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Animating the U.S. War Crimes Act

Beth Van Schaack

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I. 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 such charges 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 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

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), ¶ 13(a), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (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.").

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 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 short-falls. 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 Commissions Act of 2006.

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 so doing, it would be in a position to contribute to evolving jurisprudence under the law of armed conflict, which is otherwise

4. Geoff S. Corn & Rachel VanLandingham, *Strengthening War Crimes Accountability*, 70 AMERICAN UNIVERSITY LAW REVIEW 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, 110 Stat. 2104, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/04/16/act-pl104-192.pdf>. The statute was first codified at 18 U.S.C. § 2401(b), later renumbered as 18 U.S.C. § 2441 by § 605(p)(1) of the Economic Espionage Act of 1995, Pub. L. No. 104-294 (1996).

being shaped by international and foreign courts. 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 know, 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. personnel.

This article 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 customary international law. 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 engage 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.

II. WAR CRIMES UNDER INTERNATIONAL LAW

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 leges 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

6. Marcus Tullius Cicero, *Pro T. Annio Milone Oratio*, in 14 CICERO ORATIONS: 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 prt. 1979) (n.d.).

the lawful object of attack.⁷ Certain Islamic traditions dictated that captured combatants and civilians should be humanely treated.⁸ Likewise, in ancient combat, particular 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, approved by President Abraham Lincoln, and promulgated by the Secretary of War to govern the Union forces.¹¹ Though only applicable to this specific conflict, the Code provided inspiration 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

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/>; *See also Second Lateran Council–1139 A.D.*, PAPAL ENCYCLICALS ONLINE, <https://www.papalencyclicals.net/councils/ecum10.htm> (last visited Nov. 4, 2021).

11. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 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> (last visited Nov. 4, 2021).

13. *See* Int’l Comm. Red Cross, *Customary IHL Database*, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last visited Nov. 4, 2021). *But see* John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee*

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 weapons designed to cause superfluous injury (“Hague Law”).¹⁴ One of the most important treaties to 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.

of the Red Cross Study Customary International Humanitarian Law, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (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 AMERICAN JOURNAL OF INTERNATIONAL LAW 114 (1931).

15. Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Fourth Hague Convention].

16. *Id.* art. 23.

17. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

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 GCIV 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 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,

18. GCIV, *supra* note 17, 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> (last visited Nov. 4, 2021).

20. GCIV, *supra* note 17, art. 147. The breach of other treaty rules does not necessarily give rise to individual criminal responsibility per the treaty text. *See id.* 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.”).

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 a forceful 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

21. *Id.* 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.

COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Jean Pictet ed., 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 *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 675 (Dieter Fleck ed., 2d ed. 2008) (discussing the Convention’s universal jurisdiction regime). For the history of these provisions, see Int’l Comm. Red Cross, *Article 129: Penal Sanctions*, COMMENTARY OF 2020, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F B2C21E0040F0217C125858400446E95> (last visited Nov. 4, 2021).

23. Corn & VanLandingham, *supra* note 4, 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); American University, War Crimes Research Office, *Universal Jurisdiction Project*, <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/universal-jurisdiction-project/> (last visited Nov. 15, 2021) (tracking ability of States to prosecute war crimes under universal jurisdiction in IACs and NIACs).

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 types of 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 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 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

26. GCIV, *supra* note 17, 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). For example, the parties to the conflict in the former Yugoslavia entered into a number of agreements "without any prejudice to the legal status of the parties to the conflict or to the international law of armed conflict in force" setting forth the rules governing the conduct of hostilities. See Int'l Comm. Red Cross, *Former Yugoslavia, Special Agreement Between The Parties to the Conflicts*, ICRC: HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> (last visited Nov. 15, 2021).

27. GCIV, *supra* note 17, art. 3.

28. Common Article 3 applies to persons taking no active part in hostilities and those *hors de combat*. It 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 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 37 (1979).

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 law that applies across the conflict spectrum.³³ Article 8 of the Rome Statute of the International Criminal

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.* arts. 11, 85. Other breaches of the treaty, however, are not designated as “grave breaches” subject to the penal regime. *See, e.g., id.* 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 24, at 12.

33. *See* Int’l Comm. Red Cross, Customary IHL Database, *supra* note 13, r. 156; DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 506 (1956) (noting

Court—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

III. 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, 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

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 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 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, 211–19 (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 treaty 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 LAW JOURNAL 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 U.S. Department of Defense, Office of General Counsel, Official Treaty Documents Related to the Law of War, <https://ogc.osd.mil/Law-of-War/Treaty-Documents/> (last visited Nov. 15, 2021).

40. See Ronald Reagan, Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949 (Dec. 13, 1986), https://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.

“combatant” to include individual fighters who may not fully distinguish themselves from noncombatants at all times.⁴¹ Successive administrations have continued to support ratification of Protocol II, with President Bill Clinton 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 ex-

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 J. Matheson, as the State Department 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 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419 (1987).

42. See William J. Clinton, Message from the President of the United States Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and, for Accession, the Hague Protocol (Jan. 6, 1999), https://www.loc.gov/rr/frd/Military_Law/pdf/GC-message-from-pres-1999.pdf (“I also wish to take this opportunity to reiterate my support for the prompt approval of Protocol II Additional to the Geneva Conventions of 12 August 1949 . . . [which was] transmitted to the Senate for advice and consent to ratification in 1987 by President Reagan but has not been acted upon.”).

43. See *Geneva Conventions for the Protection of War Victims, Hearing Before the S. Comm. on For. Rel.*, 82d Cong. 23–29, 58–59 (1955); War Crimes Act of 1996, H.R. 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 VIRGINIA LAW REVIEW 753 (1953).

tant 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 about 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 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

45. H.R. Rep. No. 104–698, *supra* note 43, at 5.

46. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957) (identifying 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*, PERSPECTIVES ON HISTORY (Mar. 20, 2019), <https://www.historians.org/publications-and-directories/perspectives-on-history/march-2019/prosecuting-torture-walter-jones-and-the-unintended-consequences-of-the-war-crimes-act-of-1996>.

48. *See* War Crimes Act of 1996, H.R. 3680, 104th Cong. (1996). *See generally* Department of 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 48.

treaties and committed by, or against, U.S. 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. 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 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

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), <https://www.migrationpolicy.org/article/immigrant-veterans-united-states-2018>.

53. H.R. Rep. No. 104-698, *supra* note 43, 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.R. Rep. No. 104-698, *supra* note 43, at 13.

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, Matheson raised the specter of Rwanda and urged the inclusion of a broader list of war crimes drawn from Common Article 3 and 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 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

56. *Id.* at 14.

57. *Hearing on H.R. 2587, supra* note 49, at 9–10.

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> (hereinafter Matheson, House of Representatives Testimony). *See also* *Hearing on H.R. 2587, supra* note 49, 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”).

59. Matheson, House of Representatives Testimony, *supra* note 58.

60. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as amended on May 3, 1996, 2048 U.N.T.S. 93.

61. 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.” Matheson, House of Representatives Testimony, *supra* note 58.

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), Matheson averred that this 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 determined 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

62. *Hearing on H.R. 2587, supra* note 49, at 13.

63. Matheson, House of Representatives Testimony, *supra* note 58.

64. *Hearing on H.R. 2587, supra* note 49, 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, which created a civil cause of action, a DOJ representative argued for the ratification of the Convention Against Torture and the creation of 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, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice). The

legal, practical, and diplomatic obstacles to prosecuting 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 The Committee also noted that no Geneva Conventions signatory had yet activated universal jurisdiction.⁶⁹ While true at the time, signatories have since launched a number of war crimes prosecutions in their domestic courts, significantly outpacing the United States in the enforcement of humanitarian law.⁷⁰

The U.S. War Crimes Act 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 States⁷²

Department of Justice now has a specialized unit focused on international crimes. *See* Department of Justice, Human Rights and Special Prosecutions Section, <https://www.justice.gov/criminal-hrsp>. For a discussion of how the Human Rights and Special Prosecutions Section 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*, 74 ADMINISTRATIVE LAW REVIEW (forthcoming 2021).

67. *See generally* CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (Oct. 31, 2016).

68. H.R. Rep. No. 104-698, *supra* note 43, at 8.

69. *Id.*

70. A report by Trial International found that States issued seventy-six war crimes charges predicated on universal jurisdiction in 2020 alone. TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW 2021, at 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 AMERICAN JOURNAL OF INTERNATIONAL LAW 435, 445 (Supp. 1935).

72. War Crimes Act, 18 U.S.C. § 2441(a)–(b).

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.⁷³

A year later, the War Crimes Act was amended, as had been proposed by the DoD.⁷⁴ The list of war crimes was expanded to include not only grave breaches of the Geneva Conventions, but also violations of certain provisions of the Fourth Hague Convention Annex,⁷⁵ 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, which the United States later ratified in 1999.⁷⁶ The first and second categories of war crimes find expression in treaties that do not, by their own terms, contain a penal regime. By contrast, 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.”⁷⁷ This expansion in enumerated crimes left the jurisdictional regime 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 territories of several HCPs, although not between them, constituted a NIAC subject to Common Article

73. William J. Clinton, Statement on Signing the War Crimes Act of 1996 (Aug. 21, 1996), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/23/clintonpresstatement-1482-1996.pdf>.

74. *See supra* text accompanying note 53 (testimony of Miller).

75. The list of violations involves 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). The term “war crimes” also replaced “grave breaches” in the *chapeau*.

76. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 583, 111 Stat. 2386 (1997).

77. Mines Protocol, *supra* note 60, art. 14(2).

3.⁷⁸ With the 2006 Military Commissions Act,⁷⁹ 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 3.⁸⁰ 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.⁸¹ 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 Special Maritime and Territorial Jurisdiction Act and Military Extraterritorial Jurisdiction Act, has allowed for the prosecution of such acts by military personnel and some civilians who accompany them (although charges have been denominated as ordinary common law crimes, such as assault and battery, rather than war crimes *per se*).⁸²

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 prosecuted as such rather

78. *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 General, & Robert Delahunty, Special Counsel, to William J. Haynes II, General Counsel of the Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf>. 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 AMERICAN JOURNAL OF INTERNATIONAL LAW 475 (2002).

79. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950t).

80. 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 47.

81. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL33662, THE WAR CRIMES ACT: CURRENT ISSUES (Oct. 2, 2006) (discussing legislative history of the Military Commissions Act).

82. See Corn & VanLandingham, *supra* note 4.

than under the rubric of torture or cruel treatment.⁸³ As a result of the Military Commissions Act, 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.⁸⁴ The Military Commissions Act 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 via criminal sanctions.⁸⁵

In 2008, and following the United States’ ratification of the 2000 Optional Protocol to the Convention on the Rights of the Child,⁸⁶ Congress enacted a new war crimes statute focused on the recruitment or use of child soldiers.⁸⁷ The statute, which enjoyed strong bipartisan support,⁸⁸ allows the

83. 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, Judgment (Int’l Crim. Trib. for the former Yugoslavia June 12, 2002).

84. See Beth Van Schaack, *Amending the Amendments: The War Crimes Act of 1996*, INTLAWGRRLS (Apr. 15, 2009), <http://www.intlawgrrls.com/2009/04/obama-administration-is-receiving-no.html>; Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 48, 52 (2007) (critiquing amendments to the War Crimes Act implemented by the Military Commissions Act 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”).

85. 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.”).

86. 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 MICHIGAN STATE INTERNATIONAL LAW REVIEW 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, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P> (scroll to the entry for the United States of America and select the document at “23.12.2002”).

87. 18 U.S.C. § 2442. For a discussion, see Chris Moxley, *It’s Time to Revisit the United States’ Evolving Posture Toward the Use of Child Soldiers*, JUST SECURITY (Oct. 21, 2021).

88. See Dani Cepernich, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 SOUTHERN CALIFORNIA LAW REVIEW 1099, 1112 (2010).

United States to prosecute anyone who knowingly recruits, enlists, or conscripts a person under fifteen 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.⁸⁹ 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.⁹⁰

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 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.⁹¹ 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., of Common Article 3—that are not subject to a conventional penal regime.⁹² 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

89. 18 U.S.C. § 2442(c).

90. George Boley, active in the 1989–2003 Liberian Civil War, was the first person deported for using child soldiers. See *Liberia Ex-Warlord George Boley to be Deported from US*, BBC (Feb. 7, 2012), <https://www.bbc.com/news/world-africa-16924744>; 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>.

91. 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> (updated Jan. 2021).

92. The ICRC contends that customary international law 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 Int'l Comm. Red Cross, Customary IHL Database, *supra* note 13, r. 158 (Prosecution of War Crimes).

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.

IV. POTENTIAL AMENDMENTS TO THE WAR CRIMES STATUTE

A. *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 enacted a number of other atrocity 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.⁹³ 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.⁹⁴ 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

93. 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 JOURNAL OF INTERNATIONAL HUMAN RIGHTS 30, 32 (2009) (“There should be consistent application of the rules of jurisdiction in the coverage of atrocity crimes in the federal criminal code.”).

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

Convention obligations and modernized their penal codes to reflect the current state of international criminal law.⁹⁵

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.⁹⁶ 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* clause⁹⁷ 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*.⁹⁸ Congress in 2007 made a similar change to the genocide statute,⁹⁹ but did not render these changes retroactive, notwithstanding debates in the record.¹⁰⁰ The passage of time would not impede the prosecution of earlier war crimes if they involve the

95. See Beth Van Schaack & Zarko Perovic, *The Prevalence of Present In Jurisdiction*, 107 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 237 (2013) (compiling statutes and incorporation trends); Int'l Comm. Red Cross, National Implementation of IHL, <https://ihl-databases.icrc.org/ihl-nat> (last visited Nov. 4, 2021).

96. 18 U.S.C. § 2442(c).

97. 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.’”); *United States v. Mohammad*, 398 F.Supp. 3d 1233, 1241 (U.S.C.M.C.R. 2019) (noting congressional intent to codify existing law within the Military Commissions Act in the form of offenses that had been traditionally triable by military commission).

98. 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 COLUMBIA LAW REVIEW 1515 (1987).

99. See Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821, ¶ 2 (allowing for prosecutions for genocide if the crime is committed within the United States or 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”).

100. *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).

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.¹⁰¹ 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.¹⁰²

B. *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 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.¹⁰³ The majority of these memoranda were revoked;¹⁰⁴ two, however, escaped this deserved fate. Each attempts to limit

101. 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.

102. 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/>.

103. 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 American Civil Liberties Union, which won the public release of many of these memoranda through litigation. See ACLU, *The Torture Database*, www.thetorturedatabase.org (last visited Nov. 4, 2021). They can also be found in the OLC’s Freedom of Information Act Reading Room. See U.S. Department of Justice, *OLC FOIA Electronic Reading Room*, <https://www.justice.gov/olc/olc-foia-electronic-reading-room> (last visited Nov. 4, 2021). See generally Steven Aftergood, *OLC Torture Memos Declassified*, FEDERATION OF AMERICAN SCIENTISTS (Apr. 17, 2009), https://fas.org/blogs/secret/2009/04/olc_torture_memos/.

104. Some of these were revoked during the Bush administration when they came to light; others were repudiated by President Barack Obama. See, e.g., Exec. Order No. 13491,

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 from protection. The memos’ approach was subsequently echoed in the DoD Law of War Manual.¹⁰⁵ 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.¹⁰⁶ This is even though the Convention makes multiple references 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.”¹⁰⁷ The intent of the memorandum was to establish 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,¹⁰⁸ notwithstanding multiple U.S. detention centers

74 Fed. Reg. 4893 (Jan. 22, 2009), <https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations>.

105. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 10.3.2.2. (rev. ed. 2016).

106. Memorandum, Jack L. Goldsmith III, Assistant Attorney General, “*Protected Person*” Status in Occupied Iraq under the Fourth Geneva Convention, 28 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 35 (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.

107. See, e.g., GCIV, *supra* note 17, sec. II.

108. The memorandum also treated the conflict in occupied Iraq as separate from the conflict with al Qaeda and argued that the Geneva Conventions do not apply to the latter because al Qaeda is not a HCP. Goldsmith, *supra* note 106, at 39.

there, including the notorious Abu Ghraib prison.¹⁰⁹ 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,¹¹⁰ he went on to argue that non-Iraqi al Qaida operatives deliberately traveled to Iraq as part of a transnational terrorist network and so did not passively “find themselves” there.¹¹¹

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.¹¹² 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).¹¹³ 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*.¹¹⁴ 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

109. 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>.

110. Goldsmith, *supra* note 106, at 49.

111. *Id.* at 14–15.

112. Memorandum, Howard C. Nielson Jr., Deputy Assistant Attorney General, 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>.

113. *Id.* at 28.

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

law or address[] general or amorphous hypothetical scenarios involving difficult questions of law.”¹¹⁵ 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 in-house experts on international law, to weigh in.¹¹⁶

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.”¹¹⁷ GCIV makes 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 itself,¹¹⁸ neutral States, co-belligerents, or non-party States who are “in the territory of a belligerent state.”¹¹⁹ These exclusions are based on the theory that these individuals will ordinarily enjoy the diplomatic protection of their State of nationality. 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 med-

115. Memorandum, Steven G. Bradbury, Principal Deputy Assistant Attorney General, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf>; see also Memorandum, David Barron, Acting Assistant Attorney General, 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>.

116. 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/>.

117. GCIV, *supra* note 17, art. 4(1).

118. 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. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 163–71 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

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

ical 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.”¹²⁰ 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.”¹²¹ This blanket coverage, it should be noted, is embraced by the contemporaneous U.S. Army Field Manual 27-10, *The Law of Land Warfare*, 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.”¹²²

After identifying the persons protected by the treaty, the text sets forth a number of protections owed to such persons who are “in the territory of a Party to the conflict,”¹²³ 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.¹²⁴ But both authors go on to insist that the phrase “territory of a Party to the conflict” should actually be read as “*home* territory of *the detaining* Party to the conflict.”¹²⁵ 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 treaty commentary makes clear that:

120. INT’L COMM. 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).

121. *Id.* at 60.

122. *See also* FM 27-10, *supra* note 33, ¶ 247b; *see also id.* ¶ 73 (“If a person is determined by a competent tribunal . . . not to fall within any of the categories listed in Article 4, GPW [GCIII], he is not entitled to be treated as a prisoner of war. He is, however, a protected person within the meaning of [GCIV].”).

123. GCIV, *supra* note 17, art. 4.

124. Goldsmith, *supra* note 106, at 41, 45–46 (same with “in the territory of a belligerent State”).

125. *Id.* at 41. 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.

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.¹²⁶

By contrast, the memos would create gaps in protection that run counter to the treaty's ethos of seamless coverage. For example, as applied to World War II, GCIV's protective provisions would address individuals of Japanese nationality held in internment centers in the United States (the subject of the impugned *Korematsu* decision¹²⁷) but not U.S. citizens captured by the Japanese and held outside of Japan, such as on mainland China.¹²⁸ 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.¹²⁹ 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.

126. INT'L COMM. RED CROSS, COMMENTARY, *supra* note 120, at 60 (emphasis added).

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

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

129. *See* European Court of Human Rights Press Unit, Fact Sheet - Secret Detention Sites (Mar. 2019), https://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF.

Although they claim theirs is the most “clear” or “natural” reading of the treaty language,¹³⁰ the collective reasoning of the two ex-OLC lawyers is altogether too convoluted to replicate in its entirety here.¹³¹ Suffice it to say that this position ignores—or requires a revision of—important passages of the treaty,¹³² 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 foreign Jews from the Western European nations prior to their occupation by the Nazis, and the literal and figurative rape of Nanjing). It also includes 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), and World War I abuses of civilians in colonial territories or army staging areas. These are the events that would have been top of mind among the Geneva Conventions’ drafters.¹³³ Further, neither author grapples with the implications of their preferred 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.”¹³⁴ If this same approach were applied to GCIII, combatants in enemy custody might be

130. See Goldsmith, *supra* note 106, at 41; Nielson, *supra* note 112, at 6.

131. 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/>.

132. GCIV, *supra* note 17, 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.”).

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

134. GCIII, *supra* note 17, art. 4(A).

entitled to protections only if they were detained in the enemy's home territory, which occurs but does not encompass all wartime custodial arrangements.¹³⁵

Given the timing of the memoranda and the scrutiny being applied to the United States' war-on-terror detention operations, these anxious reinterpretations were 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 were not entitled to POW status but who might be deserving of some protections under GCIV.¹³⁶ Otherwise, the mistreatment of such individuals would constitute war crimes prosecutable under the War Crimes Act. 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.¹³⁷ 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.

135. See Robert H. Cole, *A Survey of United States Detainee Doctrine and Experience Since World War II* 1–2 (2006), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a449746.pdf> (noting that the United States operated numerous detention facilities at home and across Europe in connection with World War II).

136. Importantly, GCIV contains a regime of internment and prosecution to address the presence of individuals who pose a security threat to a HCP. See, e.g., GCIV, *supra* note 17, art. 79.

137. 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 Department of Justice, OLC FOIA Electronic Reading Room, <https://www.justice.gov/olc/olc-foia-electronic-reading-room> (last visited Nov. 15, 2021).

C. 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).¹³⁸ The classification of the conflict is thus an 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.¹³⁹ 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, which generally avoided engaging regime targets and that may (or may not) be operating with tacit Syrian consent against a common foe, and involves Turkey, which has attacked Kurdish militias in receipt of various forms of support from Western governments and occupies part of Syria.¹⁴⁰

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 information tending to suggest that a set of events charged as a NIAC are actually an IAC (or vice versa) might constitute exonerating evidence that would need to be disclosed

138. See Rogier Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, 20 INTERNATIONAL CRIMINAL LAW REVIEW 595 (2020).

139. See generally William J. Fenrick, *The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia*, 81 INTERNATIONAL REVIEW OF THE RED CROSS 317 (1999) (discussing complexity of conflict classification as the former Yugoslavia dissolved).

140. Terry D. Gill, *Classifying the Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES 353 (2016).

to the defense.¹⁴¹ And, while there is no requirement to gain inter-agency consensus on conflict classification,¹⁴² there may be circumstances in which 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 terrorism¹⁴³ or utilize immigration remedies against offenders,¹⁴⁴ which proceed under a lower burden of proof.¹⁴⁵ 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 in one go, 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.¹⁴⁶ This definition thus requires the presence of at least two HCPs 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

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

142. 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).

143. 18 U.S.C. § 2339B.

144. Alexandra Insinga, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SECURITY (Nov. 7, 2017), <https://www.justsecurity.org/46801/mohammed-jabbateh-conviction-human-rights-trial-cloaked-immigration-crimes/>. This has been described as the "Al Capone" approach to international law. Annie Hylton, *How the U.S. Became a Haven for War Criminals*, THE NEW REPUBLIC (Apr. 29, 2019).

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

146. GCIV, *supra* note 17, 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.* art. 6.

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 further complicated by the promulgation of Protocol I, which expanded the definition of IAC to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹⁴⁷ 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.¹⁴⁸

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

147. Protocol I, *supra* note 2, art. 1(4).

148. Reagan, *supra* note 40.

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 standard¹⁴⁹ and indicated that it intended to ratify the treaty with an understanding that the United States would apply Protocol II to all NIACs.¹⁵⁰ 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.¹⁵¹

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 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

149. See Martin P. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Addition to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 415, 430 (1987) (quoting Michael Matheson expressing support for the enforcement provisions of Protocol II: "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.").

150. *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.")

151. See Goldsmith memo, *supra* note 106, at 52 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 v. Rumsfeld, 548 U.S. 557, 562 (2006) (soundly rejecting this argument).

governed by the rules that apply to all IACs.¹⁵² 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.¹⁵³ 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 organized¹⁵⁴ (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);
- (e) sufficiently internationalized armed conflicts that trigger the greater part of the protections of the 1949 Geneva Conventions when a State exercises sufficient 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 their penal regimes.

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

152. *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 122–23 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (finding the Republic of Croatia exercised overall control over Bosnian Croats embattled in Bosnia-Herzegovina).

153. *See* Prosecutor v. Prlić et al., Case No. IT-04-74-A, Judgment, ¶¶ 237–38 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017) (comparing the two standards); Stefan A. G. Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 493 (2009).

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

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.¹⁵⁵ Article 2 of the Statute reproduced the grave breaches regime of the Geneva Conventions, and thus applied only to IACs. Article 3, by contrast, 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.¹⁵⁶

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.”¹⁵⁷ 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.¹⁵⁸ This merger—a function of the Security Council creating an opening in the ICTY Statute for judicial interpretation—now finds

155. 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 the Security Council in Resolution 827 on May 25, 1993, U.N. Doc. S/RES/827 (1993).

156. *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, ¶¶ 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).

157. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“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?”).

158. See Fenrick, *supra* note 139 (“As long as humanitarian law remains in two boxes [IAC and NIAC], courts which address criminal responsibility in complex modern conflicts

positivistic expression in Article 8 of the Rome Statute, indicating that this expansive approach has been largely—although not entirely—ratified by the community of States.¹⁵⁹ As a result, the International Criminal Court 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.¹⁶⁰ For its part, the ICRC has identified in Rule 156 of its magisterial study of customary IHL a number of war crimes that States may prosecute, regardless of conflict classification.¹⁶¹

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 before they can levy charges against a suspected war criminal. 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.¹⁶² 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).¹⁶³ In light of the above, Congress could enhance the DOJ's 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 the constitutional power of Congress to "define

will be compelled to undergo similar analytical contortions" to those undergone by the ICTY).

159. See generally Hortensia D. T. Gutierrez Posse, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 65 (2006).

160. See Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INTERNATIONAL LAW STUDIES 282 (2016) (discussing gaps in the Rome Statute's war crimes regime, particularly as applied to non-international armed conflicts).

161. Int'l Comm. Red Cross, Customary IHL Database, *supra* note 13, r. 156 ("Serious violations of international humanitarian law constitute war crimes.").

162. See Robert Heinsch, *Conflict Classification in Ukraine: The Return of the "Proxy War"?*, 91 INTERNATIONAL LAW STUDIES 323 (2015).

163. 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).

and punish” offenses against the law of nations.¹⁶⁴ Under the ideal formulation, all that would be required is a showing that the conduct had a nexus to an armed conflict, however denominated.¹⁶⁵ Removing some of these more technical attendant circumstances from the statute would not impact 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.

D. 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,¹⁶⁶ as accessories after-the-fact,¹⁶⁷ and under theories of attempt;¹⁶⁸ when they commit crimes as part of a conspiracy;¹⁶⁹ and when they order crimes to be committed.¹⁷⁰ However, there is no superior responsibility statute—in Title 18 or the UCMJ for that matter—that expressly applies to war crimes or to the suite of atrocity crimes more generally—an unfortunate accountability gap.¹⁷¹ The utility of the doctrine of superior responsibility is obvious: it allows prosecu-

164. U.S. Const. art. I, § 8, cls. 10–11.

165. See generally Harmen van der Wilt, *War Crimes and the Requirement of a Nexus with an Armed Conflict*, 10 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1113 (2012). See, e.g., INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES art. 8 (2013), <https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf> (requiring a showing that the conduct was committed in “the context of and was associated with” an armed conflict).

166. 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.”).

167. 18 U.S.C. § 3.

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

169. 18 U.S.C. § 371.

170. See 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/>.

171. 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 4, at 356–63.

tors 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.¹⁷² (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.

The doctrine of superior responsibility is well established in IHL (both treaty and customary) and adjacent regimes.¹⁷³ 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 by a U.S. military tribunal of atrocities committed by his subordinates.¹⁷⁴ The Court found the general's conviction lawful based on the doctrine of superior responsibility. Said the Court:

It is evident that the conduct of military operations by troops whose excesses 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.¹⁷⁵

172. See Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 UNIVERSITY OF CALIFORNIA, DAVIS, LAW REVIEW 1213 (2003) (discussing elements of command responsibility under international law).

173. See generally Jamie Allan Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 303 (2008).

174. *In re Yamashita*, 327 U.S. 1, 14–16 (1946).

175. *Id.* at 15.

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.¹⁷⁶

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.¹⁷⁷ In the *Hostage Case* (*United States v. 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.”¹⁷⁸ 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.¹⁷⁹

In the *High Command Case* (*United States v. 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.”¹⁸⁰

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

176. Jenny Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 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).

177. See Brian Finucane, *A Commander’s Duty to Punish War Crimes: Past U.S. Recognition*, JUST SECURITY (Dec. 4, 2020), <https://www.justsecurity.org/72915/a-commanders-duty-to-punish-war-crimes-past-u-s-recognition/> (compiling cases focused, in particular, on the commander’s duty to punish).

178. *United States v. List et al.* (The Hostage Case), VIII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 34, 89 (1949).

179. *Id.* at 71.

180. *United States v. von Leeb et al.* (The High Command Case), XII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 1, 76 (1949).

Article 86(2): The fact that a breach of the 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(3): 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.¹⁸¹

Modern treaties are in accord.¹⁸²

The United States was instrumental in drafting the ICTY and International Criminal Tribunal for Rwanda statutes as a permanent member of the U.N. Security Council. 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 [war crimes, genocide, and crimes against humanity] 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.¹⁸³

181. Protocol I, *supra* note 2. The United States has not taken issue with the treaty's formulation of superior responsibility. *See* Dupuis et al., *supra* note 149 (reproducing the remarks of Michael Matheson). Indeed, the original Army Field Manual & Regulations and subsequent U.S. military manuals have all incorporated a parallel formulation of superior responsibility. *See* FM 27-10, *supra* note 33, ¶ 501; OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 18.23.3.2 (rev. ed. 2016).

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

183. *See, e.g.*, Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(3), S.C. Res. 827 (May 25, 1993) (adopting the proposed statute contained within the Secretary-General's Report Pursuant to Paragraph 2 of Security Council Resolution 808).

This provision has been interpreted and applied in a range of cases involving military and civilian superiors.¹⁸⁴ Likewise, Article 28 of the Rome Statute embodies the doctrine, but imposes a slightly different test for military and non-military superiors.¹⁸⁵

According to the ICRC, customary international law allows superiors to be prosecuted under the doctrine of superior responsibility across the conflict classification spectrum.¹⁸⁶ Indeed, many key U.S. allies have incorporated the doctrine of superior responsibility into their penal codes or military manuals.¹⁸⁷ 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.”¹⁸⁸

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

185. Rome Statute, *supra* note 35, art. 28.

186. 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.

Int’l Comm. Red Cross, Customary IHL Database, *supra* note 13.

187. The ICRC has collected HCP formulations of the doctrine as well as State practice. See Int’l Comm. Red Cross, *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 (last visited Nov. 4, 2021).

188. UNITED KINGDOM MINISTRY OF DEFENCE, JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383, § 16.36 (2004), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (citations removed) (citing the Rome Statute and Protocol I).

The clearest articulation of the doctrine in U.S. law appears in the Military Commissions Act of 2006, which governs the prosecution before military commission of certain enemy combatants, including those superiors whose subordinates commit offenses. It provides that:

Any person punishable under this chapter who . . . 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.¹⁸⁹

The U.S. Department of Defense's instructions for military commissions provides that a "person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility."¹⁹⁰ It goes on to identify the following elements of the doctrine:

1. The accused had command and control, or effective authority and control, over one or more subordinates;
2. 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;
3. The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and
4. The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.¹⁹¹

The federal courts have also adjudicated superior responsibility cases in the context of suits under the Alien Tort Statute and the Torture Victim

189. 10 U.S.C. § 950q (2006).

190. U.S. Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission ¶ 6(C) (Apr. 30, 2003).

191. *Id.* ¶ 6(C)(3)(a).

Protection Act.¹⁹² This includes caselaw in the Fourth,¹⁹³ Sixth,¹⁹⁴ Ninth,¹⁹⁵ and Eleventh Circuits,¹⁹⁶ as well as several district courts.¹⁹⁷ Likewise, under immigration law, alien superiors can be excluded or removed from the United States if they fail to prevent or punish crimes committed by their subordinates.¹⁹⁸ 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.¹⁹⁹

Including superior responsibility as a punishable form of responsibility within Title 18 would extend the reach of U.S. law to individuals who may not commit atrocities themselves but instead allow their subordinates to do

192. Alien Tort Statute, 28 U.S.C. § 1350; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. The legislative history of the Torture Victim Protection Act (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. Bustamante*, 968 F.3d 1216 (11th Cir. 2020).

193. *Warfaa v. Ali*, 33 F.Supp. 3d 653, 666 (E.D. Va. 2014), *aff’d*, 811 F.3d 653 (4th Cir. 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).

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

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

196. *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.”).

197. *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).

198. Section 212(a)(3)(E) of the Immigration & Nationality Act renders 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”).

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

so with impunity.²⁰⁰ It would ensure that the United States can prosecute superiors in its midst—and not just the rank-and-file—particularly given that superiors 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 Military Commissions Act. Ideally, the Military Commissions Act definition could be incorporated by reference to apply to all other international crimes legislation and the UCMJ as well. This would better rationalize the U.S. legal framework addressing atrocity crimes and ensure that all superiors, including U.S. personnel, are held to the same standards as enemy combatants.

E. 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. This charge has proven to be quite useful in Europe,²⁰¹ where prosecutorial authorities have charged perpetrators fleeing the overlapping wars in

200. 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).

201. *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 INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE 1105 (2018).

Syria and Iraq with this crime based upon trophy videos showing them disrespecting someone *hors de combat*, a seriously wounded person, or a corpse.²⁰² 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.

V. 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 most pertinent 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 sovereign 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 clear congressional interest in IHL enforcement; and bolster 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 interpretation and enforcement of IHL—thus strengthening its retributive, deterrent, and expressive components—by holding those accountable who would commit the worst crimes known to humankind.

202. In these latter cases, the courts have relied, in part, on the Rome Statute's Elements of Crimes, which confirm that "persons" includes dead persons. *See* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES art. 8(2)(b)(xxi), War Crime of Outrages upon Personal Dignity, n.49 (2013), <https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf>.