geneva Convention encompass wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; unlawful deportation or transfer or unlawful confinement of a protected person; compelling a protected person to serve in the forces of a hostile Power; wilfully depriving a protected person of the rights of fair and regular trial; the taking of hostages; and extensive destruction and appropriation of property not justified by military necessity and carried out

¹⁵ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (“Fourth Hague Convention”).

¹⁶ *Id.* at art. 23.

¹⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁸ GCIV, *supra* note ____, at art. 4. The article goes on to identify certain exceptions, such as nationals of neutral or co-belligerent states so long as normal diplomatic relations are in place. *Id.*

¹⁹ Int’l Comm. Red Cross, Treaties, State Parties and Commentaries, Convention (IV) relative to the Protection of Civilian Persons in Time of War, <https://ihl-databases.icrc.org/ihl/INTRO/380>.

unlawfully and wantonly.²⁰ The treaties oblige HCPs to impose universal jurisdiction over breaches by codifying these prohibitions; “search[ing] for persons alleged to have committed, or to have ordered to be committed, such grave breaches;” and bringing “such persons, regardless of their nationality, before its own courts” or, in the alternative, to extradite them to another signatory for trial (*aut dedere aut judicare*).²¹ The goal of such an aggressive prosecutorial regime was to address a problem that was top of mind following World War II: war criminals avoiding prosecution by finding sanctuary in neutral countries.²² When it comes to this “enforcement trifecta” of inter-related responsibilities,²³ states retain a margin of appreciation in implementation and are entitled to enact “a more extended criminalization of violations of the law of armed conflict under national legislation.”²⁴ Many states, including the United States, have thus criminalized other IHL violations beyond the grave breaches committed in inter-state wars identified by the Geneva Conventions.²⁵

Virtually all of the provisions of the Geneva Conventions apply only to IACs absent the conclusion of a special agreement extending the Conventions’ provisions to other conflicts.²⁶ Only Common Article 3 (so named because it finds expression in all four Geneva Conventions) applies to armed conflicts “not of an international character,” today designated as non-international armed

²⁰ GCIV, *supra* note ___, at art. 147. The breach of other treaty rules does not necessarily give rise to individual criminal responsibility per the treaty text. *See id.* at art. 146: “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than ... grave breaches.”

²¹ *Id.* at art. 146 (“It may also if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned provided such High Contracting Party has made out a *prima facie* case.”). The original commentary to the 1949 Geneva Conventions elaborates:

The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.

Jean S. Pictet, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY TO THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (1958).

²² *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 97-99 (1995); Rudiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 675 (2d. ed. 2008) (discussing the Convention’s universal jurisdiction regime). For the history of these provisions, see ICRC, *Article 129: Penal Sanctions, Commentary of 2020*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=FB2C21E0040F0217C125858400446E95>.

²³ Corn & VanLandingham, *supra* note ___, at 320.

²⁴ Fausto Pocar, *The Criminalization of the Violations of International Humanitarian Law from Nuremberg to the Rome Statute*, in *WAR CRIMES AND THE CONDUCT OF HOSTILITIES: CHALLENGES TO ADJUDICATION AND INVESTIGATION* 1, 1 (Fausto Pocar et al. eds., 2013).

²⁵ *See* AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE* (Oct. 9, 2012).

²⁶ GCIV, *supra* note ___, at art. 2 (noting that parties to a conflict that have not ratified the treaty may be bound by it if they accept and apply its provisions). *See, e.g.,*

conflicts (NIACs).²⁷ A “convention in miniature,” Common Article 3 contains a set of non-derogable prohibitions, but no express penal regime.²⁸

The international community adopted two Protocols to the Geneva Conventions in 1977 in response to the changing nature of armed conflict and the post-colonial geopolitical balance of power, which saw the nature of armed conflicts shift to predominantly NIACs, the movement of the battlefield to population centers, increased civilian involvement in hostilities, an expanding U.N. General Assembly seized of certain oppressive political situations (such as apartheid South Africa), and the expansion of guerilla warfare. Protocol I, *inter alia*, defines international conflicts as including “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,” relaxes the requirements for privileged combatant status (i.e., those bearing arms who are entitled to combatant immunity), provides a detailed set of rules concerning the obligation to discriminate between military and civilian targets, and further defines and clarifies the rules with respect to mercenaries.²⁹ Marking a convergence of Hague and Geneva Law, and articulating the first treaty-based war crimes associated with the conduct of hostilities, Protocol I also expands the category of grave breaches. Additional crimes to be prosecuted by HCPs pursuant to universal jurisdiction include making civilians or cultural property the object of attack, launching indiscriminate attacks, and forcibly transferring parts of the civilian population in or out of occupied territory.³⁰

For its part, Protocol II elaborates on the minimum rules in Common Article 3, but raises the threshold of applicability to govern only those NIACs that meet certain additional conditions.³¹ It sets out rules of conduct addressed to the means and methods of warfare that echo, albeit faintly, those that regulate IACs. While Protocol I identifies additional “grave breaches” that should be made subject to prosecution under principles of universal jurisdiction, Protocol II imposes no new penal obligations on HCPs. A proposal to include a universal jurisdiction provision within Protocol II was “explicitly rejected by the majority of the States attending the revision conference in Geneva” as an “unacceptable intrusion on State sovereignty.”³²

When it comes to individual criminal responsibility, many more treaty rules govern IACs as compared to NIACs, including rules focused on detention operations. However, over the years, the customary international *jus puniendi* governing NIACs has developed in a way that mirrors, in most respects, the rules governing IACs. As such, the legal distinctions among war crimes punishable within international versus non-international armed conflicts have diminished considerably, and the various tracks of IHL have converged to create a more complete corpus of

²⁷ GC IV, *supra* note ____, at art. 3.

²⁸ Common Article 3 applies to persons taking no active part in hostilities and those *hors de combat* and prohibits: violence to life and person (including murder, mutilation, cruel treatment, and torture), the taking of hostages, outrages upon personal dignity (in particular humiliating and degrading treatment), and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording judicial guarantees. See David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11(1) CASE WEST. RESERVE J. INT’L L. 37 (1979).

²⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

³⁰ *Id.* at arts. 11, 85. Other breaches of the treaty, however, are not designated as “grave breaches” subject to the penal regime. See, e.g., *id.* at arts. 35, 54.

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

³² Pocar, *supra* note ____, at 12.

law that applies across the conflict spectrum.³³ Article 8 of the Rome Statute of the International Criminal Court (ICC)—and recent amendments thereto³⁴—reflects this gradual merging of Hague and Geneva Law and of the law applicable in international and non-international armed conflicts.³⁵ Besides the Rome Statute, many additional developments contributed to this advancement, including the jurisprudential innovations of the modern war crimes tribunals, the incorporation of the Rome Statute’s war crimes provisions into domestic penal codes around the world, and local courts adjudicating war crimes cases.³⁶

The U.S. War Crimes Act

The United States ratified the four Geneva Conventions in 1955.³⁷ Although it signed both 1977 Protocols (and ratified another establishing a third protected symbol³⁸), it has not ratified either of them.³⁹ In 1986, President Ronald Reagan recommended that the Senate ratify Protocol II, subject to certain reservations, understandings, and declarations (RUDs), but not Protocol I,⁴⁰ in part due to disagreements with the latter’s expansion both of the category of IAC to include certain wars of national liberation and of the concept of “combatant” to include individual fighters who may not fully distinguish themselves from non-combatants at all times.⁴¹ Successive administrations have continued to support ratification of Protocol II, with President Bill Clinton

³³ See ICRC CIL Study, *supra* note ____, at Rule 156; DEP’T OF THE ARMY, THE LAW OF LAND WARFARE, FM 27-10, § 506 (1956) (noting that the terms of the treaties are “declarative of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent’s own armed forces.”).

³⁴ See Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction Over War Crimes Under Article 8 of the ICC Statute*, 8(5) J. INT’L CRIM. JUST. 1219 (2010).

³⁵ Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

³⁶ See YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 205, 211-219 (2014).

³⁷ Ratification was delayed in part due to controversy stemming from the Korean War about whether Article 118 of GCIII required the forcible repatriation of prisoners of war or if the treaties allowed signatories to offer asylum to detainees who faced political persecution at home. See Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L. J. 391 (1953).

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261 (establishing the red crystal as a protected symbol not associated with a religious tradition). The other two symbols used to designate protected areas are the red cross and the red crescent.

³⁹ See Dep’t Defense, Off. Gen. Counsel, *Official Treaty Documents Related to the Law of War*, <https://ogc.osd.mil/Law-of-War/Treaty-Documents/>.

⁴⁰ See White House, Letter of Transmittal (Dec. 13, 1986), https://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.

⁴¹ See COL. THEODORE T. RICHARD, UNOFFICIAL UNITED STATES GUIDE TO THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (2019). The United States has indicated, however, that certain provisions of Protocol I constitute or reflect customary international law. See White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (noting that the United States will “choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.”). This position was first articulated by Michael Matheson, as State Deputy Legal Adviser. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L & POL’Y 419 (1987).

formally renewing the request for advice and consent, but the Senate never acted on the recommendation and both Protocols remain unratified.⁴²

On the theory that existing U.S. law provided adequate means of prosecuting war crimes under state, federal, and military law (namely the newly enacted Uniform Code of Military Justice (UCMJ)),⁴³ and because the Geneva Conventions got tied up in controversy around the Bricker Amendment,⁴⁴ no implementing legislation was immediately enacted following ratification. However, in the mid-1990s, attention returned to the Conventions, and it was acknowledged that there were in fact circumstances in which extant law was insufficient to prosecute certain grave breaches committed outside the United States as required by the treaties,⁴⁵ particularly given emerging jurisprudence limiting the reach of U.S. courts martial.⁴⁶ The effort was inspired, in part, by the recognition that the United States had no mechanism by which to prosecute war crimes committed against U.S. servicemembers during the Vietnam war.⁴⁷ Congress thus began the process of drafting a War Crimes Act in order to “carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes” by allowing for the prosecution of grave breaches of the treaties.⁴⁸

The first attempt at a bill was exclusively focused on grave breaches of the four Conventions, or of any Protocol that the United States might subsequently ratify, committed against U.S. military personnel or citizens.⁴⁹ In congressional testimony around the proposed legislation, a number of U.S. government agency representatives urged Congress to expand the statute along two dimensions: the statute’s jurisdictional reach, to encompass all U.S. perpetrators as well as persons found in the United States, and the list of punishable acts, to penalize additional war crimes, including those committed within NIACs. The next iteration of the bill, which was ultimately passed in 1996, took up the personal jurisdiction proposals in part but did not adopt other proposed expansions.⁵⁰ The War Crimes Act as originally enacted thus granted jurisdiction only over crimes denominated as grave breaches by the treaties and committed by, or against, U.S.

⁴² See White House, Letter of Transmittal (1999), <https://www.congress.gov/106/cdoc/tdoc1/CDOC-106tdoc1.pdf>.

⁴³ See Geneva Conventions for the Protection of War Victims, Hearing Before the S. Comm. For. Rel., 82nd Cong. 23-29, 58-59 (1955); War Crimes Act of 1996, H.Rep. No. 104-698, at 3-4 (1996). The UCMJ was passed in 1950. See 18 U.S.C. § 801 *et seq.*

⁴⁴ This proposed Constitutional amendment would have limited the treaty power. See Donald Richberg, *The Bricker Amendment and the Treaty Power*, 39 VA. L. REV. 753 (1953).

⁴⁵ H.Rep. 104-698, *supra* note ____, at 5.

⁴⁶ See, e.g., Reid v. Covert, 354 U.S. 1 (1957) (noting constitutional protections owed to civilians who may be tried under military law).

⁴⁷ Congressman Walter B. Jones Jr., himself a Vietnam veteran, was instrumental in this regard. See W. Fitzhugh Brundage, *Prosecuting Torture: Walter Jones and the Unintended Consequences of the War Crimes Act of 1996*, AMERICAN HISTORICAL ASSOCIATION, PERSPECTIVES ON HISTORY (Mar. 20, 2019).

⁴⁸ See War Crimes Act of 1996, H.R. 3680, 104th Cong. (1996). See generally Dep’t Justice, *War Crimes Act of 1996* (P.L. 104-192), <https://www.justice.gov/jmd/war-crimes-act-1996-pl-104-192> (compiling legislative history).

⁴⁹ War Crimes Act of 1995, Hearing on H.R. 2587 before the H. Committee on the Judiciary, 104th Cong. (1st Sess. 1996).

⁵⁰ H.R. 3680, *supra* note ____.

nationals (as defined by the Immigration and Nationality Act⁵¹) or members of the U.S. Armed Forces.⁵²

When it comes to the statute’s personal jurisdictional provisions, this clear departure from the dictates of the 1949 Geneva Conventions was controversial and the product of interagency discord at the time. When Congress was debating the War Crimes Act, both the Departments of Defense (DoD) and State argued in a series of congressional hearings and written statements that the United States should allow for the prosecution of *any* suspected war criminal present in the United States in order to comply with the 1949 Geneva Conventions. For example, in response to the original bill, then-DoD General Counsel Judith Miller advocated that

the jurisdictional provisions should be broadened from the current focus on the nationality of the victims of the war crime. Specifically, we suggest adding two additional jurisdictional bases: (1) where the perpetrator of a war crime is a United States national (including a member of the Armed Forces); and (2) where the perpetrator is found in the United States, without regard to the nationality of the perpetrator or the victim.⁵³

Miller indicated that the first change would allow for the prosecution of former U.S. service members in federal court since they would no longer be eligible for prosecution by court martial under prevailing Supreme Court precedent.⁵⁴ The second change, she argued, “is required in order to be in compliance with our international obligations.”⁵⁵ She also suggested that the list of war crimes be expanded to include violations of certain rules contained in the Annex to Hague Convention IV and, to address NIACs, in Common Article 3. Echoing these recommendations, John H. McNeill, Senior Deputy General Counsel of the Department of Defense, confirmed that “the law should apply to any person who has committed a war crime and is subject to the jurisdiction of U.S. courts.”⁵⁶

Michael J. Matheson, Principal Deputy Legal Adviser of the Department of State, also testified in support of these proposed expansions to the bill.⁵⁷ In particular, he argued that the United States “has an interest in punishing any U.S. national or armed service member who commits” war crimes as well as suspected war criminals of any nationality who would seek safe haven in the United States.⁵⁸ When it came to prosecutable war crimes, he raised the specter of Rwanda and urged the inclusion of a broader list of war crimes drawn from common Article 3 and

⁵¹ The term “national of the United States” means citizens of the United States and any person “who, though not a citizen of the United States, owes permanent allegiance to the United States.” *See* Immigration and Nationality Act, 8 U.S.C. §1101(a)(22).

⁵² *See* 18 U.S.C. § 2441(b). Certain aliens residing outside of the United States—mostly hailing from the three island nations in free association with the United States—are allowed to enlist in the U.S. armed forces. *See* Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POLICY INSTITUTE (May 16, 2019).

⁵³ H.Rep. 104-698, *supra* note ___, at 13.

⁵⁴ *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding Congress cannot subject ex-service members to trial by court martial).

⁵⁵ H.Rep. 104-698, *supra* note ___, at 13.

⁵⁶ *Id.* at 14.

⁵⁷ Hearing on H.R. 2587, *supra* note ___, at 9-10 (1996); *see also id.* at 9 (noting that this would “follow a pattern adopted in the U.S. Criminal Code for offenses implicating other international obligations, such as piracy, attacks on internationally-protected persons, and attacks against international civil aviation.”).

⁵⁸ *See* War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims, Committee on the Judiciary, House of Representatives, 104th Cong. 8 (June 12, 1996) (Testimony of Michael J. Matheson, Principal Deputy Legal Adviser), <https://2009-2017.state.gov/s/1/65717.htm>.

Additional Protocol II, noting that “some of the most horrible war crimes occur in internal armed conflicts.”⁵⁹ To this, he also suggested the addition of violations of the Annex to the 1907 Hague Convention, concerning the means and methods of warfare, and of a newly amended protocol to the Convention on Conventional Weapons and limiting the use of certain weapons⁶⁰ that was on the eve of being submitted to the Senate for its advice and consent.⁶¹ In support of expanding the list of prosecutable crimes, he invoked steadfast U.S. support for the work of the newly established International Criminal Tribunal for the former Yugoslavia (ICTY), which was just beginning to exercise jurisdiction over such crimes as a function of its constitutive statute and customary international law.

As an additional argument in favor of these amendments, Matheson observed that the U.S. government’s leverage in calling on other countries to comply with IHL was limited because of the gaps in the United States’ own enforcement regime, “particularly with respect to persons who commit such crimes outside the United States but who enter U.S. territory.”⁶² In this regard, he considered a robust war crimes statute to be a “diplomatic tool.” Said Matheson:

Expanding U.S. criminal jurisdiction over war crimes will serve not only the purpose of ensuring that the United States is able to comply fully with its obligations under international law, but will also serve as a diplomatic tool in urging other countries to do the same. Currently the U.S. Government’s leverage in calling on other governments to enforce the laws of armed conflict is restricted because of the limitations [in] our own domestic enforcement jurisdiction. ... With this bill, if modified as we suggest, we will set the right example and use it to persuade other governments to abide by and enforce the laws of armed conflict.⁶³

When asked about reciprocity concerns (the risk of rogue nations launching politicized charges against U.S. persons), he averred that such a risk existed independent of U.S. actions and that such nations would not be influenced by the content of U.S. laws.⁶⁴ Still, Matheson acknowledged that “it would not necessarily be appropriate or a good use of U.S. law enforcement resources to prosecute in U.S. courts all of the persons who might fall within the [described] categories.” To account for this concern, he proposed a provision stating that no prosecution should be undertaken unless the Attorney General or their designee determines that “such a prosecution would be in the public interest and necessary to secure substantial justice.”⁶⁵

Notwithstanding this strong support within the State and Defense Departments, the Department of Justice apparently resisted expanding the jurisdictional bases to prosecute grave breaches of the Conventions⁶⁶ given the legal, practical, and diplomatic obstacles to prosecuting

⁵⁹ *Id.* For the text of common Article 3, *see supra* note ____.

⁶⁰ *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, May 3, 1996, 1342 U.N.T.S. 168.

⁶¹ *Id.* Matheson further argued that the “United States should take care now, in H.R. 2687, to provide for making such offenses criminal under U.S. law when the amended Protocol comes into force for the United States.” *Id.*

⁶² Hearing on H.R. 2587, *supra* note ____, at 13.

⁶³ Matheson, House of Representatives Testimony, *supra* note ____.

⁶⁴ Hearing on H.R. 2587, *supra* note ____, at 16-17.

⁶⁵ *Id.* at 10-11.

⁶⁶ The Department of Justice’s position on the propriety of the United States asserting jurisdiction over international crimes has evolved considerably since this time. Indeed, in opposing the passage of the Torture Victim Protection Act, a representative argued for the ratification of the Convention Against Torture and the creation of

extraterritorial conduct.⁶⁷ Ultimately, this perspective prevailed, and the House Report notes that universal jurisdiction prosecutions might “draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting.”⁶⁸ At the time, the Committee also noted that no Geneva Conventions signatory had yet activated universal jurisdiction.⁶⁹ While true at the time, signatories of the Conventions have since launched a number of war crimes prosecutions in their domestic courts, significantly outpacing the United States in the enforcement of the humanitarian law.⁷⁰

The statute as originally enacted thus allowed for the prosecution of grave breaches of the Geneva Conventions pursuant to the active nationality and passive personality principles of jurisdiction.⁷¹ The operative provisions read:

(a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States....

Upon signing the statute into law, President Clinton expressed a commitment to work with Congress to expand the scope of the legislation to enable the prosecution of war crimes committed by any person who comes within the jurisdiction of U.S. courts.⁷²

A year later, the War Crimes Act was amended as had been earlier proposed by the DoD⁷³ to define war crimes more broadly to include not only grave breaches of the Geneva Conventions but also violations of certain provisions of the Fourth Hague Convention Annex,⁷⁴ violations of Common Article 3, and wilful killings or serious injury to civilians committed in breach of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices,

implementing legislation to enable domestic prosecutions. *See* Torture Victim Protection Act, Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Comm. on the Judiciary, 101st Cong. 33-4 (1989) (testimony of John O. McGinnis, DAAG, OLC, DOJ). The DOJ now has a specialized unit focused on international crimes. *See* Dep’t Just., Human Rights and Special Prosecutions Section (HRSP), <https://www.justice.gov/criminal-hrsp>. For a discussion of how HRSP operates and its mandate, see Madison Bingle, *Holes in the United States’ ‘Never Again’ Promise: An Analysis on the DOJ’s Approach Toward Atrocity Accountability* (forthcoming 2021).

⁶⁷ *See generally* Charles Doyle, *Extraterritorial Application of American Criminal Law*, Congressional Research Service (Oct. 31, 2016).

⁶⁸ H.Rep. 104-698, *supra* note ____, at 8.

⁶⁹ *Id.*

⁷⁰ A report by Trial International found that states issued 76 war crimes charges predicated on universal jurisdiction in 2020 alone. TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW 2021 13 (2021).

⁷¹ For a discussion of the various bases of domestic jurisdiction, see *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003); *Introductory Comment to Research on International Law, Part II, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935).

⁷² White House, *Statement on Signing the War Crimes Act of 1996* (Washington, DC: White House, 1996), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/23/clintonpresstatement-1482-1996.pdf>.

⁷³ *See supra* text accompanying note ____ (testimony of Miller).

⁷⁴ The list of violations involve certain prohibited weapons, declaring no quarter, perfidy, etc. (Article 23), the attack or bombardment of undefended towns, buildings, etc. (Article 25), attacks on cultural property or humanitarian institutions (Article 27), and pillage (Article 28).

which the United States later ratified in 1999.⁷⁵ The first and second categories of war crimes find expression in treaties that do not, by their own terms, contain a penal regime. The latter treaty obliges parties to impose penal sanctions “against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.”⁷⁶ With this expansion in the crimes, the jurisdictional regime was left unchanged.

The War Crimes Act underwent a major revision following the revelations of custodial abuses being committed at Abu Ghraib prison in Iraq and the U.S. Supreme Court’s 2006 ruling in *Hamdan v. Rumsfeld* that the “Global War on Terror,” which was being waged on the territory of several High Contracting Parties although not between them, constituted a NIAC subject to Common Article 3.⁷⁷ With the 2006 Military Commissions Act (MCA),⁷⁸ Congress decriminalized certain war crimes when committed within a NIAC—most evidently outrages upon personal dignity and breaches of due process protections—and specifically identified certain prosecutable “grave breaches” of Common Article 3.⁷⁹ These changes were made retroactive. The intent and effect of these amendments was to diminish the ability to prosecute some U.S. personnel both for harm that fell short of torture and for undertaking trials by military commission that did not adhere to universal due process protections.⁸⁰ It should be noted that these changes only applied to U.S. personnel not subject to the UCMJ, which remained unchanged. The military justice framework, when coupled with the Military Extraterritorial Jurisdiction Act (MEJA), has allows for the prosecution of such acts by military personnel and some civilians who accompany them (although denominated as ordinary common law crimes, such as assault and battery, rather than war crimes).⁸¹

At the same time, Congress also arguably expanded, or at least elaborated upon, the list of potential NIAC war crimes by specifically enumerating rape and other forms of sexual violence within the so-called “grave breaches” of Common Article 3, so such conduct can be now

⁷⁵ § 583, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Public Law 105-118, <https://www.govinfo.gov/content/pkg/PLAW-105publ118/pdf/PLAW-105publ118.pdf>.

⁷⁶ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 14(2), 1342 U.N.T.S. 168 (Dec. 2, 1983).

⁷⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006). This conclusion ran counter to a memorandum authored by two OLC lawyers who argued that the War Crimes Act would not apply to the detention or trial of persons captured during the Afghanistan conflict. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep’t of Def., Re. Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/>. The administration had argued that while the conflict with Al Qaeda was “international,” it was outside the scope of the Geneva Conventions altogether. See Sean D. Murphy, *Contemporary Practice of the United States*, 96 AM. J. INT’L L. 475 (2002).

⁷⁸ Military Commissions Act of 2006, Pub. L. No. 109-366 (2006), https://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

⁷⁹ Although the term “grave breaches” relates to breaches of the Geneva Conventions that constitute war crimes under IHL, this term is not utilized in, or in connection with, Common Article 3. Congressman Jones, to his credit, opposed these amendments on the ground that they weakened the War Crimes Act. Brundage, *supra* note ____.

⁸⁰ Michel John Garcia, *The War Crimes Act: Current Issues*, Congressional Research Service (Dec. 14, 2006) (discussing legislative history of the MCA).

⁸¹ See Corn & VanLandingham, *supra* note ____.

prosecuted as such rather than under the rubric of torture or cruel treatment.⁸² As a result of the MCA, the United States can currently prosecute the following crimes when committed in a NIAC: torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and the taking of hostages. Congress also defined the conduct that constitutes “cruel treatment” similarly to that which constitutes “torture,” thus shortening the spectrum of mistreatment that may be prosecuted in U.S. courts even further.⁸³ The MCA notes that even though elements of Common Article 3 were decriminalized, the United States is still bound by the full scope of that provision in its international relations and remains obliged to repress such acts by its personnel in ways other than criminal sanctions.⁸⁴

In 2008, and following the United States’ ratification of the 2000 Optional Protocol to the Convention on the Rights of the Child,⁸⁵ Congress enacted a new war crimes statute focused on the recruitment or use of child soldiers.⁸⁶ The statute, which enjoyed strong bipartisan support,⁸⁷ allows the United States to prosecute anyone who knowingly recruits, enlists, or conscripts a person under 15 years of age to serve in an armed force or group or who uses a child to participate actively in hostilities. There is jurisdiction over this offense if committed by U.S. nationals and legal permanent residents, stateless persons with habitual residence in the United States, or aliens who are present in the United States, irrespective of nationality, or if the offense occurs in whole or in part within the United States.⁸⁸ So far, no one has been prosecuted under this statute, but it has served as the basis for the deportation of individuals who stand accused of recruiting or using child soldiers in conflict, even if prior to the statute’s enactment.⁸⁹

In summation, as the War Crimes Act currently stands, federal prosecutors can charge grave breaches of the Geneva Conventions and enumerated breaches of the Annex of the Fourth

⁸² The *ad hoc* tribunals have confirmed that sexual violence can be prosecuted as torture. See *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement (Int. Crim. Trib. for the former Yugoslavia June 12, 2002).

⁸³ If amendments are in the works, Congress should reinstate all breaches of Common Article 3 as war crimes. See Beth Van Schaack, *Amending the Amendments: The War Crimes Act of 1996*, INTLAWGRRLS (April 15, 2009), <http://www.intlawgrrls.com/2009/04/obama-administration-is-receiving-no.html>. See also Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AM. J. INT’L L. 48, 52 (2007) (critiquing amendments to the War Crimes Act implemented by the MCA and concluding that the “net effect [of the amendments] is not to achieve greater clarity but, rather, to limit in an uncertain way the scope of acts to which criminal sanctions apply.”).

⁸⁴ 18 U.S.C. § 2441(d)(5) (“The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.”).

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Nov. 14, 2000, 2173 U.N.T.S. 222. See generally Jo Becker, *From Opponent to Ally: The United States and Efforts to End the Use of Child Soldiers*, 22 MICH. ST. INT’L L. REV. 595 (2014) (discussing gradual U.S. embrace of the prohibition on the use of child soldiers given that the United States has historically recruited 17-year-olds with parental consent). See Declaration and Understandings by the United States to the Optional Protocol on Children in Armed Conflict at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P>.

⁸⁶ 18 U.S.C. § 2442. For a discussion, see Chris Moxley, _____, JUST SECURITY (_____); Jo Becker, *From Opponent to Ally: The United States and Efforts to End the Use of Child Soldiers*, 22 MICH. ST. INT’L L. REV. 595 (2014).

⁸⁷ See Dani Cepernich, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 S. CAL. L. REV. 1099, 1112 (2010).

⁸⁸ 18 U.S.C. § 2442(c).

⁸⁹ George Boley of Liberia was the first person deported for using child soldiers in the 1989-2003 Liberian Civil War. See *Liberia ex-warlord George Boley to be deported from US*, BBC (Feb. 7, 2012); Press Release, U.S. Immigration and Customs Enforcement, *Liberian Human Rights Violator Removed from US* (Mar. 29, 2012), <https://www.ice.gov/news/releases/liberian-human-rights-violator-removed-us>.

Hague Convention in connection with IACs; certain violations of Common Article 3 in connection with NIACs; certain weapons offenses involving mines and booby traps regardless of conflict classification; and the recruitment or use of child soldiers, also across the conflict spectrum. With the exception of the latter set of crimes involving child soldiers, these other war crimes are only prosecutable when they are committed by or against U.S. persons. As originally suggested by the State Department, approval from the Assistant Attorney General or their designee is required before any prosecution can go forward.⁹⁰ All told, the War Crimes Act goes farther than what IHL treaties require of HCPs in some ways, such as by criminalizing certain treaty violations—*e.g.*, Common Article 3—that are not subject to a conventional penal regime.⁹¹ However, when it comes to the jurisdictional regime vis-à-vis grave breaches, the statute falls short of what the Geneva Conventions require. Despite this expansive list of prosecutable war crimes, not a single prosecution has occurred under the War Crimes Act since its inception more than twenty-five years ago. The remainder of this chapter will discuss why and offer targeted suggestions to rectify this unfortunate state of affairs.

Potential Amendments to the War Crimes Statute

Expand the Act's Jurisdictional Reach

Starting with the *in personam* jurisdictional regime, and as discussed in connection with its legislative history, the statute allows for the prosecution of war crimes committed abroad, but only if the perpetrator or victim is a U.S. citizen or member of the U.S. Armed Forces. In this way, the War Crimes Act stands in stark contrast to other U.S. statutes devoted to the prosecution of international crimes. Over the years, Congress has also enacted a number of other atrocities crimes legislation criminalizing a range of acts of terrorism, various forms of human trafficking and slavery, genocide, piracy, the killing of internationally protected persons, and torture. In contradistinction to the War Crimes Act, the United States can prosecute individuals suspected of committing these other international offenses if they are found or present in the United States.⁹² The terms “found in” or “present in” are interpreted literally and generally apply regardless of the circumstances in which the person is present, or brought to, the United States.⁹³ Given this jurisdictional asymmetry in U.S. law, the United States stands as an outlier among its friends and allies abroad that have more faithfully implemented their Geneva Convention obligations and modernized their penal codes to reflect the current state of international criminal law.⁹⁴

⁹⁰ See Sec. 9-2.139 of the U.S. Attorneys' Manual, <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.139>.

⁹¹ The ICRC contends that CIL mandates states to penalize war crimes beyond those designated as “grave breaches” of the Geneva Conventions, including war crimes addressed to the means and methods of warfare and war crimes committed in NIACs. See ICRC, *Rule 158: Prosecution of War Crimes*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

⁹² See Beth Van Schaack, *The Unexceptional Nature of the South African Universal Jurisdiction Law*, *Just Security* (Dec. 12, 2013), <https://www.justsecurity.org/4569/unexceptional-nature-south-african-universal-jurisdiction-law/> (discussing the United States' suite of international crimes statutes). See generally David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NORTHWESTERN J. INT'L HUM. RTS 30, 32 (2009) (“There should be consistent application of the rules of jurisdiction in the coverage of atrocity crimes in the federal criminal code”).

⁹³ See, *e.g.*, *United States v. Yunis*, 924 F.2d 1086, 1091-92 (D.C. Cir. 1991) (upholding jurisdiction under Hostage Taking Act and Antihijacking Act where defendant was arrested in international waters and brought to United States by federal agents).

⁹⁴ See Beth Van Schaack & Zarko Perovic, *The Prevalence of Present In Jurisdiction*, 107 PROC. OF THE AM. SOC'Y OF INT'L L. 237 (2013) (compiling statutes and incorporation trends); American University, War Crimes Research Office, *Universal Jurisdiction Project*, <https://www.wcl.american.edu/impact/initiatives->

Aligning the War Crimes Act with these other statutes should be an easy fix. Congress could simply insert the language from § 2442(c) of the Child Soldiers Act into the War Crimes Act or incorporate those provisions by reference.⁹⁵ Indeed, Congress should explore whether it can render this jurisdictional change retroactive to 1996 when the War Crimes Act was first enacted. Such a change might not offend the *ex post facto* clause⁹⁶ since it would not penalize conduct that was lawful when committed but rather open up the possibility of prosecuting conduct before a federal forum that was already unlawful under domestic and international law. The International Covenant on Civil and Political Rights indicates that new legislation that penalizes conduct already deemed criminal under international law does not violate the principle of legality, *nullum crimen sine lege*.⁹⁷ Congress in 2007 made a similar change to the genocide statute,⁹⁸ but did not render these changes retroactive notwithstanding debates in the record.⁹⁹ The passage of time would not impede the prosecution of earlier war crimes if they involve the death of the victim, but other war crimes are subject to a five-year statute of limitations (with potential tolling), which can be a barrier to prosecution as well, particularly in complex cases where it may be years before a perpetrator, victim, or witness surfaces in the United States or evidence can be compiled.¹⁰⁰ This proposed jurisdictional amendment would expand the reach of the moribund War Crimes Act and render it a more powerful tool to address the presence of war criminals in our midst.¹⁰¹

Re-Interpret the Concept of “Protected Persons”

The limitations on the War Crimes Act’s jurisdictional reach are obvious on the face of the statute. Less so are interpretations of the underlying law-of-war concepts that have rendered the

[programs/warcrimes/our-projects/universal-jurisdiction-project/](#) (tracking ability of states to prosecute war crimes under universal jurisdiction); ICRC, National Implementation of IHL, <https://ihl-databases.icrc.org/ihl-nat>.

⁹⁵ 18 U.S.C. § 2442(c)

⁹⁶ U.S. Const. art. I, § 9, cl. 3. *See Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“The *ex post facto* prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’”) *U.S. v. Mohammad*, 398 F.Supp.3d 1233, 1241 (U.S.C.M.C.R. 2019) (noting congressional intent to codify existing law within the MCA in the form of offenses that had been traditionally triable by military commission).

⁹⁷ International Covenant on Civil and Political Rights art. 15(2), Dec. 16, 1966, 999 U.N.T.S. 171 (“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”). *See generally* Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515 (1987).

⁹⁸ *See* Genocide Accountability Act of 2007, Pub. L. 110-151, 121 Stat. 1821, ¶ 2 (allowing for prosecutions for genocide if the crime is committed within the United States and if the perpetrator is a U.S. national, is lawfully admitted for permanent residence, is stateless but makes their habitual residence in the United States, or is “brought into, or found in, the United States, even if that conduct occurred outside the United States.”).

⁹⁹ *Genocide and the Rule of Law, Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 31, 37 (2007).

¹⁰⁰ *See* 18 U.S.C. § 3282(a) (indicating that capital crimes, such as certain war crimes, are imprescriptible). Indeed, international law contains no statute of limitations for international crimes generally. *See* Beth Van Schaack, *International Crimes and Statutes of Limitation*, INTLAWGRRLS (Oct. 30, 2008), <http://www.intlawgrrls.com/2008/10/international-crimes-and-statutes-of.html>. Congress should consider extending or eliminating the statute of limitations for § 2441 as has been done for other international crimes. *See, e.g.*, 18 U.S.C. § 3286.

¹⁰¹ Without “present in” jurisdiction, the United States has had to utilize immigration remedies to address suspected war criminals found on U.S. soil. *See* Beth Van Schaack, *Salvadoran General Deemed Deportable in the Absence of Criminal Charges*, JUST SECURITY (Mar. 17, 2015), <https://www.justsecurity.org/21146/salvadoran-general-deemed-deportable/>.

statute more difficult to invoke. In particular, the OLC during the administration of George W. Bush promulgated unsupported interpretations and guidance on the Geneva Conventions that significantly limited the circumstances in which the War Crimes Act could be invoked in the context of IACs.¹⁰² The majority of these memoranda were revoked;¹⁰³ two, however, escaped this deserved fate. Each attempts to limit the definition of “protected persons” in GCIV to individuals in *occupied territory* or enemy aliens in U.S. custody *on U.S. territory*, thus excluding all enemy aliens in non-occupied territory. The memos’ approach was subsequently echoed in the DoD Law of War Manual.¹⁰⁴ This reasoning guts the protections of the treaty when the United States—or any other HCP that adopts the same approach—projects its military power abroad without occupying territory and detains or mistreats civilians and other persons protected by GCIV. This interpretation has consequences for the prosecution of grave breaches as well because it limits the categories of civilians who can be deemed the victims of war crimes under GCIV and thus under the War Crimes Act, which incorporates the concept of protected persons.

During the Bush administration, OLC lawyers promulgated two memoranda purporting to clarify the concept of “protected persons” in GCIV—one devoted to occupied Iraq and one devoted to the conflict in Afghanistan. The Iraq memorandum, authored by Professor Jack Goldsmith in 2004, argues that the protections provided to “protected persons” by GCIV apply only to two classes of civilians: those in occupied territory or those on the home territory of the HCP in whose hands they are.¹⁰⁵ This is even though the Convention makes multiple reference to the rights enjoyed, and the responsibilities of, protected persons who are in the “territory of a Party [i.e., any Party] to the conflict.”¹⁰⁶ The gist of the memorandum was to conclude that the United States owed no treaty-based treatment obligations toward al Qaeda members or operatives captured by U.S. forces in occupied Iraq who do not qualify as POWs,¹⁰⁷ notwithstanding multiple U.S. detention centers there, including the notorious Abu Ghraib prison.¹⁰⁸ Although Goldsmith conceded that some unprivileged combatants (including Iraqi nationals) would fall within the scope of “protected persons” if they “find themselves” in Iraqi occupied territory,¹⁰⁹ he went on to argue that non-Iraqi

¹⁰² A series of interlocking memoranda emanating from the OLC undergirded the post-9/11 detention and interrogation system. These memos and more on the U.S. torture program are available in the Torture Database maintained by the ACLU, which won the public release of many of these memoranda through litigation. See “Torture FOIA Database,” www.thetorturedatabase.org. They can also be found in the OLC’s FOIA “Reading Room.” See OLC FOIA Electronic Reading Room, <https://www.justice.gov/olc/olc-foia-electronic-reading-room>. See generally Steven Aftergood, “OLC Torture Memos Declassified,” Federation of American Scientists (April 17, 2009), https://fas.org/blogs/secrecy/2009/04/olc_torture_memos/.

¹⁰³ Some of these were revoked during the Bush administration when they came to light; others were repudiated by President Barack Obama. See Exec. Order No. 13491, 74 FR 4893 (2009), <https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations>.

¹⁰⁴ Dep’t Defense, LAW OF WAR MANUAL, § 10.3.2.2. (2016).

¹⁰⁵ Jack L. Goldsmith III, “*Protected Person*” Status in Occupied Iraq under the Fourth Geneva Convention (Mar. 18, 2004), <https://www.justice.gov/file/18871/download>. Note that the memo does not fully explore the outer reaches of the concept of “partial” occupation, which might encompass a detention center controlled by a foreign force even if the entire territory is not under occupation.

¹⁰⁶ See, e.g., GCIV, *supra* note ____, at Section II.

¹⁰⁷ The memorandum also treated the conflict in occupied Iraq as separate from the conflict with Al Qaida and argued that the Geneva Conventions do not apply to the latter because Al Qaida is not a HCP. *Id.* at 4.

¹⁰⁸ See Human Rights Watch, *Iraq: Background on U.S. Detention Facilities in Iraq* (May 7, 2004), <https://www.hrw.org/report/2004/05/07/iraq-background-us-detention-facilities-iraq>.

¹⁰⁹ Goldsmith, *supra* note ____, at 13.

Al Qaida operatives deliberately traveled to Iraq as part of a transnational terrorist network and so did not passively “find themselves” there.¹¹⁰

The second memorandum, authored by Howard C. Nielson Jr. in 2005, follows suit but is focused on persons captured and detained by the United States in Afghanistan.¹¹¹ Like Goldsmith, whose memo is only cited once in passing, Nielson concludes that GCIV does not apply to persons captured by a party to the conflict in territory belonging to its enemy (or elsewhere). Lest his readers be concerned about stripping civilians of any rights or protections in unoccupied territory, he insists that the Hague Regulations do apply in such contexts (although not in Afghanistan, which is not a party).¹¹² These latter rules, however, do not speak to custodial abuses of civilians, or contain a penal regime, which mark the legal innovations embodied within the four Geneva Conventions.

Oddly, the latter memo is dated 2005, long after the conflict in Afghanistan had shifted from an international to a non-international armed conflict following the fall of the Taliban and the 2002 *loya jirga*.¹¹³ This suggests that the memo was not really meant to govern operations in Afghanistan *ex ante*, but was rather geared toward subsequent IACs while also laying the argumentative groundwork for a set of defenses against future accountability efforts. Its timing and framing “to the file” also runs counter to the OLC’s normal practice, which is to “render[] formal opinions addressed to particular policy proposals and not undertak[e] a general survey of a broad area of the law or address[] general or amorphous hypothetical scenarios involving difficult questions of law.”¹¹⁴ In fact, Nielson may have directed this memo to the file to avoid the ordinary interagency clearance process, which would have invited the State Department Legal Adviser’s office, the government inhouse experts on international law, to weigh in.¹¹⁵

Both memos turn on the definition of protected persons in GCIV:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.¹¹⁶

GC IV, and the commentary thereto, make clear that “protected persons” include individuals who do not enjoy protection under one of the other three Conventions—which are dedicated to the wounded and sick, the shipwrecked, and prisoners of war—but exclude nationals of: the HCP

¹¹⁰ *Id.* at 14-15.

¹¹¹ Memorandum for the Files, Howard C. Nielson Jr., *Whether Persons Captured and Detained in Afghanistan are “Protected Persons” under the Fourth Geneva Convention* (Aug. 5, 2005), <https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-080505.pdf>.

¹¹² *Id.* at 28.

¹¹³ See Francoise Hampson, *Afghanistan 2001 Onwards*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 242, 251, 255 (Elizabeth Wilmshurst ed., 2012).

¹¹⁴ Steven G. Bradbury, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf>. See also David Barron, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), <https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2010.pdf>

¹¹⁵ Beth Van Schaack, *Judicial Nominee Howard C. Nielson’s Own Torture Memo*, JUST SECURITY (Jan. 2, 2018), <https://www.justsecurity.org/50290/judicial-nominee-howard-c-nielsons-torture-memo/>.

¹¹⁶ GC IV, *supra* note ____, at art. 4(1).

itself,¹¹⁷ neutral states, co-belligerents, or non-party states (which, excepting stateless persons, is a null set given universal ratification) who are “in the territory of a belligerent state” on the theory that these individuals will enjoy the diplomatic protection of their state of nationality.¹¹⁸ The point of the four treaties was to ensure that all individuals caught up in an IAC have some sort of protection—from either the norms of diplomatic protection or international law. As the ICRC’s commentary states: “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status*; nobody in enemy hands can be outside the law.”¹¹⁹ It continues: “The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.”¹²⁰ This blanket coverage, it should be noted, is embraced by the contemporaneous U.S. Army Field Manual 27-10, which stated that “those protected by [GCIV] also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.”¹²¹

After identifying the persons protected by the treaty, the treaty text sets forth a number of protections owed to such persons who are “in the territory of a Party to the conflict,”¹²² whether occupied or not. Both OLC authors concede that this latter phrase could be interpreted to include any circumstances in which a HCP to an IAC acts upon a person who is not a national, so long as none of the other exceptions to the protected persons category applies.¹²³ But both memo authors go on to insist, however, that the phrase “territory of a Party to the conflict” should actually be read as “*home* territory of *the* Party to the conflict.”¹²⁴ While there is no question that communities under occupation and enemy nationals in a party’s home territory are particularly vulnerable and deserving of protection under the treaty—and, indeed, several provisions are dedicated to these two scenarios—it takes considerable linguistic gymnastics to conclude that the treaties provide no protections to enemy nationals in the custody of a party operating on enemy territory outside of a situation of occupation. Rather, the treaties’ commentary makes clear that:

¹¹⁷ Note that the ICTY—operating in the context of an inter-ethnic conflict in which the bonds of ethnicity offered more meaningful protection than the bonds of formal nationality—extended the protections of GCIV to the nationals of the custodial state in reliance on the object and purpose of GCIV. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, ¶¶ 163-171 (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

¹¹⁸ *Id.* (“Persons protected by [GC I – III] shall not be considered as protected persons within the meaning of the present Convention.”).

¹¹⁹ INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (emphasis added).

¹²⁰ *Id.* at 60.

¹²¹ See also Dep’t Army, *The Law of Land Warfare*, FM 27-10, ¶ 247b (Washington, DC: Department of the Army, 1956); see also *id.* at ¶ 73 (“[i]f a person is determined by a competent tribunal ... not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a protected person within the meaning of” GCIV).

¹²² GCIV, *supra* note ____, at arts. ____.

¹²³ Goldsmith memo, *supra* note ____, at 6, 9-10 (same with “in the territory of a belligerent State”).

¹²⁴ *Id.* at 7. This memo also tries to get some mileage out of the phrase “find themselves” to include only Iraqi citizens already resident in Iraq (who are subject to occupation by “happenstance or coincidence” and not members of Al Qaida who are present by virtue of “deliberate action” as “willing agents of an international terrorist organization engaged in a global armed conflict.” *Id.* at 14-15. Nielson memo, *supra* note ____, at

The relations between the civilian population of a territory and *troops advancing into that territory*, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. *Even a patrol which penetrates into enemy territory* without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.¹²⁵

By contrast, the memos would create gaps in protection that run counter to the treaties' ethos of seamless coverage. For example, as applied to World War II, GCIV's protective provisions would address individuals of Japanese descent held in internment centers in the United States (the subject of the impugned *Korematsu* decision¹²⁶) but not any U.S. citizens captured by the Japanese and held elsewhere in the Pacific theater other than in Japan itself.¹²⁷ When applied to contemporary conflicts, this interpretation would render GCIV almost entirely irrelevant to internment operations in Afghanistan involving non-POWs during the period of time when the conflict was an international one (since it was not occupied and there were no hostilities on U.S. territory). Nor would it apply to so-called "black sites" established outside either battlespace but under U.S. control.¹²⁸ Indeed, if this theory of the treaty were to prevail, United States personnel could torture civilians without breaching the treaty—so long as they did so outside the United States and without occupying the enemy's territory. Under the same reasoning, U.S. adversaries could harm U.S. civilians in their custody, so long as the victims were not brought back to the territory of the belligerent in question. Because embattled states are unlikely to transfer large swaths of an enemy civilian population into their own territory, the impact of the GCIV under the impugned interpretation would be significantly diminished.

Although they claim theirs is the most "clear" or "natural" reading of the treaty language,¹²⁹ the collective reasoning of the two former OLC lawyers is altogether too convoluted to replicate in its entirety here.¹³⁰ Suffice it to say that this position ignores—or requires a revision of—important passages of the treaty,¹³¹ perceives ambiguities where none exist, rests upon tortuous and over-determined conclusions drawn from the structure of the treaty, gathers snippets out of context from the *travaux préparatoires*, misrepresents the limited IHL scholarship that is cited and ignores other mainstream interpretations, and does violence to the object and purpose of GCIV. It also disregards the many circumstances that animated the promulgation of the Fourth Convention. This includes Axis depredations in enemy territory during World War II (such as harm to civilians during and following the brutal annexation and effective dissolution of Poland, the deportations of

¹²⁵ Pictet, *supra* note ___, at 60 (emphasis added).

¹²⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹²⁷ See 50 U.S.C. § 4104 (offering compensation for U.S. citizens captured by Japan at Midway and other U.S. territories).

¹²⁸ See European Court of Human Rights, *Secret Detention Sites* (Mar. 2019), https://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF.

¹²⁹ See Goldsmith, *supra* note ___, at 10; Nielson, *supra* note ___, at 6.

¹³⁰ For more detailed arguments, see Beth Van Schaack, *Memo to President Obama: You Have Another Memo to Withdraw*, JUST SECURITY (Dec. 5, 2016), <https://www.justsecurity.org/35236/memo-president-obama-memo-withdraw/>; Beth Van Schaack, *Parsing Howard Nielson's Sources: A Thesis Without Support*, JUST SECURITY (Jan. 8, 2018), <https://www.justsecurity.org/50739/parsing-howard-nielsons-sources-thesis-support/>.

¹³¹ GCIV, *supra* note ___, at art. 13 ("The provisions of Part II [General Protection of Populations Against Certain Consequences of War] cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.").

foreign Jews from the Western European nations prior to their occupation by the Nazis, and the literal and figurative rape of Nanjing), but also prior conflict situations that involved harm to civilians in enemy hands absent a state of occupation, such as the Boxer Rebellion of 1899-1901, the Russo-Japanese War of 1904-5 (which was largely fought in Korea and Manchuria), or World War I abuses of civilians in colonial territories or army staging areas. All these scenarios would have been top of mind among the GCs' drafters.¹³² Further, neither author grapples with the implications of this interpretation for GCIII, which defines its protected persons—prisoners of war—as “persons belonging to one of the following categories [e.g., members of an armed force or militia belonging to a HCP], who have fallen into the power of the enemy.”¹³³ If this approach were applied to GCIII, combatants in enemy custody might be entitled to protections only if they were detained in the enemy's home territory.

Given the timing of the memoranda and the scrutiny being applied to the United States' war-on-terror detention operations, these arguments are clearly motivated less by a desire to strip protections from civilians—in the colloquial sense of “innocent” non-combatants—and more by concerns that GCIV might be deemed to apply to armed actors captured in these two battlespaces who are not entitled to POW status but who might be deserving of some protections under GCIV.¹³⁴ Otherwise, the mistreatment of such individuals would constitute war crimes prosecutable under the War Crimes Act—no doubt a driving force behind these anxious reinterpretations. The Biden administration should withdraw these two memoranda (and direct the Department of Defense to make the necessary conforming amendments to the Law of War Manual) in order to confirm its understanding of the more expansive application of the Geneva Conventions in IACs and also signal a repudiation of earlier efforts to exempt U.S. actions from the reach of the Conventions.¹³⁵ Doing so would ensure that the United States can prosecute individuals who mistreat persons protected by GCIV in unoccupied enemy territory. In addition, in the event that Congress takes up the jurisdictional amendments encouraged above, it should advance the appropriate interpretation of the concept of “protected persons” in GCIV in legislative findings and the legislative history.

Dispense with the Need to Engage in Conflict Classification

The above discussion sheds light on another major obstacle to utilizing the War Crimes Act: conflict classification. The statute tracks the underlying treaties and bifurcates its recitation of war crimes into those that can be prosecuted in IACs (*inter alia* grave breaches of the Geneva Conventions when committed against protected persons and enumerated breaches of the Hague Convention Annex) versus those that can be prosecuted in NIACs (*viz.* the idiosyncratic enumerated “grave breaches” of Common Article 3).¹³⁶ The classification of the conflict is thus an

¹³² See generally MATTHEW STIBBE, CIVILIAN INTERNMENT DURING THE FIRST WORLD WAR (2019) (discussing harm to civilians in World War I, including in extraterritorial zones).

¹³³ GCIII, *supra* note ___, at art. 4(A).

¹³⁴ Importantly, GCIV contains a regime of internment and prosecution to address the presence of activities individuals who pose a security threat to a HCP. See, e.g., GCIV, *supra* note ___, at art. 79.

¹³⁵ It is not clear if these memoranda continue to reflect the OLC's position (particularly the Nielson memo, which was not formally published). OLC memoranda are available on the OLC's Freedom of Information Reading Room, which contains the disclaimer that “[a]lthough these records may be of public or historical interest, the views expressed in some of these records may not reflect the Office's current views.” See Dep't Just., OLC FOIA Electronic Reading Room, <https://www.justice.gov/olc/olc-foia-electronic-reading-room>.

¹³⁶ See Rogier Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, 20 INT'L CRIM. L. REV. 595 (2020).

element of each offense that must be proven beyond a reasonable doubt. While this may seem like a facile exercise, today's conflicts are quite complex, may morph from international to non-international (and *vice versa*) over time, and may contain both international and non-international components simultaneously.¹³⁷ Consider, for the moment, the conflict in Syria, which pits the Assad regime, with Russian and Iranian support, against the Syrian opposition and ISIL, who are themselves embattled with each other. This conflict also features a multinational anti-ISIL coalition that generally avoided engaging regime targets and that may (or may not) be operating with tacit Syrian consent against a common foe and includes Turkey, which has attacked Kurdish militias in receipt of various forms of support from Western governments.¹³⁸

As this example reveals, conflict classification in ambiguous operational environments can occasion some thorny legal and political elements when it comes to charging and sources of proof. In particular, establishing the charged conflict classification may require recourse to classified or sensitive material and would put the U.S. government on record with respect to classification in ways that might complicate (to put it mildly) its foreign relations. Charging in the alternative is not an option, and any evidence tending to suggest that a set of events charged as a NIAC are actually an IAC might constitute exonerating evidence that would need to be disclosed to the defense.¹³⁹ And, while there is no requirement to gain inter-agency consensus on conflict classification,¹⁴⁰ there may be circumstances where other agencies disagree with the Department of Justice's determination, which itself might be discoverable. Given this complexity, it may come as no surprise that prosecutors are unwilling to take the considerable risks in the courtroom of invoking the War Crimes Act, particularly when they can more easily charge material support for terrorism¹⁴¹ or utilize immigration remedies against offenders,¹⁴² which proceed under a lower burden of proof.¹⁴³ All told, retaining this bifurcation creates real charging headaches that could be alleviated were the War Crimes Act to reflect the status of customary international law and list all prosecutable war crimes regardless of classification.

This conundrum reflects the fact that although the IHL governing IACs and NIACs is converging in important respects, conflict classification remains a pertinent exercise. As mentioned, the 1949 Geneva Conventions primarily apply to IACs, defined at Common Article 2 as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them," or situations of occupation.¹⁴⁴ This definition thus requires the presence of at least two HCPs

¹³⁷ See generally William J. Fenrick, *The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia*, 81 INT'L REV. RED CROSS 317 (1999) (discussing complexity of conflict classification as the former Yugoslavia dissolved).

¹³⁸ Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT'L L. STUD. 353 (2016).

¹³⁹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁴⁰ There are some criminal statutes that mandate interagency consultation. See, e.g., 18 U.S.C. § 1119 (requiring the Attorney General to consult with the Secretary of State about the ability of the territorial state to secure a suspect's presence).

¹⁴¹ 18 U.S.C. § 2339B.

¹⁴² Alexandra Insinga, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SECURITY (Nov. 7, 2017). This has been described as the "Al Capone" approach. Annie Hylton, *How the U.S. Became a Haven for War Criminals*, THE NEW REPUBLIC (Apr. 29, 2019).

¹⁴³ See generally Jamie Rowen & Rebecca Hamlin, *The Politics of a New Legal Regime: Governing International Crime Through Domestic Immigration Law*, 40 LAW & POL'Y 243, 250 (2018).

¹⁴⁴ GCIV, *supra* note ___, at art. 2. The treaties apply from this point in "the territory of Parties to the conflict" until "the general close of military operations" or the dissolution of the occupation. *Id.* at art. 6.

embattled against each other but does not encompass conflicts involving multiple states on the same side. During the drafting of the four Geneva Conventions, the ICRC and some state delegates proposed more detailed rules for NIACs. In the face of steep resistance, all that was achieved was the laconic, yet important, Common Article 3, which applies in cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The latter terminology is employed in lieu of “civil war” or “internal war” to encompass the entire range of conflicts that do not meet the somewhat technical and unintuitive definition of “international armed conflict” contained in Article 2. The only textual requirement for the applicability of Common Article 3 is the occurrence of an “armed conflict” within “the territory” of a HCP.

This deceptively simple bifurcation was complicated by the promulgation of Protocol I, which expanded the definition of IAC to include “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹⁴⁵ By elevating these conflicts to the status of IACs, the Protocol to a certain degree invokes the “just war” tradition of the *jus ad bellum*. The United States resisted this change, reasoning that it granted a political advantage to certain liberation movements.¹⁴⁶

Protocol II elaborates on the minimum rules in Common Article 3 and reflects a trend toward a greater acceptance of the need to regulate conflicts that do not fall within the bailiwick of the 1949 Geneva Conventions. Protocol II also contains a more precise, and stricter, test for its field of application than that within Common Article 3. Article 1 states:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, Protocol II does not apply until the NIAC involves armed groups under responsible command that have sufficient control over territory to launch “sustained and concerted” military operations and also to conduct their operations in accordance with the rules of war contained in the Protocol. Moreover, Protocol II arguably applies only to conflicts between a state’s armed forces and rebel or dissident movements (and not to conflicts between such militia). During the drafting process, the United States expressed resistance to Protocol II’s higher standard¹⁴⁷ and indicated that it intended to ratify the treaty with an understanding that the United States would

¹⁴⁵ Protocol I, *supra* note ____, at art. 1(4).

¹⁴⁶ Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and relating to the Protection of Victims of Noninternational Armed Conflicts, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. (1987), *as reprinted in* 81 AM. J. INT’L L. 910, 911 (1987)

¹⁴⁷ Matheson, *supra* note ____, at 430 (“This is a narrower scope than we and other Western delegations would have desired and it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area.”).

apply Protocol II to all NIACs.¹⁴⁸ Common Article 3, by comparison, applies to all armed conflicts between non-state groups competing for power or resources within a state, even when the central government is not involved or has ceased to exist. Common Article 3 also applies to those civil wars in which guerilla forces lack any fixed location from which to exercise territorial control or are not led by responsible command. And it also applies to conflicts that may cross borders and pit nation states against transnational non-state actors, such as Al Qaida or the Islamic State—a position originally rejected by the U.S. government but later confirmed by the U.S. Supreme Court.¹⁴⁹

A further wrinkle in the exercise of conflict classification involves conflicts that appear to be NIACs in the sense that a state’s military is embattled against rebel or insurrectionary forces, but that involve the significant intervention by other nation states in support of the non-state actor(s). In situations in which this outside involvement rises to the level of “overall control,” a conflict that appears to be a NIAC can become internationalized and thus governed by the rules that apply to all IACs.¹⁵⁰ A complicating factor is that some confusion exists in the literature as to whether the test is actually one of “effective control,” which suggests a slightly higher standard.¹⁵¹ In either case, when a state is supporting a non-state actor embattled against another state, there is a threshold of control that, when surpassed, can transform a NIAC into an IAC.

Viewed collectively, the Geneva treaty regime thus establishes a taxonomy of conflict classification that includes the following:

- (a) situations that do not trigger IHL at all because the violence has not reached the necessary level of intensity and the parties remain insufficiently organized¹⁵² (e.g., riots, sporadic acts of violence);
- (b) NIACs that do not meet the heightened requirements of Protocol II but that still trigger Common Article 3’s protections;
- (c) NIACs between a state and armed groups that meet the heightened organizational and territorial control requirements of Protocol II;
- (d) IACs within the meaning of Protocol I (e.g., situations in which an indigenous population is resisting colonial domination);

¹⁴⁸ *Id.* (“Because of these limitations, we have recommended that United States ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by common article 3 of the 1949 Conventions, thus including all non-international armed conflicts as traditionally defined.”).

¹⁴⁹ See Goldsmith memo, *supra* note ___, at 15 n.20 (arguing that Common Article 3 applies only to conflicts that are “purely internal to a State, such as civil wars and related domestic insurgency” and not transnational conflicts against international terrorist organizations) (emphasis in original). *But see Hamdan*, 548 U.S. at 562.

¹⁵⁰ See, e.g., *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000) (finding Republic of Croatia exercised overall control over Bosnian Croats embattled in Bosnia-Herzegovina).

¹⁵¹ See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgment, ¶¶ 237-38 (Nov. 29, 2017) (comparing the two standards); Stefan A. G. Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L & COMP. L. Q. 493 (2009).

¹⁵² See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia, April 3, 2008) (discussing when IHL is triggered).

- (e) sufficiently internationalized armed conflicts that trigger the greater part of the protections of the 1949 Geneva Conventions when a state exercises some measure of control over a non-state actor embattled against another state within the conflict; and
- (f) traditional IACs pitting two HCPs against each other.

The latter three scenarios trigger the bulk of the 1949 Geneva Conventions, including its penal regime.

Notwithstanding these textual realities, the *ad hoc* criminal tribunals made quick work of dismantling distinctions between the norms applicable in international and non-international armed conflicts that were so carefully crafted by states during the IHL treaty-drafting process. As a result, much deleterious conduct prohibited or criminalized in IACs now constitutes a war crime even if committed in internal or other NIACs. With respect to the ICTY, this process was enabled by the formulation of the war crimes provisions within the ICTY Statute.¹⁵³ Article 2 of the ICTY Statute reproduced the grave breaches regime of the Geneva Conventions, and thus applied only to IACs. Article 3 of the ICTY Statute extended the jurisdiction of the Tribunal to cover “violations of the laws and customs of war,” including a non-exhaustive list of violations of the regulations accompanying the Fourth Hague Convention. The Tribunal interpreted this latter provision expansively to penalize violations of Common Article 3 as well as other prohibitions within the Geneva Conventions and their Protocols that were not designated as “grave breaches,” finding authority for this assertion in customary international law rather than treaty law.¹⁵⁴

In penalizing violations of Common Article 3 and Protocol II under a customary international law rubric, the ICTY essentially merged the law governing international and non-international armed conflicts, rendering conflict classification a virtually irrelevant exercise in its proceedings. The Appeals Chamber in *Tadić* was quite self-conscious about this, having found that national practice and the inroads made by the international human rights regime into areas traditionally shrouded by state sovereignty have “blur[red] the traditional dichotomy between international wars and civil strife.”¹⁵⁵ In addition, as most global conflicts are now non-international in character (in the sense that they are not inter-state), the distinction between the two bodies of law seemed increasingly arbitrary and outmoded to the judges of the modern tribunals.¹⁵⁶ This merger—a function of the Security Council creating an opening in the ICTY Statute for judicial activism—now finds positivistic expression in Article 8 of the Rome Statute, indicating that this expansive approach has been largely—although not entirely—ratified by the community

¹⁵³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

¹⁵⁴ Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 86-90 (Int’l Crim. Trib. for the Former Yugoslavia, Nov. 30, 2006) (allowing for the prosecution for the war crime of terrorizing the civilian population).

¹⁵⁵ *Tadić* Decision on Jurisdiction, *supra* note ___, ¶ 97 (“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals . . . when two sovereign States are engaged in war, and yet refrain from the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?”).

¹⁵⁶ See Fenrick, *supra* note ___, (“As long as humanitarian law remains in two boxes [IAC and NIAC], courts which address criminal responsibility in complex modern conflicts will be compelled to undergo similar analytical contortions” to those undergone by the ICTY).

of states.¹⁵⁷ As a result, the ICC can prosecute most—but not all—war crimes committed in any type of conflict, as can states that have harmonized their domestic penal codes with the Rome Statute. For its part, the ICRC has identified in Rule 156 of its magisterial study of customary IHL a number of war crimes that may be prosecuted, regardless of conflict classification.¹⁵⁸

Despite these developments in international law, U.S. prosecutors seeking to invoke the War Crimes Act are still required to undertake a conflict classification exercise and to establish their conclusion by proof beyond a reasonable doubt. This can embroil them in complex political determinations. For example, if crimes in Ukraine are under consideration, it would be necessary to determine whether Russia is asserting sufficient control over separatists in Ukraine to internationalize the conflict there.¹⁵⁹ Likewise when it comes to the conflict in Yemen, which involves foreign support for both the internationally recognized government (*e.g.*, Saudi Arabia et al.) and the Houthi rebels (*e.g.*, Iran).¹⁶⁰ In light of the above, Congress could enhance the ability to prosecute war crimes under Title 18 if it condensed the list of war crimes to those unequivocally prosecutable across the conflict spectrum without reference to their treaty provenance (which could alleviate the problems with the definition of “protected persons” as well). Such an approach is entirely consistent with constitutional power of Congress to “define and punish” offenses against the law of nations.¹⁶¹ Under the ideal formulation, all that would be required is a showing that the conduct had a nexus to an armed conflict, however denominated.¹⁶² Removing some of these more technical attendant circumstances from the statute would not undermine the recognition of the social harm caused by the commission of war crimes—to the victim, military order, and the international community writ large—or the moral culpability of the offender. Prosecutors could thus focus on the impugned conduct without having to prove definitively whether the conflict at the time the defendant acted was an IAC or NIAC.

Extend the Doctrine of Superior Responsibility to Title 18

Turning to forms of criminal responsibility, individuals may be prosecuted under U.S. federal law as principals and accomplices,¹⁶³ as accessories after-the-fact,¹⁶⁴ and under theories of attempt,¹⁶⁵ when they commit crimes as part of a conspiracy;¹⁶⁶ and when they order crimes to be committed.¹⁶⁷ However, there is no superior responsibility statute—in Title 18 or the UCMJ for

¹⁵⁷ See generally Hortensia D. T. Gutierrez Posse, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 INT’L REV. RED CROSS 65 (2006).

¹⁵⁸ Rule 156, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (“Serious violations of international humanitarian law constitute war crimes.”).

¹⁵⁹ See Robert Heinsch, *Conflict Classification in Ukraine: The Return of the “Proxy War”?*, 91 INT’L L. STUD. 323 (2015).

¹⁶⁰ See COMMISSION OF INTERNATIONAL JURISTS, BEARING THE BRUNT OF WAR IN YEMEN: INTERNATIONAL LAW VIOLATIONS AND THEIR IMPACT ON THE CIVILIAN POPULATION 4-7 (July 2018).

¹⁶¹ U.S. Const. art. I, § 8, cls. 10-11.

¹⁶² See generally Harmen van der Wilt, *War Crimes and the Requirement of a Nexus with an Armed Conflict*, 10 J. INT’L CRIM. JUST. 1113 (2012). See, *e.g.*, International Criminal Court, Elements of Crimes, art. 8 (requiring a showing that the conduct was committed in “the context of and was associated with” an armed conflict).

¹⁶³ 18 U.S.C. § 2(a) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

¹⁶⁴ 18 U.S.C. § 3.

¹⁶⁵ See, *e.g.*, 18 U.S.C. § 1113 (criminalizing attempt to commit murder or manslaughter).

¹⁶⁶ 18 U.S.C. § 371.

¹⁶⁷ See *supra* note ____; Beth Van Schaack, *Libya’s Haftar and Liability of Superiors: Ordering Offenses v. Responsibility for Omissions*, JUST SECURITY (Sept. 20, 2017), <https://www.justsecurity.org/45178/khalifa-haftar-liability-superiors-ordering-offenses-v-responsibility-omissions/>.

that matter—that expressly applies to war crimes or to the suite of atrocity crimes more generally—an unfortunate accountability gap.¹⁶⁸ The utility of the doctrine of superior responsibility is obvious: it allows prosecutors to charge civilian or military leaders for crimes committed by their subordinates when such superiors knew, or should have known, that their subordinates were committing offenses and they failed to prevent or punish them, thus vitiating the defense of willful blindness.¹⁶⁹ (To be sure, and depending on the facts, the superiors of those who commit international crimes could be prosecuted under the forms of responsibility expressly legislated in Title 18 (e.g., complicity), but defendants would no doubt challenge the legality of any charges based solely on a failure to prevent or punish the conduct of their subordinates.) Enacting a domestic superior responsibility statute would reflect IHL’s requirement that combatants be under responsible command and better harmonize the U.S. legal framework addressed to atrocity crimes in light of the fact that superior responsibility exists in other areas of U.S. law.¹⁷⁰

The doctrine of superior responsibility is well established in IHL (both treaty and customary) and adjacent regimes.¹⁷¹ The doctrine traces its origins to the law of armed conflict and finds expression in a number of post-WWII proceedings that involved the United States. In *In re Yamashita*, the U.S. Supreme Court entertained a *habeas* petition by a Japanese general convicted of atrocities committed by his subordinates before a U.S. military tribunal.¹⁷² The Court found the general’s detention lawful based on the doctrine of superior responsibility. Said the Court:

It is evident that the conduct of military operations by troops whose excess is are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates...¹⁷³

The decision, however, has been widely criticized for establishing what amounted to strict liability that did not require a showing of any *mens rea* or any ability to exercise effective control over subordinates engaged in abuses.¹⁷⁴

¹⁶⁸ See Beth Van Schaack, *Title 18’s Blind Spot; Superior Responsibility*, JUST SECURITY (June 3, 2014), <https://www.justsecurity.org/11066/title-18s-blindspot-superior-responsibility/>. Corn & VanLandingham identify a similar gap in the UCMJ, so any superior responsibility statute should extend to civilian or military jurisdiction. Corn & VanLandingham, *supra* note ___, at 356-363.

¹⁶⁹ See Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003) (discussing elements of command responsibility under international law).

¹⁷⁰ Corn & VanLandingham, *supra* note ___, at 321 (noting that IHL “assigns primary responsibility—for both compliance with the law and accountability for violations—to military commanders”).

¹⁷¹ See generally Jamie Allan Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90 INT’L REV. RED CROSS 303 (2008).

¹⁷² *In re Yamashita*, 327 U.S. 1, 14-16 (1946).

¹⁷³ *Id.* at 15.

¹⁷⁴ Jenny Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT’L CRIM. JUST. 638 (2007). For a more modern articulation of the doctrine by a U.S. court invoking international criminal law jurisprudence, see *Ford ex. rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286, 1288-89 (11th Cir. 2002).

Following World War II, a number of other U.S. military tribunals invoked the doctrine of superior responsibility to prosecute mid-level Nazi defendants who were not indicted by the Nuremberg Tribunal.¹⁷⁵ In the *Hostage Case (United States v. Wilhelm List et al.)*, for example, a U.S. military tribunal held that “a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.”¹⁷⁶ The tribunal went on to explain that:

[w]ant of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use on his own behalf.¹⁷⁷

In the *High Command Case (United States v. Wilhelm von Leeb et al.)*, another U.S. military tribunal observed that for a superior to be held criminally liable for the acts of his subordinates, “[t]here must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.”¹⁷⁸

In terms of treaty law, superior responsibility finds expression in Articles 86-87 of Additional Protocol I to the Geneva Conventions:

Article 86(2): The fact that a breach of this Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he [a subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87(2): The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or of this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.¹⁷⁹

Modern treaties are in accord.¹⁸⁰

¹⁷⁵ See Brian Finucane, *A Commander's Duty to Punish War Crimes: Past U.S. Recognition*, JUST SECURITY (Dec. 4, 2020) (compiling cases focused in particular on the commander's duty to punish).

¹⁷⁶ U.S. v. Wilhelm List *et al.*, VIII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 34, 89 (1949).

¹⁷⁷ *Id.* at 71.

¹⁷⁸ U.S. v. William Von Leeb *et al.*, XII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 1, 76 (1949).

¹⁷⁹ Protocol I, *supra* note _____. The United States has not taken issue with the treaty's formulation of superior responsibility. See Matheson, *supra* note _____, at 428 (expressing support for the enforcement provisions of Protocol I). Indeed, the original Army Field Manual & Regulations and subsequent U.S. military manuals have all incorporated a parallel formulation of superior responsibility. See U.S. Army Field Manuals and Regulations, FM 27-10, § 501; U.S. DEP'T OF DEF., LAW OF WAR MANUAL, § 18.23.3.2 (June 2015).

¹⁸⁰ See International Convention for the Protection of All Persons from Enforced Disappearance art. 6, Dec. 20, 2006, 2716 U.N.T.S. 3 (2006).

The ICTY and ICTR statutes were promulgated by the U.N. Security Council, although the United States was instrumental in their drafting. Article 7(3) of the Statute for the ICTY states:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁸¹

This provision has been interpreted and applied in a range of cases involving military and civilian superiors.¹⁸² Likewise, Article 28 of the Rome Statute embodies the doctrine, but imposes a slightly different test for military and non-military superiors.¹⁸³

According to the ICRC, CIL allows the doctrine of superior responsibility to be prosecuted across the conflict classification spectrum.¹⁸⁴ Indeed, many key U.S. allies have incorporated the doctrine of superior responsibility into their penal codes or military manuals.¹⁸⁵ By way of example, the U.K. Law of Armed Conflict Manual (2004) provides:

Military commanders are responsible for preventing violations of the law (including the law of armed conflict) and for taking the necessary disciplinary action. A commander will be criminally responsible if he participates in the commission of a war crime himself ..., particularly if he orders its commission. However, he also becomes criminally responsible if he “knew or, owing to the circumstances at the time, should have known” that war crimes were being or were about to be committed and failed “to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authority for investigation and prosecution.”¹⁸⁶

The clearest articulation of the doctrine in U.S. law appears in the Military Commissions Act of 2006 (MCA), which governs the prosecution before military commission of certain enemy

¹⁸¹ See, e.g., Statute of the International Criminal Tribunal for the former Yugoslavia (Sept. 2009), art. 7(3).

¹⁸² Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement (Int’l Crim. Trib. for the Former Yugoslavia, Feb. 20, 2001); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement (Int’l Crim. Trib. for Rwanda, Nov. 16, 2001).

¹⁸³ Rome Statute, *supra* note ____, at Rule 28.

¹⁸⁴ Rule 153 of the ICRC’s customary international law study states:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

ICRC, CIL Database, *supra* note ____.

¹⁸⁵ The ICRC has collected international formulations of the doctrine as well as state practice. See ICRC, *Practice Relating to Rule 153: Command Responsibility for Failure to Prevent, Punish or Report War Crimes*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule153.

¹⁸⁶ THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383, § 16.36 (citations removed) (citing the Rome Statute and Protocol I), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

combatants, including those superiors whose subordinates commit offenses. It provides at §950(q) that:

Any person punishable under this chapter who... (3) is a superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.¹⁸⁷

The U.S. Department of Defense's draft instructions for military commissions provides that, as a matter of customary international law, a "person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility."¹⁸⁸ It goes on to identify the following as elements of the doctrine:

The accused had command and control, or effective authority and control, over one or more subordinates;

One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; [and]

The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.¹⁸⁹

The federal courts have also adjudicated superior responsibility cases in the context of suits under the Alien Tort Statute and the Torture Victim Protection Act.¹⁹⁰ This includes caselaw in the Fourth,¹⁹¹ Sixth,¹⁹² Ninth,¹⁹³ Eleventh Circuits,¹⁹⁴ as well as several district courts.¹⁹⁵ Likewise, under immigration law, alien superiors can be excluded or removed from the United States if they

¹⁸⁷ 10 U.S.C. § 950q (2006).

¹⁸⁸ Draft Military Commission Instruction 14, <https://fas.org/irp/doddir/dod/022803dmci.pdf>.

¹⁸⁹ *Id.* at 15-16.

¹⁹⁰ The legislative history of the TVPA makes plain that Congress contemplated superior responsibility liability for acts of torture and extrajudicial killing. S. REP. NO. 102-249, at 8-9 (1991). *See generally* Brief of *Amici Curiae* Retired U.S. Military Commanders and Law of War Scholars in Support of Plaintiffs-Appellants and Reversal, *Mamani v. Sánchez Bustamante*, 968 F.3d 1216 (11th Cir. 2020) (No. 18-12728).

¹⁹¹ *Warfaa v. Ali*, 33 F.Supp.3d 653, 666 (E.D. Va. 2014) (finding sufficient facts alleged to support command responsibility under the TVPA where plaintiff alleged defendant was aware that subordinates had abducted and tortured plaintiff), *aff'd*, 811 F.3d 653 (4th Cir. 2014).

¹⁹² *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009).

¹⁹³ *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996).

¹⁹⁴ *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 609 (11th Cir. 2015) ("There is extensive support from international law and in the text, legislative history, and jurisprudence of the TVPA for civilian liability under the command responsibility doctrine.").

¹⁹⁵ *See, e.g.*, *Xuncax v. Gramajo*, 886 F.Supp. 162, 172, 173 n.4 (D. Mass. 1995); *Doe v. Qi*, 349 F.Supp.2d 1258, 1332-33 (N.D. Cal. 2004); *Yousuf v. Samantar*, No. 1:04cv1360, 2012 WL 3730617, 10-11, 13 (E.D. Va. 2012) (walking through the elements of command responsibility and finding them satisfied).

failed to prevent or punish crimes committed by their subordinates.¹⁹⁶ For example, in *In re D-R*, the Board of Immigration Appeals ruled that a police officer of the Republic of Srpska was subject to removal because as a commander, “he knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts,” including extrajudicial killings.¹⁹⁷

Including superior responsibility as a punishable form of responsibility would extend the reach of U.S. law to individuals who may not commit atrocities themselves but instead allow their subordinates to do so with impunity. It would ensure that the United States can prosecute superiors in its midst—and not just the rank-and-file—particularly given that the former are more likely to have the financial and other means to travel to the United States.

Because the doctrine of superior responsibility already finds expression in other areas of U.S. law, devising an appropriate standard for war crimes, which could also apply to the punitive provisions of the UCMJ and other atrocity crimes within Title 18, should be straightforward. For example, *chapeau* language in § 2441(a) could be amended to read: “It shall be unlawful for any person to commit, order, aid or abet, or otherwise participate, including through superior responsibility, in any of the following acts, . . .” Later, at § 2441(c), the statute could define superior responsibility with reference to § 950q of the MCA. Ideally, the MCA definition could be incorporated by reference to apply to all other international crimes legislation and the UCMJ as well to better rationalize the U.S. legal framework addressed to atrocity crimes.¹⁹⁸

Recriminalize Outrages Upon Personal Dignity

Finally, Congress should consider reinstating all violations of common Article 3 as war crimes under the War Crimes Act. Of particular relevance is the crime of committing “outrages upon personal dignity, in particular humiliating and degrading treatment,” which covers conduct that might not rise to the level of torture but that is nonetheless prohibited by humanitarian law obligations. This charge has proven to be quite useful in Europe,¹⁹⁹ where prosecutorial authorities have charged perpetrators fleeing the overlapping wars in Syria and Iraq with this crime based upon trophy videos showing them disrespecting someone *hors de combat*, a

¹⁹⁶ Section 212 (a)(3)(E) of the Immigration & Nationality Act bars as inadmissible any alien “who, outside the United States, has committed, ordered, incited, assisted, or *otherwise participated in*” an act of torture or any extrajudicial killing, a formulation that has been interpreted to include superior responsibility. See Presidential Proclamation 8697—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses (Aug. 4, 2011) (suspending entry to “[a]ny alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population.”) (emphasis added).

¹⁹⁷ *In re D-R*, 25 I. & N. Dec. 445 (B.I.A. Apr. 6, 2011).

¹⁹⁸ Human rights treaty bodies have noted this deficiency in U.S. law and called for its rectification. See, e.g., Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 5, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

¹⁹⁹ See generally Anna Andersson, *Outrage upon the Personal Dignity of the Dead in International and Swedish War Crimes Legislation and Case Law*, in 66 SCANDINAVIAN STUDIES IN LAW: INVESTIGATION AND PROSECUTION IN SCANDINAVIA OF INTERNATIONAL CRIMES 245 (Lydia Lundstedt ed., 2020) (discussing the origins, elements, and utility of this charge). Courts have ruled that the dead are “protected persons” within international armed conflicts per the Geneva Conventions, although this conclusion is not without its detractors. See Kai Ambos, *Deceased Persons as Protected Persons within the Meaning of International Humanitarian Law*, 16 INT’L J. CRIM. JUSTICE 1105 (2018).

seriously wounded person, or a corpse.²⁰⁰ In many of these cases, it is not possible to prove that the defendant killed or wounded the individual victim depicted, but producing and/or disseminating the photo itself on social media or elsewhere is *res ipsa loquitur* when it comes to outrages upon dignity. Re-criminalizing common Article 3's due process violations is also desirable, but may be a bridge too far while the military commissions are still operating at the Guantánamo Bay Naval Station.

Conclusion

These legislative and interpretive fixes are not dramatic; nor should they be particularly controversial as they track existing law and reflect U.S. treaty obligations that have been recognized by the key U.S. agencies. Together, they will help actuate the woefully under-utilized prosecutorial authorities Congress has enacted. Furthermore, they would enable the United States to live up to its state responsibility obligations to ensure accountability for breaches of IHL; strengthen an important tool in its prosecutorial arsenal that has yet to be utilized, notwithstanding the presence of potential war criminals in U.S. territory; and strengthen the United States' ability to mount complementarity arguments vis-à-vis extraterritorial or international prosecutions of its personnel. The United States should continue to refine and rationalize its ability to prosecute international crimes by closing existing accountability deficits resulting in states of impunity; signal its firm commitment to the values underlying IHL; and contribute to the enforcement of IHL—thus strengthening its retributive, deterrent, and expressive components—by holding those accountable who would commit the worst crimes known to humankind.

* * *

²⁰⁰ The courts have relied, in part, on the Rome Statute's Elements of Crimes, which confirm that "persons" includes dead persons. See ICC, Elements of Crimes, *Article 8(2)(b)(xxi) War Crime of Outrages upon Personal Dignity*, n.49.