Article

What is a War Crime?

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INTRODUCTION

What is a war crime? The question appears to have a simple answer: a war crime is a violation of the law of war. But do all violations of the law of war qualify as war crimes? And are all war crimes violations of the law of war? These questions are not new. In 1942, Hersch Lauterpacht, a leading international lawyer who assisted the prosecution of the Nazis for war crimes at the International Military Tribunal (IMT) in Nuremberg, wrote a memo in which he asked, “Is there a definition of war crimes?” More than seven decades later, the answer to his question remains unsettled.

To date, the most common approach to defining a war crime has been to identify a war crime as a violation of the law of war that has been “criminalized.” This approach has the appeal of simplicity, but it lacks a deep underlying justification and thus fails to guide criminal tribunals, courts, or commissions seeking to determine what a war crime is. It leads to varied answers to the question, “What is a war crime?”, since each statute that criminalizes violations of the law of war does so slightly differently. It also leads to confusion over whether an act must have been historically punishable as a crime in order to constitute a prosecutable “war crime” today—and therefore whether international criminal law can evolve over time.

As international criminal liability continues to spread, this “it’s a war crime if it’s been criminalized” approach is likely to yield a plethora of disconnected criminal statutes with little underlying rhyme or reason guiding them. When existing international tribunals, including most notably the International Criminal Court (ICC), add new war crimes to their statutes or prosecute for the first time those already included in their statutes, the apparent need to prove that the offenses have been “criminalized” may produce inconsistent results and uncertainty about the corpus of war crimes. When domestic courts and prosecutors are called to assess whether a particular act mentioned in a domestic statute amounts to an international “war crime,” the current approach fails to provide clear guidance on where to look for confirmation.

This uncertainty is not merely a problem for academic treatises; it has real world consequences. For instance, the U.S. military commissions at Guantánamo Bay, Cuba, have jurisdiction over violations of the law of war but not over mere domestic crimes. In the case against Omar Khadr, the prosecution has maintained that Khadr, who threw a grenade during a firefight in Afghanistan in...

1. Memorandum by Hersch Lauterpacht to the Committee on Crimes Against International Public Order entitled “Punishment of War Crimes” 6 (1942), http://diginole.lib.fsu.edu/islandora/object/fsu%3A547450.


2002,4 committed a war crime when he killed an enemy combatant—even though his act did not violate international humanitarian law (IHL)—because he was an “unlawful enemy combatant.”5 But is that enough to constitute a war crime?6 If not, then the commission lacks jurisdiction. Similarly, the Special Court for Sierra Leone (SCSL) confronted the question of whether the recruitment of child soldiers amounted to a “war crime” triable before it.7 Once again, the judges struggled to define a war crime and became mired in the confusing and conflicting case law.

Even outside the prosecution context, the “criminalization” approach to a war crimes definition creates problems. Consider the U.S. Alien Tort Statute (ATS): the ATS permits aliens to sue in tort for violations of “the law of nations.”8 Courts have long recognized a “war crime” as a violation of the law of nations,9 but which acts qualify? U.S. courts have been inconsistent in how they have answered this question because they have been unable to agree on what exactly constitutes a war crime.10

This Article aims to distill the core features of war crimes in a way that transcends these differences to supply practitioners, jurists, and scholars with a consistent and intuitive definition that can be applied in different jurisdictional contexts. It aims to identify substantive criteria for war crimes that permit evolution and innovation without retroactively subjecting any individual to criminal penalty. Specifically, to be an international war crime, an act must meet two substantive criteria: it must be (1) a breach of IHL (2) that is serious. In other words, to be a war crime, an act must violate IHL, but not all violations of IHL are subject to criminal penalty—only those that are “serious.”

We argue that the concerns about retroactivity and lack of notice that motivate the “criminalization” approach should be addressed not by incorporating retroactivity into the definition but by establishing non-retroactivity as an independent check on the prosecution—a check that is specific to the context in which a particular prosecution takes place. This approach achieves the goal of ensuring that criminal penalties are not illegitimately applied.
to activity that was not criminal at the time of its commission, while avoiding much of the confusion, circularity, and uncertainty that currently plagues efforts to define war crimes.

This Article proceeds in four Parts. Part I begins by following the history of war crimes from the late 1800s to the present in order to show the roots of the contemporary understanding of war crimes. Part II presents the prevailing interpretation of war crimes in contemporary academic literature and as articulated by international tribunals: law of war offenses that have been “criminalized.” This Part then offers a critique of “criminalization” as a method of identifying the proper reach of “war crimes.” Part III offers an alternative definition of war crimes that does not rely on criminalization and instead treats non-retroactivity as an independent, prosecution-specific check. Part IV then identifies the theoretical and practical benefits of recognizing a trans-jurisdictional definition of war crimes. The new definition not only yields more predictable and consistent international law, but it also has the potential to resolve some contentious contemporary debates in U.S. courts, including those over the proper jurisdiction of the military commissions at Guantánamo Bay and the scope of potential liability under the ATS.

I. THE HISTORY OF “WAR CRIMES”

To understand why the task of defining a war crime continues to challenge scholars and practitioners, this Part traces the historical origins of “war crimes.” Although rules regulating the conduct of war have ancient roots and international treaties regulating the conduct of war were first concluded in the mid-1800s, the modern concept of war crimes and modern war crimes prosecutions did not emerge until the Nuremberg trials in the wake of World War II. Notably, the judgment by the IMT erred by failing to adequately address a key objection: that criminal punishment of the Nazis was retroactive and thus did not respect the basic principle of legality. The failure of the tribunal to address this concern provoked intense criticism that contributed to a decades-long halt in international war crimes prosecution. When international criminal tribunals and the ICC finally emerged at the close of the twentieth century, they responded to concerns about the retroactivity of international criminal liability by incorporating “criminalization” into the very definition of a “war crime”—an approach that remains dominant, but which has produced significant confusion.

A. Early Laws of War

Rules regulating the conduct of war are hardly new. The Hebrew Bible,
though it sanctioned immense brutality, condemned unnecessary collateral and environmental damage when besieging cities;\textsuperscript{13} the Mahabharata spoke of conduct on the battlefield in terms that prefigure “proportionality”;\textsuperscript{14} and the Quran explained the early law of self-defense.\textsuperscript{15} Codes of war existed in ancient China, Greece, India, Japan, and Rome,\textsuperscript{16} while thinkers from the Enlightenment through the modern era sought to extend the intellectual foundation of wartime obligations beyond domestic borders.\textsuperscript{17}

Although there have long been rules governing the conduct of war, the modern concept of “war crime” and the use of international courts to try war criminals are largely twentieth-century inventions. Before Nuremberg, the regulation of wartime conduct was marked by two intertwined features. First, the law of war regulated State conduct, and States were in turn obligated to police their militaries for compliance with the law of war;\textsuperscript{18} but there were no international war crimes tribunals. Second, when the term “war crime” first emerged in the mid-1800s, its meaning was fundamentally different from the meaning it has today. In part because individual legal personality in international law was (as it has remained) a contentious subject, “war crimes” were defined, not by international law, but instead by its absence: where conduct was not privileged by the law of war, it became subject to domestic prosecution. In other words, war crimes in this era are best understood as criminal acts not immunized by international law, rather than as severe violations of IHL, as is the case today.

1. Focus on State Responsibility

The common starting point for examining the formal legal regulation of war is the Lieber Code, issued by President Abraham Lincoln in 1863 to regulate

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\textsuperscript{13} See, e.g., Deuteronomy 20:19 (“When you lay siege to a city for a long time, fighting against it to capture it, do not destroy its trees by putting an ax to them, because you can eat their fruit. Do not cut them down. Are the trees people, that you should besiege them?”).

\textsuperscript{14} See, e.g., Mahabharata 12:96 (noting, for example, that “[a] warrior whose armour has fallen off, or who begs for quarter, saying, ‘I am thine’ or joining his hands, or who has laid aside his weapon, may simply be seized but never slain”).

\textsuperscript{15} See, e.g., Quran 22:39 (Surah Al-Hajj, Verse 39) (“To those against whom war is made, permission is given (to fight) for they have been oppressed, and verily Allah is well able to assist them.”).

\textsuperscript{16} See Michael Bryant, A World History of War Crimes 11-71 (2016).

\textsuperscript{17} Hersch Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Brit. Y.B. Int’l L. 58, 65 (1944) (“There is a weighty additional reason why the Hague Conventions must be considered to be binding upon individuals irrespective of the question whether they have been expressly incorporated as part of municipal law. This is so for the reason that they formulate and are largely declaratory of the fundamental rules of warfare as dictated by generally recognized principles of humanity.”).

\textsuperscript{18} Eve La Haye, a legal advisor of the International Committee of the Red Cross, writes that “individuals could always be held criminally responsible if they breached the laws of war.” Eve LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 105 (2009). Yet, the legal obligations flowed through the States involved in the conflict, not directly to the individual.
the conduct of “Armies of the United States in the Field.” Though it did not refer to “war crimes,” the Lieber Code stipulated that the law of war disclaimed “all cruelty and bad faith concerning engagements concluded with the enemy during the war,” and that violations “shall be severely punished.” The Code provided for prosecution of soldiers who violated the law of war. Jurisdiction, however, was granted to U.S. military commissions, not to an international tribunal. The Code also established that certain domestic crimes committed abroad could be prosecuted in commissions, likely in an effort to ensure that the United States could discipline criminal behavior that might otherwise fall outside any tribunal’s jurisdiction to punish. As the Code noted, “[c]rimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are . . . punishable as at home.” Members of the armed forces could not be held criminally liable for their mere “warlike acts”; after all, the purpose of a soldier was precisely to engage in “killing, wounding, or other warlike acts” on behalf of the sovereign.

Treaties, including the landmark Hague and Geneva Conventions, also did not establish international war crimes as we think of them today. They focused on State, rather than individual, conduct—and left to the State the task of regulating its armed forces and civilians to ensure compliance with the law of war. The Geneva Convention of 1864 bound States to respect a range of rules that primarily sought to define the rights of victims and prisoners of war. States, in turn, enforced these rules within their military ranks. States were required to


20. Id.

21. Gideon M. Hart, Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions, 203 MIL. L. REV. 1, 4-5 (2010). Hart discusses not only the military commissions under the Lieber Code, but also the war commissions that preceded it, in which Union soldiers were tried for criminal acts. Id. at 8-12. These appear to be consistent with prior practice, in which States held their own soldiers responsible for perpetrating crimes on each other or civilians. See infra notes 22-24 and accompanying text.

22. Lieber Code, supra note 19, art. 13 (“The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. . . . It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts. . . . Offenses to the contrary shall be severely punished, and especially so if committed by officers.”).

23. Id. art. 47.

24. Id. art. 57 (“So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.”).


26. LA HAYE, supra note 18.
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inform their armies of the rules of international law and to answer enemy
States when their forces broke these rules.27 However, the Convention lacked
any mention of war crimes or breaches as punishable international crimes.

The 1906 Geneva Convention marked the first time that a binding
multilateral IHL treaty addressed law of war abuses committed by individuals.28
However, it did so by obligating States to ensure that their penal laws were
sufficient to “repress, in time of war, individual acts of robbery and ill treatment
of the sick and wounded of the armies, as well as to punish” certain violations of
the Convention.29 States were again obligated to regulate the conduct of their
own forces through domestic legal and military systems. The 1899 and 1907
Hague Conventions did not change this basic structure. They established
standards for accepted weaponry and methods of warfare, as used and controlled
by States. The 1907 Convention, for instance, expanded the scope of State
responsibility under customary international law, reinforcing “the principle that
the State, rather than the individual, is responsible under international law for
breach of the laws and customs of war.”30 But neither established the
international criminal responsibility of individuals, nor did they create a
universal right of States to prosecute perpetrators for violations.31 States parties
remained responsible for “issu[ing] instructions to their armed land forces” to
abide by the rules set forth in the treaties and ensure their compliance.32 As
Article 3 of the 1907 Convention provides, breaches of the law of war would be
enforced through inter-State interactions, not criminal prosecution.33

The law of war developed in this pre-World War I era thus continued to

27. 1864 Red Cross Convention, supra note 25, art. 8 (explaining in Article 8 that the
“execution” of the Convention shall simply “be regulated by the commanders-in-chief of the belligerent
armies, according to the instructions of their respective Governments, and in accordance with the general
principles laid down in this convention”). Even the Lieber Code of 1863, which refers in comparatively
greater detail to punishment for violations of the law of war, can be understood to recognize the State as
the mechanism through which the law of war was to be enforced. Article 11 explains that “[t]he law of
war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy
during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of
peace, and avowedly intended to remain in force in case of war between the contracting powers.” Lieber
Code, supra note 19. While the laws of war provided in the Code “do not apply except between
Contracting Powers, and then only if all the belligerents are parties to the Convention,” “[t]he laws, rights,
and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following
conditions.” Hague Convention (IV), supra note 25, arts. 1-2.
28. Ryan Liss, Crime at the Limits of Sovereignty: Rethinking International Criminal Justice
29. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in
Armies in the Field art. 28, July 6, 1906, 35 Stat. 1885 (revising 1864 Red Cross Convention, supra note
25) (“In the event of their military penal laws being insufficient, the signatory governments also engage
to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual
acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations
of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or
private individuals not protected by the present convention.”).
30. LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS
31. LÀ HÀI, supra note 18, at 106 (2009).
32. Hague Convention (IV), supra note 25.
33. Id. art. 3 (“A belligerent party which violates the provisions of the said Regulations shall, if
the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons
forming part of its armed forces.”).
locate responsibility for the conduct of individuals with the State. The regulation of individuals under the law of war was, as one commentator has summarized it, effectively a two-part system: “breaches of the laws of war by soldiers were punishable at the local level by States exercising normal territorial jurisdiction and military discipline,” while at the same time, “responsibility at the international level” could still be “owed by the state of the soldier’s nationality (or allegiance) to the state injured by the war crime.”

Amidst this practice, the “principle that individuals are not subjects of the law of nations” unsurprisingly remained firmly entrenched in the minds of many scholars throughout the first half of the twentieth century. Though he disagreed, Hans Kelsen wrote in 1944 that “[m]ost of the writers on international law maintain that war crimes constitute only penal offenses against national law, and that they have only ‘municipal’ character, since international law does not provide punishment of the offenders.” American political scientist Quincy Wright similarly concluded that this lack of direct individual responsibility resulted from the fact that during “the nineteenth century the notion of sovereignty became so exalted that many people thought anybody could commit any crime and gain immunity if in the pursuance of an act of a sovereign state.”

2. “War Crime”

The idea of a “war crime” was rarely referenced before the mid-twentieth century. There appears to have been not a single reference to the term in print before the mid-1800s. Once it emerged, its meaning was fundamentally different from today’s. Instead of referring to conduct that violated the law regulating the conduct of war, it typically referred to conduct during war that was not protected by the law of war. Such conduct was therefore open to prosecution by domestic tribunals—whether ordinary domestic courts, military commissions, or courts martial.

The term “war crime” appears to have been first used in print in 1872, in the second edition of Johann Caspar Bluntschli’s *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt.* The term (kriegsverbrechen, in German) appeared once in passing, in reference to the obligation of civilians not


36. HANS KELSEN, PEACE THROUGH LAW 101 (5th ed. 2007).


38. The identification of Bluntschli as the first writer to mention a “war crime” in print is from JOHN FABIAN WITT, LINCOLN’S CODE 343, 465 (2012) (citing JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRIEN STATEN ALS RECHTSBUCH DARGESTELLT [MODERN INTERNATIONAL LAW OF CIVILIZED STATES AS A LEGAL CODE] § 643a (1878)). Witt observes that Lieber had used the term earlier but not in print. Witt cites to the 1878 edition, but the term first appeared in the 1872 edition. In this and other work, Bluntschli drew heavily on the work of Francis Lieber, author of the Lieber Code. WITT, supra, at 343.
to “promote such war crimes.” The reference to “such war crimes” in turn appears to relate to the preceding paragraphs, which provide that civilians in an occupied territory who take up arms may be court-martialed and punished with death. Thus, rather than refer to criminal punishment for combatants who engage in violations of the rules and regulations of war, the first mention of “war crimes” in print was instead to the resort to arms by civilians—conduct that was not immunized by the laws of war because it was not carried out by lawful combatants.

More than three decades later, German jurist L. F. L. Oppenheim used the term “war crime” in his famous treatise on international law. Once again, while the term was the same as the term used today, Oppenheim’s description of a war crime reflected an understanding of “war crime” that was entirely different. Noting that “[w]riters on the Law of Nations have hitherto not systematically treated the question of War Crimes and their punishment,” Oppenheim wrote that “war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.”

Oppenheim defined four different kinds of war crime: (1) violations of recognized rules of warfare by enemy armed forces, if carried out without orders; (2) hostilities committed by individuals not members of the enemy armed forces; (3) espionage and war treason; and (4) marauding acts. The first category—violations of the rules regarding warfare by members of armed forces—were, Oppenheim explained, “war crimes only when committed without an order of the belligerent Government concerned.” If the acts were committed under orders, States could resort to reprisals against the offending States, but the individuals could not be prosecuted for war crimes. The second category—hostilities committed by individuals not members of enemy armed forces—were punishable because the individuals did not enjoy the privileged treatment of members of armed forces. This category appears to echo Bluntschli’s earlier reference. Such acts were “war crimes, not because they really are violations of recognized rules regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare.” Similarly, espionage, war treason, and marauding could be prosecuted because those committing the acts were not protected by immunities granted to armed forces in war—in the

39. JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIERTEN STÄTEN ALS RECHTSBUCH DARGESTELLT [MODERN INTERNATIONAL LAW OF CIVILIZED STATES AS A LEGAL CODE] § 643a (2d ed. 1872), https://archive.org/details/dasmodernevlke00blunuoft. Bluntschli wrote, “Gemeinden und Hausbesitzer, welche solche Kriegsverbrechen begünstigen oder nicht durch ihre Wachsamkeit verhindern, können je nach der Grösse der Gefahr mit Strafe bedroht und zum Schadensersatz angelhalten werden.” This translates as: “Communities and homeowners who promote such war crimes or who do not prevent them by their vigilance, can be punished, with punishment depending on the size of the harm, and be held liable for damages.”
40. Id. § 643.
42. Id. at 263 n.2, 264.
43. Id. at 264.
44. Id.
45. Id. at 266-67.
case of espionage and war treason, because they are committed by armed forces not in uniform, 46 and in the case of marauding, because it was often committed by “soldiers who have left their corps.” 47

In short, early efforts by both Bluntschli and Oppenheim to define war crimes specified a category of criminal acts that took place in war but were not sanctioned by—and thus not protected or immunized by—the law of war.

B. World War II and the Creation of the Modern “War Crime”

The shift in the understanding of “war crime” can be traced to changes that took place in the period between World War I and World War II. Following World War I, the Allies attempted to subject Kaiser Wilhelm II to criminal liability for waging war. The Versailles Treaty stated: “The German Government recognises the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law.” 48

However, the charge was not for a legal violation but instead an offense against “international morality” and the “sanctity of treaties.” 49 The impropriety of criminal prosecution for what was not, in fact, a criminal act. The absence of any legal prohibition on aggressive war led the government of the Netherlands—to which the Kaiser had fled—to refuse to release him to the Allies. The Americans agreed, concluding that “a precedent is lacking, and . . . appears to be unknown in the practice of nations.” 50

At the conclusion of World War II, however, the situation had changed markedly. In 1943, the Allies founded the United Nations War Crimes Commission to investigate war crimes committed by Nazi Germany, and the foreign ministers of the Allies announced in Moscow that the perpetrators of wartime atrocities would be tried. 51 In 1945, Manfred Lachs, a Polish diplomat and future president of the International Court of Justice, reflected on these developments and the need to break away from a State-centric view of the law of war. He explained, while “[w]ar crimes may appear a minor issue in this deadly conflict,” “the manner in which the problem is resolved might become a great precedent.” 52 He wished to see the concept of war crimes elevated “to the

46. Id. at 159-63.
47. Id. at 270.
48. Treaty of Peace Between the Allied and Associated Powers and Germany art. 228, June 28, 1919, 2 Bevans 43. The argument in this Section draws significantly from OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS 244-75 (2017).
49. HATHAWAY & SHAPIRO, supra note 48, at 252.
50. Treaty of Peace with Germany: Hearings Before the S. Comm. on Foreign Relations, 66th Cong. 372 (1919); see also Liss, supra note 28, at 37 n.181 Though a few war crimes prosecutions of other German officials did occur, they were generally regarded as a failure. The Treatment of War Crimes and Crimes Incidental to the War, 22 BULL. OF INT’L. NEWS 95-102 (1945); see also David C. Morrison, War Crimes, GREAT DECISIONS 68 (2007).
52. MANFRED LACHS, WAR CRIMES: AN ATTEMPT TO DEFINE THE ISSUES 102 (1945).
height it deserves,” as “[t]he principle that crime does not pay must become law, not only in the everyday life of an individual, but also in inter-State relations.”

The crucial difference between 1919 and 1945 was that, in the interim, war had been outlawed by the States that had participated in World War I, including both Germany and Japan. The 1928 Kellogg-Briand Pact provided a foundation for charges of illegal conduct that did not exist in the wake of World War I. The Pact did not, however, necessarily establish individual criminal liability. Hans Kelsen noticed this problem during preparations for the prosecution of the German leaders at Nuremberg and offered a powerful argument for holding individuals liable, as well as a solution to a looming jurisdictional problem. War crimes, he argued, had a “double character”: “they are penal offenses against international and at the same time against national law.”

Kelsen argued that States should, as a result, be allowed to prosecute enemy belligerents as well as members of their own forces for war crimes. To ensure that the IMT would have jurisdiction over such crimes, Kelsen drafted language on individual responsibility to be inserted into the agreement forming the tribunal: any person who violates “international law forbidding the use of force . . . may be held individually responsible for these acts . . . and brought to trial and punishment before the court.” While international law “always” “leaves to national law to specify the penalty,” he explained, the “application of national law to the war criminal is at the same time execution of international law.” Where no such domestic law giving force to international law exists, “a direct application of the international rules of warfare by the courts of the State is possible.”

Drawing on Kelsen’s arguments as well as arguments developed by Lauterpacht, lead British prosecutor at Nuremberg Sir Hartley Shawcross argued that individuals could be held responsible for waging war illegally. To the claim that the tribunal was attempting to retroactively criminalize behavior, thus violating the principle of legality, he responded that the acts were crimes when committed even if the machinery of the tribunal did not yet exist to prosecute those crimes:

There is all the difference between saying to a man, “You will now be punished for what was not a crime at all at the time you committed it,” and in saying to him, “You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgment against you.”

The IMT commenced proceedings in Nuremberg in November 1945,
marking the first time in history that an international tribunal heard cases of war crimes, crimes against the peace, and crimes against humanity.\textsuperscript{59} War crimes were defined in the tribunal’s Charter as “violations of the laws or customs of war,” including, “but not . . . limited to”

murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.\textsuperscript{60}

In its judgment, the tribunal addressed the question of individual responsibility in conclusory—and, it is widely agreed, unsatisfactory—terms, even though it had carefully crafted arguments available to it.\textsuperscript{61} It stated that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\textsuperscript{62} To ground this finding, the tribunal simply explained: “[E]nough has been said to show that individuals can be punished for violations of International Law.”\textsuperscript{63} In an attempt to justify this approach to what was a skeptical international legal audience, the tribunal pointed to the United States’ prosecution of eight German saboteurs in \textit{Ex Parte Quirin} for violating the law of war by landing in the United States for purposes of spying and sabotage.\textsuperscript{64} But many regarded this justification as insufficient—for U.S. court practice was not international practice.

The cursory treatment of concerns about retroactivity opened the door to accusations that the tribunal had ignored the dictates of justice.\textsuperscript{65} While Nuremberg was a signal moment in the evolution of international criminal law, establishing that individuals could be held criminally liable for illegally waged war, the failure of the tribunal to fully and adequately justify that liability had a corrosive effect on the international criminal law that followed. The resultant criticism of the judgment at Nuremberg may have played a role in the decades-long stasis in international criminal law prosecutions that followed the trials. It was not really until the International Criminal Tribunal for the Former Yugoslavia (ICTY) was launched in 1993 that the world again attempted international prosecutions for war crimes. Moreover, the tribunals that addressed war crimes post-Nuremberg took pains to explain that the crimes they prosecuted


\textsuperscript{60} Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

\textsuperscript{61} See \textit{HATHAWAY & SHAPIRO, supra} note 48, at 215-18, 248-53.

\textsuperscript{62} \textit{Judgment, in 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL} 223 (1947).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} (citing \textit{Ex Parte Quirin}, 317 U.S. 1 (1942)).

had been previously criminalized, thus insulating themselves from the chief critique launched at the IMT. But that very same emphasis on criminalization—which courts treated as so essential that they attached it to the very definition of a “war crime”—sowed the seeds of confusion about war crimes that continues today.

C. The Geneva Conventions of 1949

The drafting of the 1949 Geneva Conventions offered an opportunity to clarify the scope of war crimes. But continued discomfort with the concept of war crimes, perhaps partially inspired by fresh memories of the Nuremberg trials, infected the debate. Supporters of the State-centric approach to criminal responsibility opposed efforts at the drafting stage of the 1949 Geneva Conventions to declare violations as “war crimes” that could entail international criminal responsibility. They insisted “that the use of the word ‘crime’ had to be avoided, since violations of the Conventions will not be crimes until they are so made by domestic penal legislation.” This approach aimed to avoid the problem of retroactivity by placing the responsibility for prosecution of violations of the Convention squarely on domestic courts.

The 1949 Geneva Conventions consequently did not use the term international “war crimes” and simply obligated State parties to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.” Yet by linking the concept of “grave breaches” in the treaty to punishment and penalization at the individual level, the drafters of the Geneva Conventions created a system that, as commentators have noted, “expressly indicate[d] the violations of the rule that, in addition to the international responsibility of the party to the conflict, also entail criminal responsibility of the individual for war crimes.”

Nevertheless, the grave breaches system remained unclear on an important point: whether “grave breaches” were to be understood as the same thing as “war crimes,” given the lack of any mention of “war crimes” in the Conventions.


68. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 67 (3d ed. 2013).

69. See generally Marko Divac Öberg, The Absorption of Grave Breaches into War Crimes Law, 91 INT’L REV. RED CROSS 163, 166 (2009) (explaining that the terms “grave breaches” and “war crimes” have evolved over time such that “grave breaches” are now understood to constitute a subset of
Only in 1977, with the entry into force of Additional Protocol I to the Geneva Conventions (AP I), was there explicit clarification under Article 85(5) that “grave breaches” of the Geneva Conventions and of AP I “shall be regarded as war crimes.” This removed any doubt about the legality of war crimes prosecutions for the most serious offenses under the Geneva Conventions. But for breaches of the Geneva Conventions or customary rules, for which there was no explicit statement that a breach could give rise to criminal liability, courts continued to look to past criminal prosecutions, existing statutes, and military codes to determine whether criminal liability was appropriate. As a result, the problem of determining the propriety and appropriate scope of individual criminal responsibility remained unsettled.

D. The New War Crimes Tribunals and “War Crimes” Prosecutions

The close of the twentieth century saw renewed international resolve to develop criminal responsibility for violations of the law of war. In 1993 and 1994, the U.N. Security Council created the ICTY and the International Criminal Tribunal for Rwanda (ICTR). The tribunals were followed by the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998. This was accompanied by ambitious aspirations as much of the international community embraced the idea of a permanent judicial body capable of bringing perpetrators of atrocities to justice.

The Rome Statute envisioned a crystallized, universal, and precise rendering of war crimes, integrated into the criminal law of national legal systems. But it encountered a number of challenges. There was substantial disagreement about the offenses over which the ICC would have jurisdiction, and extensive negotiations were required to finalize the Elements of Crimes. The parties inserted an enumerated list of four prosecutable crimes, one of which was “war crimes,” to address concerns that the original draft was “too vague or ill-defined.” For “war crimes,” the Rome Statute vested the ICC with jurisdiction in cases of international armed conflict (IAC), where there were


74. The UN General Assembly first held a conference to approve the Rome Statute in 1998, but did not receive the minimum sixty ratifications until 2002. On July 1, 2002, the ICC was born. CROWE, supra note 12, at 379.

75. Simpson, supra note 65, at 232.

76. Id. at 238.
“grave breaches” of the 1949 Geneva Conventions, or “[o]ther serious violations of the laws and customs applicable in international armed conflict.”\(^ {77}\) And in situations of non-international armed conflict (NIAC), it granted the court jurisdiction over serious violations of Common Article 3 to the Geneva Conventions as well as over “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character.”\(^ {78}\)

While the Rome Statute made clear that far more than just “grave breaches” could constitute prosecutable war crimes, difficulty arose in determining just which of these violations of the law of war not amounting to “grave breaches” should properly constitute “war crimes” as a matter of general international law. Furthermore, the Rome Statute did nothing to resolve uncertainty regarding terminology used by various other sources—for example, the differences between the terms “serious violations” in the International Law Commission (ILC) Revised Draft Statute,\(^ {79}\) “exceptionally serious war crimes” in the ILC Code of Crimes,\(^ {80}\) and “grave breaches” in the Geneva Conventions. In response to these uncertainties, the law of war offered few answers. Law of war rules regulate conduct but they do not make clear when and whether a breach can give rise to criminal sanction.\(^ {81}\) As a result, the term “war crime” in the Rome Statute was left “in a state of general terminological confusion.”\(^ {82}\)

In addition to the confusion over terminology, the ICC confronted concerns regarding legality and fair-warning—the resolution of which depended in part on proving that those on trial were being prosecuted for widely-accepted crimes. It was not alone in this predicament. The ad hoc tribunals for the former Yugoslavia and Rwanda similarly faced the challenge of establishing their legitimacy in prosecuting particular war crimes.\(^ {83}\)

In response to these challenges, and recognizing similar critiques lodged

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\(^ {77}\) Rome Statute, supra note 73, art. 8(2)(a)-(b).

\(^ {78}\) Id. art. 8(2)(c)-(e).


\(^ {81}\) See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 22, ¶ 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (requiring that detaining forces provide detainees with a canteen and “every guarantee of hygiene and healthfulness”); id. art. 24 (requiring that “[t]ransit or screening camps of a permanent kind shall be fitted out under conditions similar to those described in the present Section”).

\(^ {82}\) See, e.g., Achieving The Promise of Nuremberg, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES, 229, 240 (Tomothy L.H. McCormack & Gerry J. Simpson eds., 1997); see also Kaut Dörmann, War Crimes under the Rome Statute of the International Criminal Court, 7 MAX PLANK Y.B. UNITED NATIONS L. 341, 343-350 (2003). Marko Milanovic noted that later efforts, such as the Kampala Compromise, “did not clarify this ambiguity about the nature of the Rome Statute— if anything, it made it worse.” Marko Milanovic, Aggression and Legality: Custom in Kampala, 10 J. INT’L CRIM. JUST. 165, 175 (2012).

against the IMT, the ICC and the other modern international criminal tribunals argued that the crimes prosecuted before them were not unusual or unprecedented in general international law. They pointed to customary international law and domestic criminal statutes, as well as prior international and domestic criminal prosecutions, as evidence that international criminal responsibility for particular IHL breaches was appropriate. As a consequence, prior “criminalization” came to permeate discussions of international war crimes.

Yet there was considerable confusion about the proper sources of individual criminal responsibility. Is it possible to infer a source of criminalization for non-grave breaches from the statutes of the international courts and tribunals themselves? And is it enough to simply point to a crime, particularly a non-grave breach, as listed in the Rome Statute or the statutes of the ICTY or ICTR? Or is it sufficient (or perhaps even necessary) to look to domestic statutes and prosecutions?

Given this uncertainty, it is hardly surprising that several prominent treatises continue to make mention of the “confusing state of war crimes,” noting that the term is “used in various and sometimes contradictory ways.” Some accounts describe both “broad” and “narrow” senses of the term “war crimes,” with the former referring to any criminal conduct in war, and the latter referring to a more legally-precise definition, which often includes criminalization. Others suggest that a war crime is any violation of IHL. Within some domestic legal systems, the term “war crime” is used to refer to acts that would not constitute war crimes under international law.

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84. See, e.g., discussion of Prosecutor v. Galic, infra Section II.A.
85. For example, in 1998, the ICTY Trial Chamber in the Mucić case (a.k.a. the Čelebići case) assessed the fourth Tadić element by referencing international jurisdictional statutes as evidence that “provisions of common article 3 are not incompatible with the attribution of individual criminal responsibility.” It looked to the ICL Draft Code on Crimes Against the Peace, the ICTR Statute, and the Statute of the International Criminal Court—indeed, in addition to the domestic criminal statutes. Prosecutor v. Mucić, Case No. IT-96-21-T, Judgment, ¶ 309 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [hereinafter Mucić Trial Chamber Judgment], http://www.icty.org/x/cases/mucic/jug/en/981116_jugd_en.pdf; see also Timothy L.H. McCormack & Gerry J. Simpson, Achieving in Promise of Nuremberg: A New International Criminal Law Regime, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 229, 240 (Timothy L.H. McCormack & Gerry J. Simpson eds., 2007) (discussing the ILC’s reference to international armed conflict conventions in delineating the term war crimes in drafting the Rome Statute, and the associated terminological confusion); Theodor Meron, IS INTERNATIONAL LAW MOVING TOWARDS CRIMINALIZATION, 9 EUR. J. INT’L L. 18 (1998) [hereinafter Meron, IS INTERNATIONAL LAW MOVING] (discussing the implications of the ICTY and ICTR statutes for the “criminalization” of war crimes in the post-Nuremberg era).
86. KAI AMBOS, 2 TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 164 (2014).
87. WERLE & JESSBERGER, supra note 2, at 390.
88. See, e.g., AMBOS, supra note 86, at 118 (“In a broad sense, [war crime] encompasses all criminal acts committed in a ‘war’ or an armed conflict, notwithstanding their character as war crimes in a narrow sense.”).
90. See, e.g., Cottier, supra note 89, at n.1.
91. For example, domestic law “may subsume offenses violating the national military code or discipline such as a military disobedience or offenses like ‘high treason’ under the nationally coined notion of ‘war crimes.’” Id.
Some scholars have insisted on Manfred Lachs’s 1945 definition as a starting point in defining war crimes, adhering to an essentially mid-century or classical understanding of war crime. Others have written accounts of war crimes trials without addressing the terminological haze at all. Confusingly, the term is also prone to linguistic and idiomatic ambiguity, as it is sometimes used colloquially to convey a level of gravity in an offense or to indicate that an atrocity may have been committed with a State’s imprimatur. A subgenre of legal literature is even devoted to the task of deciphering the appropriate subject of “war crimes.”

It is in this state of uncertainty that we have entered the twenty-first century. The focus on criminalization has contributed to the confusion by by amplifying and elevating past practice without specifying the proper sources for identifying what constitutes relevant past practice. The next Part explores these drawbacks in greater detail.

II. “CRIMINALIZATION” IN CONTEMPORARY APPROACHES TO WAR CRIMES

In attempting to determine individual criminal responsibility for IHL offenses, contemporary courts and commentators have most frequently maintained that war crimes are IHL offenses that have been “criminalized”—that is, those IHL offenses for which courts, tribunals, or even legislatures crafting jurisdictional statutes have previously held individuals criminally responsible. This Part explains that the “criminalization” approach developed as a solution to theoretical and institutional challenges faced in war crimes adjudication after Nuremberg has created unnecessary confusion and uncertainty about what constitutes a “war crime.”

A. “Criminalization” in Contemporary Scholarship and Jurisprudence

Major IHL treatises, Rome Statute commentaries, scholars, and international judges describe war crimes as those breaches of IHL that have been “criminalized,” and therefore to which “international criminal responsibility” or “individual criminal responsibility” attaches. But what does it mean for an offense to have been criminalized? At times, courts and commentators have looked to whether a treaty explicitly provides for the criminality of an offense;

92. “A war crime is any act of violence qualified as crime, committed during and in connection with a war under specially favourable conditions, created by the war and facilitating its commission, the act being directed against the other belligerent state, its interests, or its citizens, against a neutral state, its interest, its citizens as well as against stateless civilians, unless it is justified under the law of warfare.” LACHS, supra note 52, at 100.

93. See, e.g., LA HAYE, supra note 18, at 104. La Haye takes Lachs’s definition as a first premise, opening a chapter on the prosecution of war crimes by citing Lachs’s definition in full. The limitations of the definition in turn inform her understanding of the application of war crimes doctrine to NIAC. Id. at 118, 121.

94. See, e.g., MICHAEL BRYANT, A WORLD HISTORY OF WAR CRIMES: FROM ANTIQUITY TO THE PRESENT (2016); CROWE, supra note 12. Bryant’s history of war crimes does not dwell on precise definitions, nor does it discuss in depth the absence of consensus among scholars pertaining to what constitutes a war crime.

95. See, e.g., LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2014).
however, only the Geneva Conventions clearly provide for the criminality of law of war offenses, and even then only with respect to grave breaches. At other times, courts have referenced general principles of international law, albeit only in vague terms. So for the most part, courts and commentators have taken an easier approach: they look for evidence of previous prosecutions of particular IHL offenses as well as evidence of existing domestic and international statutes that criminalize or provide jurisdiction over particular offenses. These appeals to criminalization, however, lead to varying understandings of what constitutes a war crime, since each statute that criminalizes violations of the law of war does so slightly differently. These appeals also lead to confusion over whether an act must have been historically punishable in order to constitute a prosecutable “war crime” today.

Reliance on “criminalization” as a defining characteristic of a war crime is widespread. According to the Commentary to the Rome Statute edited by Kai Ambos and Otto Triffterer, a preeminent treatise on international criminal law, war crimes are:

1. “violations of international humanitarian law that are”
2. “criminalized under international law.”

Professor Georges Abi-Saab, a former appellate judge at the ICTY, similarly describes a war crime as “a violation of a rule of jus in bello” that has “the special legal effect of entailing the criminal responsibility of the individual who commits it.” The major treatise by Gerhard Werle and Florian Jessberger agrees. While acknowledging that “the term ‘war crimes’ is used in various and sometimes contradictory ways,” Werle and Jessberger state that the more “legally precise definition” is that “a war crime is a violation of a rule of international humanitarian law that creates direct criminal responsibility under international law.” Similarly, the Max Planck Encyclopedia of Public International Law, which provides respected commentaries on the subject, states that “[a] war crime is any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law.”

In its seminal study of customary IHL, the International Committee for the Red Cross (ICRC), one of the most important authorities on the law of war, states that war crimes are “serious violations of international humanitarian law.” But the ICRC clarifies that State practice confirms that war crimes are limited to those “[v]iolations entailing individual criminal responsibility under

96. Cottier, supra note 89 (formatting added for emphasis). Later, with respect to the Rome Statute in particular, the Commentary similarly remarks that, “The delegations at Rome agreed on two cumulative criteria to define war crimes in Article 8: 1) the conduct must amount to a violation of customary international humanitarian law, and 2) the violation of humanitarian law concerned must be criminalized under customary international law.” Id. at 309.
97. Abi-Saab, supra note 69, at 112 (emphasis added).
98. Werle & Jessberger, supra note 2, at 392.
99. Schwarz, supra note 2, ¶ 1 (emphasis added).
international law.”

Perhaps the biggest champions of the “criminalization” approach to defining war crimes have been the judges of major international criminal tribunals. The ICTY’s first case—the case against Duško Tadić—was the first to explicitly announce a view of war crimes rooted in “criminalization.” The case has since become the leading case on war crimes. In a seminal interlocutory judgment, the Appeals Chamber in Prosecutor v. Tadić enumerated the elements of a prosecutable IHL offense in assessing whether it had jurisdiction under Article 3 of its Statute, which empowered it to prosecute “persons violating the laws or customs of law.” According to the Appeals Chamber, in order for an offense to be subject to prosecution under Article 3, the following requirements had to have been met:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . . ;
(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ; and
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

The fourth of these elements has sparked the most debate. This element speaks to the core challenge of determining how to apply IHL rules to individuals in an international criminal law context. But what does an assessment of “individual criminal responsibility” under this fourth element entail? In applying

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101. Id. at 570.
103. Id. ¶ 86.
104. Tadić Interlocutory Appeals Decision, supra note 102, ¶ 94 (emphasis added); see also WERLE & JESSBERGER, supra note 2, at 403 (“The decision pertained primarily to the Tribunal’s jurisdiction, rather than to the substantive criminality of violations of international humanitarian law, but it allowed inferences to be made about substantive criminal law, since acceptance of jurisdiction over crimes assumes their existence.”). Furthermore, the “criminalization” of war crimes should be understood as part of a historical development of the criminalization of various aspects of international law at the same time, including, in particular, various projects of the ILC. The ILC’s project to codify State Responsibility in the Draft Articles on State Responsibility employs the language of “primary” and “secondary” rules. Primary rules are obligations on States under international law. Secondary rules are rules about when and how a State may be held responsible for breaches of such rules in international law. The aim of the Draft Articles was to develop these secondary rules. Article 58 explains that the Draft Articles are without prejudice to questions of individual responsibility, including international criminal responsibility. Int’l Law Comm’n, Rep. of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 58, U.N. Doc. A/56/10, at 142 (2001). While the law of State responsibility thus has no direct relevance to international criminal liability, the influence of efforts to codify the law of State responsibility throughout the twentieth century can nonetheless be seen in scholarship about war crimes and, in particular, scholarship discussing a dual system of primary and secondary rules in international criminal law. For example, Schwarz explains that “the concept of war crimes is based on the accessoriness between the primary rules concerning prohibited acts under international humanitarian law and secondary rules concerning the punishment of war crimes.” Schwarz, supra note 2, ¶ 2. Cassese makes similar reference to “primary” and “secondary” rules.” See, e.g., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 381 (Antonio Cassese et al. eds., 2002).
this element, the Tadić Appeals Chamber avoided complex theoretical inquiry into the nature of individual responsibility and instead looked to past prosecutions and existing criminal and jurisdictional statutes.

The Tadić Appeals Chamber first began with an intuitive approach: assessing the IHL rule that had allegedly been breached for guidance as to whether it contemplated penal consequences and whether the breach had been prosecuted as a war crime in the past. Had the case before the Tadić Appeals Chamber concerned an alleged grave breach of the Geneva Conventions, as opposed to an alleged violation of Common Article 3, the inquiry would have ended there. But the Chamber reasoned that even non-grave breaches, such as violations of Common Article 3, could be “war crimes” provided they had been criminalized. This was despite the absence of explicit contemplation of individual criminal responsibility for such offenses in the Geneva Conventions of 1949, in the Additional Protocols, or in any other source of IHL rules. Referencing the IMT, the Tadić Appeals Chamber explained that “a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.”

To make the case for considering non-grave breaches of IHL “war crimes,” the Tadić Appeals Chamber recalled the approach taken at Nuremberg, where there was no IHL treaty explicitly contemplating international criminal responsibility for any IHL offenses, let alone any relevant history of past prosecutions. According to the Chamber, the IMT resolved these problems by “consider[ing] a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility.” These factors included the following: “the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.”

Drawing on Nuremberg, the Tadić Appeals Chamber then surveyed a variety of sources, including the Military Manual of Germany, the “Interim Law of Armed Conflict Manual” of New Zealand, the U.S. Department of the Army Field Manual, and the British Manual of 1958. All of these documents, it explained, pointed to a conclusion that breaches of Common Article 3 are criminally punishable.

The ICTY repeated this approach in Prosecutor v. Galić. As in Tadić, the Galić Trial and Appeals Chambers adopted an approach to “criminal responsibility” that involved looking to past prosecutions as well as domestic statutes incorporating given IHL offenses. The Galić Trial Chamber was

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105. See supra notes 67-70 and accompanying text.
106. Tadić Interlocutory Appeals Decision, supra note 102, ¶ 131.
107. Id. ¶ 128.
108. Id.
109. Id.
110. Id. ¶ 131.
111. Id.
specifically tasked with considering whether terrorism could be a war crime. To determine this, it followed the approach in Tadić to the letter, including the fourth element, which required it to determine "whether the intent to spread terror had already been criminalized by 1992." The Galić Trial Chamber began by noting that the first conviction of terrorism against a civilian population was delivered in Makassar in the Dutch East Indies in 1947; it then turned to the history of how the crime of terrorism came to be included in the Nuremberg Charter. 

As in Tadić, the Galić Trial Chamber concluded that this evidence was sufficient to allow the tribunal to hold an individual criminally responsible for an act of terrorism. On appeal, the Appeals Chamber in Galić reaffirmed that the appropriate approach to determining individual criminal responsibility was to look to past prosecutions, established criminal statutes, and military codes. The Galić Appeals Chamber looked to the 1919 Report of the Commission on Responsibilities which deemed terrorism a war crime, as well as to the Norwegian Military Penal Code of 1902, the criminal codes of the Czech Republic and the Slovak Republic, the Penal Code of Côte d’Ivoire, and a host of other domestic criminal and penal codes, all of which considered terrorism a prosecutable crime.

The ICC has taken a similar approach. The Rome Statute grants the ICC war crimes jurisdiction over “grave breaches” of the Geneva Conventions of 1949, serious violations of Common Article 3 to the Geneva Conventions, and “[o]ther serious violations of the laws and customs applicable in international armed conflict” and NIAC. However, when it comes to the non-grave breaches, confusion remains over how to determine which violations of IHL constitute war crimes and whether the Rome Statute itself criminalizes all offenses falling within its jurisdiction. As locating the source of criminalization for the non-grave breaches offenses in the Rome Statute itself runs into issues of circularity, some scholars maintain that an offense must have been criminalized by statute or custom before it can constitute a war crime in terms of Article 8. But when ICC chambers have been called upon to confirm war crime charges, they have simply referenced the Rome Statute as the primary source of criminalization.

For example, in confirming charges against Congolese warlord Thomas Lubanga for the conscription, enlistment, and use of child soldiers in the Ituri conflict, the ICC Pre-Trial Chamber pointed to the Rome Statute as the source of criminalization to address the defense’s contention that he could not have been

113. Id. ¶¶ 114-117.
114. Id. ¶ 118.
115. Id. ¶ 113.
117. Rome Statute, supra note 73, art. 8(2)(a)-(b).
118. See Cottier, supra note 89, at 305.
aware that recruitment and use of child soldiers constituted a crime:

Having regard to the principle of legality, the terms enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities are defined with sufficient particularity in articles 8(2)(b)(xxvi) and 8(2)(e)(vii), 22 to 24 and 77 of the Rome Statute and the Elements of Crimes, which entered into force on 1 July 2002, as entailing criminal responsibility and punishable as criminal offences.119

Thus, the ICC Pre-Trial Chamber rejected Defendant Lubanga’s submission that he could not have “foreseeably . . . anticipated . . . his individual criminal responsibility.” It ruled that Lubanga should have known the enlistment and use of child soldiers constituted a “war crime” because of the Rome Statute’s inclusion of these offenses.121 As the tribunal explained:

[T]here is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (lex scripta) pre-existing criminal norms approved by the States Parties to the Rome Statute (lex praevia), defining prohibited conduct and setting out the related sentence (lex certa), which cannot be interpreted by analogy in malam partem (lex stricta).122

Moreover, the Chamber established the criminal nature of such offenses by adopting the position of victims’ representatives that “[t]he Statute’s entry into force could not have escaped the attention of Thomas Lubanga, who claims to be a politician and head of state, and who, because of his involvement in an armed conflict, was directly concerned.”123

Taken together, these examples represent the prevailing contemporary approach to war crimes: war crimes are IHL breaches that have previously been criminalized by courts or under existing statutes and codes. Few cases since Tadić have questioned this approach to defining a war crime.124

120. Id. ¶ 296.
121. Id. ¶ 302-304, 314.
122. Id. ¶ 303; see also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgement Pursuant to Article 74 of the Statute, ¶ 603 (Mar. 14, 2012) [hereinafter Lubanga Trial Chamber Judgment], https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf (indicating that “the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute”); Milanovic, Is the Rome Statute Binding on Individuals?, supra note 82, at 34-35 (discussing the legality concern in Lubanga in the context of whether the Rome Statute should be read as a jurisdictional and substantive instrument). The Lubanga Pre-Trial and Trial Chambers also pointed to the 1989 Convention on the Rights of the Child, a multilateral human rights treaty that commands nearly universal State accession. Lubanga Pre-Trial Chamber Decision, ¶ 310; Lubanga Trial Chamber Judgment, ¶ 604. Some scholars have identified human rights instruments as giving notice of “well-developed norms and penal proscriptions,” and in this sense helping to overcome the retroactivity problem. See, e.g., Beth Van Schaack, The Principle of Legality in International Criminal Law, 103 AM. SOC’y INT’L L. PROCEEDINGS 101, 102 (2009). We do not specifically embrace that view here, but instead focus on the more influential and salient instruments that appear to undergird the current “criminalization” approach: past prosecutions, penal codes, and international statutes.
123. Lubanga Pre-Trial Chamber Decision, ¶ 314 (citation omitted).
124. For example, in the Akayesu judgment, a key point of contention was whether or not atrocities committed in the court of an internal armed conflict were sufficiently criminalized under international law. The ICTR concluded that they were. See Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 601-17 (Sept. 2, 1998) [hereinafter Akayesu Trial Chamber Judgment], http://unictr.un.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf;
section explains why, despite this consensus, this approach to defining war crimes is mistaken.

**B. The Limits of “Criminalization”**

The criminalization approach is theoretically and practically flawed. It fails to provide a coherent test or principle that determines what counts as a war crime and has therefore produced fragmentation across the international and domestic jurisdictions charged with adjudicating war crimes. The absence of a clear test gives rise to uncertainty about which IHL violations currently constitute war crimes as well as which IHL offenses might in the future be prosecuted as war crimes. In short, with criminalization as a central condition of a “war crime,” the legitimate corpus of war crimes remains elusive and indeterminate.

1. **Circularity**

The criminalization approach to defining a war crime is fundamentally circular: a violation of IHL is prosecutable as an international war crime only if it has previously been prosecuted as a war crime (ideally in an international forum) or previously criminalized in the statute of an international criminal tribunal. For example, Schwarz explains that “violations of international humanitarian law, which have been criminalized or termed as war crimes by the Statute of an international criminal court, may be justifiably regarded as war crimes under the jurisdiction of the relevant international court.”

This is not simply a theoretical concern; it also curtails the dynamism of international criminal law in practice. Because of its circularity, the “criminalization” approach is likely to yield an under-inclusive set of offenses as candidates for international war crimes. If an act cannot generate individual criminal responsibility as a war crime until it has been prosecuted as a war crime, then the set of potential war crimes is necessarily very constrained. The expectation that a crime ought to have been prosecuted previously in order to establish a sufficiently strong customary international basis for inclusion in a statute or prosecution by an international tribunal limits the ability of judicial bodies to try untested and more novel offenses—such as conscription of child soldiers. Dapo Akande has pointed out that “there seems to be no reason why international tribunals may not apply treaties which create crimes that have not

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yet been accepted under customary international law."\textsuperscript{126} But requiring prior criminalization necessarily excludes such crimes from being recognized. Indeed, the few new offenses that have been recently recognized as war crimes were recognized by courts that largely elided the criminalization condition.\textsuperscript{127}

The necessity of looking to some prior evidence for criminalization can also lead national courts to distrust their own judgment and look only to preexisting international jurisdictional statutes, particularly the most recent: the Rome Statute. At the Assembly of States Parties of the ICC in December 2017, State parties considered multiple proposals to amend Article 8 of the Rome Statute to include three new war crimes.\textsuperscript{128} In the debates leading to these amendments, many State parties had expressed concern over whether the new crimes ought to be included, because the crimes had not yet been criminalized under customary international law.\textsuperscript{129}

Cassese warned of this danger in 1999: “national courts—as well as the ICTY and ICTR—might be tempted to rely on the ICC’s restrictive provisions as codifying existing international law” and in doing so, would adopt a “restrictive attitude” toward war crimes that would “no doubt . . . constitute a serious setback.”\textsuperscript{130} Abi-Saab likewise warned that Article 8 of the Rome Statute is “far from being a faithful snapshot” of customary international war crimes at

\begin{itemize}
\item \textsuperscript{126} Dapo Akande, Sources of International Criminal Law, in \textit{THE OXFORD COMPANION ON INTERNATIONAL CRIMINAL JUSTICE} 48-49 (Antonio Cassese ed., 2009). Cassese himself agreed that “a breach is termed a war crime by the Statute of an international criminal court . . . [and] even if the breach has never been brought before a national or international criminal court . . . [it] may justifiably be regarded as a war crime.” \textit{CASSESE, INTERNATIONAL CRIMINAL LAW}, supra note 68, at 68. \textit{But see} Heller, \textit{supra} note 125 (arguing against the view that violations of international law are directly criminalized under international law, and suggesting instead that international crimes are “crimes” in light of their criminalization under national law).
\item \textsuperscript{127} \textit{See infra} note 145 and accompanying text.
\item \textsuperscript{128} Dapo Akande, \textit{Customary International Law and the Addition of New War Crimes to the Statute of the ICC}, EJIL: TALK! (Jan. 2, 2018) [hereinafter Akande, \textit{Customary International Law}], http://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/. The three new crimes include: (1) employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production; (2) employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays; and (3) employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.
\item \textsuperscript{129} \textit{Int’l Crim. Ct.}, Rep. of the Working Group on Amendments, ICC-ASP/16/22 (Nov. 15, 2017), ¶ 14. Not only are there divergent perspectives on whether criminalization, as such, is a requirement, but also on what the defining elements of a war crime are. Some States, for instance, contended that the underlying IHL prohibition must itself have reached customary status. To make this point, States parties asserted that Article 8 in fact already included crimes not prohibited under customary international law at the time of their inclusion in the Rome Statute, pointing in particular to the recruitment of children and attacks against peacekeepers. \textit{id.}
\item \textsuperscript{130} Antonio Cassese, \textit{The Statute of the International Criminal Court: Some Preliminary Reflections}, 10 EUR. J. INT’L L. 144, 158 (1999). This focus on the Rome Statute also brings an attendant risk of over-inclusivity. Article 8 of the Rome Statute defines “war crimes” as “serious violations of the laws and customs applicable in international armed conflict,” Rome Statute, \textit{supra} note 73, art. 8. But as highlighted by one Rome Statute Commentary, the drafters ended up settling on the term war crimes because “[q]uestions arose concerning terminology, given reference in the International Law Commission draft to ‘serious violations’, ‘exceptionally serious violations’, and ‘grave breaches.’” \textit{WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE} 222 (2d ed. 2016). Today, some parties still challenge whether all the Article 8 crimes were sufficiently serious to be included. See Cassese \textit{supra}; Cottier, \textit{supra} note 89.
\end{itemize}
the time of its drafting—or today. Abi-Saab instead compares Article 8 to a “mere ‘artist’s sketch’” of the more general category of war crimes in general international law. But criminalization undermines such adaptability of the law, as its methodology is inherently backwards-looking. As a result, tethering the concept of war crimes to particular jurisdictions or to the statutes creating these jurisdictions may well lead to the under-development of substantive war crime law.

2. Fragmentation

The reliance on “criminalization” not only produces circular reasoning (which in turn undermines the dynamism of international criminal law), but it has also led to a great degree of variation across courts adjudicating war crimes. Fragmentation can happen for two reasons. First, when courts focus their criminalization inquiry on their own statutory framework and prosecutorial history, as many do, the circularity noted above can produce divergent definitions of war crimes because the statutes and history vary significantly from court to court. Jurisdictional statutes do not cleanly map onto one another. The problem of fragmentation is further exacerbated when courts prioritize their own precedent flowing from these statutes. For example, although the ICTR has jurisdiction to prosecute IHL violations of “collective punishments” and “terrorism,” the Rome Statute specifically omits these provisions. The ICTY has jurisdiction over the war crime of “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering,” which would encompass nuclear weapons or cluster munitions, but the Rome Statute’s weapons provisions do not include these weapons. Article 8’s section on crimes in NIAC fails to include many crimes that the ICTY has declared are customary, such as the crime of intentionally attacking civilian objects. Indeed, when compared against existing customary international law (informed by the statutes and jurisprudential outputs of other tribunals), the Rome Statute is under-inclusive.

Second, when courts look outside their own statutory framework, their attempts to prove criminality can easily become a functional grab-bag, with

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131. Abi-Saab, supra note 97, at 118.
132. For instance, in evaluating alleged violations of Common Article 3 by Clement Kayishema, the ICTR observed that:
   Article 4 of the ICTR Statute states that the persons committing or ordering to be committed serious violations of Common Article 3 and Protocol II should be prosecuted. The Chamber finds that this is a qualitative limitation of its competence and the phrase “serious violations” should be interpreted as breaches involving grave consequences. The list of prohibited acts, which is provided in Article 4 of the ICTR Statute, as well as in Common Article 3 and in Article 4 of Protocol II, undeniably should be recognised as serious violations entailing individual criminal responsibility.
   Prosecutor v. Clement Kayishema, Case No. ICTR-95-1, Trial Chamber Judgment, ¶ 184 (May 21, 1999).
   Similarly, as explained earlier, in Prosecutor v. Lubanga, the ICC Pre-Trial Chamber addressed the criminalization inquiry through express reliance on the relevant provisions of the Rome Statute, supplemented by citation to a past instance of the child soldier offenses being prosecuted by the SCSL. See supra notes 121-122 and accompanying text.
133. See SCHABAS, supra note 130, at 224.
134. GROVER, supra note 95, at 301-02.
courts drawing on a vast array of disparate sources as evidence of criminal responsibility. Across the scholarship and case law, various sources of law have been identified as relevant to an inquiry about the appropriateness of individual criminal liability, including _inter alia_ jurisdictional statutes, customary international law, and domestic precedent, among other sources. As noted by Meron, “whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community.”

In practice, courts frequently point to a variety of potential and purported sources of criminalization without showing how these sources are ultimately sufficient, or why they are necessary. Courts also draw to differing degrees on domestic laws and their treatment of war crimes. These references to domestic law are rarely systematic or comprehensive, leaving a great deal of uncertainty as to why the courts have relied on the domestic laws or decisions they have. For example, in _Tadić_, in an effort to show that States “intend to criminalize serious breaches of customary rules and principles,” the tribunal cited “many elements of international practice” including multiple domestic military manuals, domestic statutes, and two U.N. Security Council Resolutions concerning Somalia in a manner that can hardly be described as systematic. The tribunal also emphasized that during the Nigerian Civil War both army members and rebels belonged to the Federal Army and rebels were brought before Nigerian courts, but did not reference other similar examples. The tribunal did not explain why it relied upon the examples it did.

In the case against the commanders of the Čelebići prison camp (_Prosecutor v. Mucić_, also known as the “Čelebići Case”), the ICTY Trial and Appeals Chambers referred to an entirely different set of sources. The _Mucić_ chambers focused in particular on the Rome Statute as well as other international documents, such as the ILC Draft Code of Crimes, as evidence of prior

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135. Meron, _Is International Law Moving_, _supra_ note 85, at 24. Somewhat differently, Schwarz tethers the determination of “criminalization” more to existing criminal and jurisdictional statutes, as well as past judicial conclusions:

[I]ndividual criminal responsibility for war crimes can be derived from customary international law providing criminal sanctions for serious violations of international humanitarian law . . . by taking into account the different sources of State practice that contributes to the existence of customary international law: (i) military manuals; (ii) national legislation; (iii) judicial decisions; (iv) official pronouncements of States; and (v) the general criminal principles of criminal justice common to domestic legal systems.

Schwarz, _supra_ note 2, ¶ 22 (citations omitted).

136. _Tadić_ Interlocutory Appeals Decision, _supra_ note 102, ¶ 130.

137. _Id_. ¶ 131.

138. _Id_. ¶ 130.

139. The Trial Chamber stressed that:

the United Nations cannot “criminalize” any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the statute of the ICTR.

_Mucić_ Trial Chamber Judgment, _supra_ note 85, at ¶ 310.
criminalization. Perhaps the most confusing aspect of the Mucić Appeals Chamber’s discussion of criminalization was its suggestion of another potential source of individual criminal responsibility: general principles of international law. According to the Mucić Trial Chamber, while the Nuremberg Tribunals carried out prosecutions in the absence of any language in the 1929 Geneva and 1907 Hague Conventions contemplating international criminal liability, the ICTY was nonetheless able to prosecute breaches of these treaties because “general principles of law” supplied the criminality of these breaches. The Chamber concluded that “it is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to ‘general principles of law’ recognized by all legal systems.”

More recently, in Prosecutor v. Galić, the ICTY Appeals Chamber appears to have gathered together as many sources as it could to bolster its position that the crime of terrorism against civilian populations ought to be considered an HIL offense prosecutable by that court. The SCSSL case against Samuel Hinga Norman, a former Deputy Minister of Defence in the Government of Sierra Leone who was accused of enlisting and using child soldiers, similarly relied on a wide variety of sources, including a number of selected military guides that prohibit child soldier recruitment.

The lack of a consistent methodology regarding the sources sufficient to show criminalization means that it is difficult to tell what belongs in the set of “war crimes.” We are not the first to notice this problem, of course. Professor Robert Cryer has argued:

The fourth Tadić condition, that it is necessary to identify a separate rule criminalising a violation of humanitarian law, is one that has led to some of the most questionable argumentation in international tribunals. The Tribunals have been rather better about establishing the customary status of a rule than showing evidence of the separate rule that criminalises it.

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140. Id. ¶ 313.

141. Id. The Blaskić case provides another instructive example. There, the Trial Chamber seemed particularly concerned with establishing that the acts were criminal under the domestic regime in force at the time and place of the relevant events. In response to the defense’s argument that the Common Article 3 prohibitions did not entail criminality liability, the Trial Chamber pointed to the fact that the domestic criminal code of Yugoslavia provided for criminal liability for the perpetrators of war crimes. Prosecutor v. Blaskić, Case No. IT-95-14-T, Trial Chamber Judgment, ¶ 176 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000), http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf.

142. The Appeals Chamber reiterated that “[i]ndividual criminal responsibility under the fourth Tadić condition can be inferred from, inter alia, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.” Galić Appeals Chamber Judgment, supra note 116, ¶ 92; see also id. ¶¶ 91-98. Further, the Appeals Chamber also identified as supplying the requirement criminalization various authorities from international and domestic law, including the 1919 Report of the Commission on Responsibilities drafted by the Paris Peace Conference, Australia’s War Crimes Act, and the Norwegian Military Penal Code of 1902. Id. ¶¶ 93-94.

143. Hinga Norman Appeals Chamber Decision, supra note 7.

144. See id. ¶¶ 43-47.

145. Robert Cryer, Prosecuting v. Galić and the War Crime of Terror Bombing, 2 ISR. DEF. FORCES L.R. 75, 90 (2005-2006); see also Matthew Happold, International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone’s Decision in Prosecutor v. Samuel Hinga Norman, 18 LEIDEN J. INT’L L. 283, 288-95 (2005) (criticizing the treatment of the fourth Tadić prong in the Hinga Norman decision and arguing that the evidence mustered should be viewed as
Cassese, too, recognizes that “international rules do not specify with sufficient clarity the objective and subjective requirements for individual criminal responsibility to arise.”

3. Non-Retroactivity, or “Legality”

The fragmentation described above is not merely a practical problem; it goes to the core of the legitimacy of war crimes prosecutions. If the sources of criminalization are unpredictable and the law fragmented, the “criminalization” requirement cannot serve its most important purpose: putting potential defendants on advance notice of their criminal liability. This is the principle of *nullum crimen sine lege*, also known simply as the principle of “legality.” The criminalization condition, if applied haphazardly and unpredictably by courts, does not always provide the consistency that would be necessary to provide advance notice and thus satisfy the legality condition.

To satisfy the principle of legality, the “scope of [a] crime and the applicable punishment must be set out in clear terms before its commission,” in order for a person to be held criminally liable for committing it. The IMT noted that the principle of *nullum crimen* is a “principle of justice,” meaning that an accused must have had notice of the crime at issue before committing it. But one of the great failings of the IMT was its refusal to seriously address the concern. Its judgment endorsed the proposition that it is permissible to punish evil acts even if they were not crimes when committed: “To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue,” it wrote, “for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.” That failure was a tragedy, not simply for the legitimacy of the judgment but for the legitimacy of international criminal law more generally, as it lent a flavor of victors’ justice to the prospect of international criminal liability. This is all the more tragic given that the IMT had much better arguments actually insufficient to satisfy the prong).

146. CASSESE, supra note 68, at 5.

147. Overall, the criminalization requirement seems driven in large part by the tribunals’ concern over ensuring that individuals are not prosecuted for offenses for which they were not on notice at the relevant time, per the principle of *nullum crimen sine lege*. In the Galić case, for instance, the defendant challenged his terrorism conviction on appeal by claiming it violated the *nullum crimen sine lege* principle. See Galić Trial Chamber Judgment, supra note 112, ¶¶ 79-85. The Appeals Chamber’s criminalization analysis was thus provided to overcome this ground of appeal. For a similar discussion in the context of the child soldiers crime, see Happold, supra note 145, at 296 (“One can see why international criminal tribunals are anxious to proclaim that a specific rule criminalizing such conduct is required for violations of international humanitarian law to engage individual criminal responsibility. Otherwise, claims that their actions breach the fundamental rule of *nullum crimen sine lege* and are more akin to legislation than adjudication would gain greater currency and cogency.”).


149. Judgment, supra note 63, at 219.

150. Id.; see HATHAWAY & SHAPIRO, supra note 48, at 276-97 (describing the trial at Nuremberg).
available to it.151

In the aftermath of World War II, most international criminal courts followed the IMT’s lead, and failed to take a rigorous or strict approach to nullum crimen. Instead, as Beth Van Schaack has persuasively explained, tribunals have employed a host of methods for determining nullum crimen, even, “occasionally,” to the point of “producing substantive justice at the expense of strict legality.” 152

The principle of legality requires, at minimum, notice and foreseeability of criminal conduct within international criminal law.153 As noted earlier, the focus on “criminalization” can be understood as a renewed attempt to meet this requirement. But it unfortunately fails at the task; it provides an unclear basis for determining what conduct constitutes a war crime—particularly as tribunals have often looked to a variety of international legal documents as well as both domestic and international legal examples to satisfy the principle of legality. The principle of legality “does not prevent a court . . . from determining an issue through a process of interpretation and clarification as to the elements of a particular crime.” 154 However, it raises deep questions about the appropriateness of holding an individual criminally responsible for an act in the first place.

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As currently conceived, a definition of war crimes tethered to “criminalization” is circular, prone to fragmentation, and fails to reliably satisfy the requirements of legality. For these reasons, we propose a conception of a war crime that does not rely on a reference to the concept of “criminalization.” Furthermore, as international criminal tribunals represent only a portion of the world’s prosecutions for war-related conduct—and as both domestic and

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151. See HATHAWAY & SHAPIRO, supra note 48, at 276-97.
152. Van Schaak, supra note 122, at 103; see also Meron, International Criminalization, supra note 84, at 564 (noting that “neither the Geneva Conventions that preceded those of 1949 nor the fourth Hague Convention contained explicit penal provisions” and that “they were accepted as a basis for prosecutions and convictions in the post-World War II Tribunals”). The ICTY Trial Chamber, apparently frustrated by the limits imposed by the prior criminalization condition, has dismissed the legality concern, observing in Mucić that “[i]t strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.” Mucić Trial Chamber Judgment, supra note 85, at ¶ 313. Similarly, the Tadić Appeals Chamber seems to have acknowledged that, irrespective of the evidence proffered in support of the criminalization element, the accused should have been on constructive notice. It stated: “Principles and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.” Tadić Interlocutory Appeals Decision, supra note 102, at ¶ 129; see also Happold, supra note 145, at 296. Both echo the much-criticized IMT judgment’s dismissal of similar concerns, opening international war crimes prosecutions up to concerns about their legitimacy. See infra Section III.C. for our alternative approach to addressing these concerns.
international tribunals rely on one another when prosecuting war crimes—it is important to establish a definition of a war crime that can transcend not only international tribunals, but which can also be applied in domestic courts. The next section attempts to offer such a definition.

III. DEFINING WAR CRIMES: A TRANS-JURISDICTIONAL STANDARD

It is possible to define international war crimes by dispensing with the language of “criminalization” and instead focusing on salient features of war crimes that do not require reference to statutes, jurisdictions, or evidence of previous prosecutions. Under this approach, domestic and international tribunals with jurisdiction over war crimes are best understood as having jurisdiction over sub-sets of the universe of potential war crimes. They may be limited to a particular geographic area, a limited period of time, a restricted set of actors, or a particular set of crimes. Indeed, no international tribunal has been designed to possess jurisdiction over all war crimes. Even the Rome Statute, the most comprehensive of the statutes, specifically recognizes the potential for evolution in international war crimes outside of its jurisdictional reach: “[n]othing in this Part [of the Rome Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Here we identify the core features of war crimes untethered from prior criminalization. These are minimum standards by which nearly every court abides, deliberately or not. We show that, despite differences in war crimes across jurisdictions and statutes, agreement exists as to the core features of war crimes. A war crime has two key elements: (1) a breach of IHL that is (2) “serious.” We take each element in turn.

A. A Breach of International Humanitarian Law

IHL supplies the underlying prohibitions of offenses cognizable as war crimes. The authoritative Pictet Commentary to the Geneva Conventions clarifies, for instance, that the First Geneva Convention was the “first instrument to incorporate a coherent system of rules for the repression of violations of its provisions,” and the Convention “forms part of what are generally known as the laws and customs of war, breaches of which are commonly called ‘war crimes.’” The Charter of the IMT similarly defines war crimes as based principally on IHL. Article 6(b) of the Charter specifies that war crimes are “namely, violations of the laws or customs of war.” Article 6(b) also includes a list of illustrative examples.

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155. Rome Statute, supra note 73, art. 10.
156. JEAN S. PICTET, COMMENTARY: I GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 353 (1952).
157. Id. at 351 (emphasis added).
159. By contrast, the other crimes over which Article 6 established the IMT’s jurisdiction (crimes
827, which established the ICTY in 1993, called specifically for a tribunal to be established for prosecuting “persons responsible for serious violations of international humanitarian law.” The ICTR and ICC Statutes include violations of IHL as offenses covered under this mandate and treat the violation of IHL as the “first step” in establishing a war crime.

In the domestic context, military manuals also treat IHL as the starting point for potential war crimes prosecutions. Indeed, the U.S. Army Military Manual from 1956 suggests that IHL violations and war crimes are synonymous. It reads, “The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.” The German Military Manual from 1992 takes a similar approach, suggesting that courts can prosecute any member of the armed forces who has violated IHL.

IHL prohibitions can be based on treaties, such as the Geneva Conventions, or customary law. In practice, tribunals often seek to determine that a prohibition is customary, in addition to locating the prohibition’s roots in treaty law, or even in the tribunal or court’s own statute. In the ICTR’s Judgment in Akayesu, for example, the Trial Chamber noted that it “should apply rules of International Humanitarian law which are beyond any doubt part of customary law.” In considering whether terrorism constituted a war crime, the Galić Appeals Chamber explained,

"The International Tribunal’s jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law. . . . While binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal’s jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom."

against peace and crimes against humanity, are defined solely through reference to examples—as opposed to the body of law of war.

160. ICTY Statute, supra note 71.

161. ICTR Statute, supra note 72, art. 1; Rome Statute, supra note 73, art. 3. Article 8 of the Rome Statute specifically defines “war crimes” as not simply grave breaches, but other “serious violations of the laws and customs applicable in international armed conflict.” Rome Statute, supra note 73, art. 3.

162. Multiple statutes take as a starting point the existence of IHL prohibitions. See, e.g., ICTY Statute, supra note 71, art. 3; ICTY Statute, supra note 72, art 4; and Rome Statute, supra note 73, art 8. See, e.g., Lubanga Trial Chamber Judgment, supra note 122, ¶ 568, 604; Galić Trial Chamber Judgment, supra note 112, ¶ 44-52; Akayesu Appeals Chamber Judgment, supra note 124, ¶ 438.

163. DEP’T OF THE ARMY (U.S.), FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, 178 (1956). Notably, at the adoption of the Statute of the ICTY by the UN Security Council, the U.S. Representative to the United Nations interpreted Article 3 of that statute, which covers the laws of war, to mean that all violations of that article were criminal under international law. Meron, supra note 83, at 560.


165. Akayesu Trial Chamber Judgment, supra note 124, ¶ 605.

166. Galić Appeals Chamber Judgment, supra note 116, at ¶ 85. As another example, the Appeals Chamber of the ICTY specifically pointed out in the case against Kordić and Čerkez that “the International Tribunal . . . has jurisdiction over violations which are prohibited by international treaties” before looking to customary international law to determine that the conduct at issue indeed gave rise to individual criminal responsibility. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶ 167 (Feb. 26, 2001); cf. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶ 41 (Dec. 17, 2004). Likewise, the role of custom also seems rooted in Article 8 of the Rome Statute. During the drafting of this Article, only IHL prohibitions deemed “customary” in nature were
Across commentary and cases, it is widely recognized that for conduct to amount to a violation of IHL to which criminal responsibility can attach, there must be a sufficient “nexus” between the conduct at issue and the relevant armed conflict.\(^\text{167}\) The “nexus” requirement helps establish a connection between the violation of IHL, which is a body of law generally applicable to the behavior of States, and the act committed by an individual.\(^\text{168}\) In the words of one ICTY Trial Chamber, a “sufficient link” between the crime and armed conflict is necessary “in order for a particular crime to qualify as a violation of international humanitarian law.”\(^\text{169}\) This nexus is evaluated with respect to a particular act.\(^\text{170}\)

In the international cases of Lubanga,\(^\text{171}\) Akayesu,\(^\text{172}\) Mucić et al.,\(^\text{173}\) Prlić et al.,\(^\text{174}\) Rutaganda,\(^\text{175}\) and Kordić & Ćerkez, for instance, the nexus requirement figured prominently in the discussion of required conditions for a war crime.\(^\text{176}\)

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\(^\text{167}\) See, e.g., Gloria Gaggioli, Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law, 96 INT’L REV. RED CROSS 503, 514 (2014) (“It is true that the notion of nexus cannot be found in IHL treaties and has been mainly developed in international criminal case law for the purpose of determining the jurisdiction of the tribunal or, in other words, establishing whether a war crime has been committed.”).

\(^\text{168}\) Nexus “serves to distinguish war crimes from purely domestic crimes over which international criminal courts and tribunals have no jurisdiction.” Guenael Mettraux, Nexus with Armed Conflict, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 435-36 (Antonio Cassese ed., 2009). According to Cassese, nexus distinguishes war crimes from “ordinary criminal conduct (offences falling under the law of the relevant territory).” As he writes, “[t]his relationship . . . serves to distinguish between war crimes, on the one side, and ‘ordinary’ criminal conduct that therefore falls under the law applicable in the relevant territory.” CASSESE, supra note 68, at 77.

\(^\text{169}\) Kordić & Ćerkez, Case No. IT-95-142-T, supra note 166, ¶ 32 (noting also that a “sufficient link” between the crime and armed conflict is necessary “in order for a particular crime to qualify as a violation of international humanitarian law”).

\(^\text{170}\) Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 59 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (noting that nexus is relevant in “determining whether or not the act in question is sufficiently related to the armed conflict”) (emphasis added), www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

\(^\text{171}\) Lubanga Trial Chamber Judgment, supra note 122, ¶¶ 1349-50.

\(^\text{172}\) “Evidence presented during trial established that, at the time of the events alleged in the Indictment, Akayesu wore a military jacket, carried a rifle, he assisted the military on their arrival in Taba by undertaking a number of tasks, including reconnaissance and mapping of the commune, and the setting up of radio communications, and he allowed the military to use his office premises. The Prosecutor relied in part on these facts to demonstrate that there was a nexus between the actions of Akayesu and the conflict.” Akayesu Trial Chamber Judgment, supra note 124, ¶ 641.

\(^\text{173}\) The nexus of rape committed against a prisoner was that the heads of the camp were part of the military apparatus involved in the nearby armed conflict. Mucić Trial Chamber Judgment, supra note 85, ¶¶ 190-207.

\(^\text{174}\) The Trial Chamber held in Prlić et al. that “[i]t is not necessary for the acts of an accused to have been committed at the height of the attack . . . so long as there is even a minimally sufficient nexus.” Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, ¶ 43 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013), www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf.


\(^\text{176}\) In evaluating the facts of the case, the Trial Chamber found that there was “no doubt that a clear nexus exists between the armed conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina and the acts alleged in the indictment.” Prosecutor v. Kordić, Case No. IT-95-142-T, Trial Chamber Judgment, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). In the seminal Galić case, discussed supra, the Appeals Chamber did not identify nexus as a war crime element. However, this is almost certainly because in its discussion of the actus reus, the establishment of a nexus was implicit. In that case, Galić was accused of sniping civilians in a heavily populated area of
The nexus requirement also finds expression in the Rome Statute “Elements of Crimes” document, whose Article 8 section affirms that “[f]or a war crime to be established under Article 8,” it must be committed “in the context of and associated with” an armed conflict. 177 Whereas the first term, “in the context of,” is generally interpreted as referring to the existence of armed conflict, the term “associated with” refers to the nexus requirement for the particular act.178

The precise function of “nexus” as part of the IHL requirement remains a matter of some ongoing debate.179 Some commentators treat it as a separate and independent requirement for a war crime. However, the “nexus” requirement is best understood as triggering the application of IHL to particular acts of misconduct by an individual defendant.180 Across tribunals and commentary, there is consensus that the fact that an abuse would not have occurred but for the existence of armed conflict is not sufficient to make an act a war crime; the action must violate the law of war.181 There is “no presumption that, because a crime is

Sarajevo, with the purpose of terrorizing the local civilian population. Because these were acts against civilians with a military purpose, the armed conflict nexus was arguably self-evident. See generally Galić Appeals Chamber Judgment, supra note 116, ¶ 125-30. Cassese has acknowledged that while nexus is not also explicitly discussed by courts, they always require it to be present. See Cassese, supra note 68, at 77-79.

177. Rome Statute, supra note 73, art. 8.


179. See, e.g., Harmen van der Wilt, War Crimes and the Requirement of a Nexus with an Armed Conflict, 10 J. INT’L CRIM. JUST. 1113, 1113 (2012) (“The case law of the international criminal tribunals reveals that this nexus requirement is an open concept, resulting in diverging interpretations by both international and domestic criminal courts.”). Triibunals that have looked to assess “nexus” often look to a number of diverse factors when considering whether the “nexus” requirement is satisfied. For example, as the ICTY Appeals Chamber summarized in the Kunarac case:

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.

Appeals Chamber Judgment, supra note 170, ¶ 59.

180. For a similar view, see Gaggioli, supra note 167, at 514-15. According to the ICTY in the Tadić case, an IAC exists when there is a “resort to armed force between States.” Tadić Interlocutory Appeals Decision, supra note 102, ¶ 70. This understanding of the application of jus in bello rules in cases of IAC has been described as the “first-shot” theory, under which jus in bello rules apply from the moment that force is used by one State against another. Jann K. Kleffner, Scope of Application of International Humanitarian Law, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45-46 (Dieter Fleck ed., 3d ed. 2013) (citing Pictet, supra note 157, at 32). The ICRC similarly maintains that “any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict.” Id. at 42 (citing Pictet, COMMENTARY, supra note 156, at 32).

committed in time of armed conflict, it automatically constitutes a war crime."\textsuperscript{182}

The key question, instead, is whether the accused has committed a violation of applicable IHL.

Notably, this formulation excludes those not governed by IHL from prosecution for a war crime. A civilian who commits a crime against a fellow civilian in time of war is not governed by IHL unless that civilian is a member of an organized armed group and thereby subject to the obligations of an actor in a NIAC.\textsuperscript{183} Such an actor could be subject to criminal prosecution in domestic court but not for the commission of a war crime.

\textbf{B. Seriousness}

The second core attribute of a “war crime” is that the IHL breach must constitute a \textit{serious} violation. As an empirical matter, severity is consistently identified by tribunals and scholars as a requirement of war crimes. Scholars and treatises regularly describe war crimes as “serious violations of IHL,”\textsuperscript{184} implying that the IHL rule itself must be of a particularly serious character, as compared to other IHL rules. The international criminal tribunals have reiterated

\textsuperscript{182} Mettraux, supra note 168, at 435-36. See generally AM\textit{BOS}, supra note 86, at 140-41; Schwarz, supra note 2, at \S 23-27.

\textsuperscript{183} Interestingly, this would exclude one of the four categories identified by Oppenheim in 1906: hostilities committed by individuals not members of the enemy armed forces. See OPP\textit{ENHEIM}, supra note 41, at 266. It would also exclude espionage and war treason, unless committed by members of enemy armed forces or an organized armed group engaged in an armed conflict.

\textsuperscript{184} See, e.g., CASSESE, supra note 68, at 65 (“War crimes are serious violations of customary or treaty rules belonging to international humanitarian law.”); \textit{id.} at 67 (“In order for an individual to be held criminally responsible for a war crime, first of all it is necessary that he \textit{seriously} infringed a rule of IHL.” (emphasis added)); Abi-\textit{Saab}, supra note 69, at 112 (“’War crimes’ by contrast, as serious violations of the laws and customs of war, can only take place in the course of an armed conflict and only once it has started.”); Cottier, supra note 89, at 309 (“An additional, somewhat secondary criterion was whether the war crime in question was \textit{sufficiently serious} to be included under the Draft Statute, since the Court was meant to deal only with the most serious crimes of concern to the international community as a whole.”).
a similar position, as evident in statements in Akayesu, Blaškić, Galić, Kordić & Čerkez, Kunarac, and nearly every other criminal tribunal. In one recent example, the ICC Trial Chamber in the Lubanga judgment relied expressly on a definition of war crimes that assumed a “serious violation of the laws and customs” of war, based on the use of the word “serious” in the Rome Statute itself. The use of “serious” in describing violations of the law of war is found in numerous domestic military manuals as well.

The central role of seriousness in the definition of war crimes reflects the historical link between war crimes and the grave breaches regime. For instance, the ICC “Elements of Crimes,” a document articulating the structure and requirements of the crimes under ICC jurisdiction, states that a war crime based on sexual violence requires “gravity comparable to that of a grave breach

185. The Akayesu Trial Chamber noted that “the Tribunal has the power to prosecute persons responsible for serious violations” of IHL as well as “serious violations of Article 3,” Akayesu Trial Chamber Judgment, supra note 124, ¶ 4. The Chamber said it understood “the phrase ‘serious violation’ to mean ‘a breach of a rule protecting important values which must involve grave consequences for the victim,’” in line with Tadić. Id. ¶ 616.

186. In the Blaškić case, the accused were indicted only for “the most serious violations of international humanitarian law, punishable by the most severe of penalties.” Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 681 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) [hereinafter Blaškić Appeals Chamber Judgment], http://www.icty.org/x/cases/blaskic/acjug/en /bla-a040729e.pdf.

187. The Galić Appeals Chamber relied on the Tadić conditions for determining a war crime, of which the third condition is that the violation be “serious.” Galić Appeals Chamber Judgment, supra note 116, ¶ 91. In a separate opinion, Judge Shahabuddeen evaluated whether “terror” is a crime by considering whether a “serious violation of the laws or customs of war” gives rise to criminal responsibility. Id. at Separate Opinion of Judge Shahabuddeen, ¶ 5.


189. The Trial Chamber utilized the Tadić conditions, the third of which notes that a violation must be serious. Prosecutor v. Kunarac, Case No. IT-96-23/1-T, Trial Chamber Judgment, ¶ 403 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

190. Lubanga Trial Chamber Judgment, supra note 122, ¶ 504; see Rome Statute art. 8(2)(b) (including within the Court’s jurisdiction “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts . . . .”).

191. See, e.g., Rule 156. Definition of War Crimes, IHL DATABASE: CUSTOMARY IHL, INT’L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (citing military manuals from Colombia, Croatia, France, Italy, and Spain as well as legislation from Congo, New Zealand, and Nicaragua); see also 18 U.S.C. § 2441 (2018) (“(c) Definition.— As used in this section the term “war crime” means any conduct . . . (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character.”) (cited in U.S. DEP’T OF DEF., LAW OF WAR MANUAL 1076 (2015), http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf (“In some cases, the term ‘war crime’ has been used as a technical expression for a violation of the law of war by any person; i.e., under this usage, any violation of the law of war is a war crime.”)). Notably, Rule 156 of the ICRC Customary IHL Study asserts the more categorical position that IHL violations that are serious are war crimes. Rule 156 is “[s]erious violations of international humanitarian law constitute war crimes.” Rule 156. Definition of War Crimes, IHL DATABASE. Under this view, severity is the sole, or at least predominant, element delineating which IHL violations constitute war crimes. In support of this approach, Robert Cryer has argued that Rule 156 seem[s] both clear and simple, and to take the correct position on the question of whether or not a separate rule criminalising the violation (serious or not) is required.” Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Survey, 11 J. CONFLICT & SECURITY L. 239, 262 (2006).

See supra notes 67-70 and accompanying text.
of the Geneva Conventions” or “to that of a serious violation of [common] article 3.” Likewise, one seminal commentary notes that one of the most important criteria in prosecuting a war crime “was whether the war crime in question was sufficiently serious to be included under the Draft Statute, since the Court was meant to deal only with the most serious crimes of concern to the international community as a whole.”

A potential concern with defining a war crime as a “severe” violation of IHL is that the severity requirement might invite subjective assessments. Any variation, however, is likely to decrease as international criminal law doctrine evolves and courts look to one another for guidance as to which violations of IHL are properly considered “severe.”

To the extent there has been variation in the approach to severity, moreover, it has not been so much substantive as procedural: tribunals and commentators introduce the severity factor at different points in the analysis. Sometimes severity is provided as a precondition that attaches to underlying IHL rules: that is, some IHL violations are considered “serious” while others are not. The Rome Statute lists certain “serious” IHL prohibitions under Article 8. The Tadić Appeals Chamber takes a similar approach: “[T]he fact of a combatant simply appropriating a loaf of bread in an occupied village” would not amount to a serious breach that could be prosecuted as a war crime “although it may be regarded as falling afoul of the basic principle laid down in Article 46(1) of the 1907 Hague Regulations [on land warfare].”

In other instances, commentators and tribunals assess seriousness as applied to the facts of the case and the act itself, focusing on the heinous manner in which the offense was carried out or on the gravity of its consequences. This essentially becomes a severity “as applied” analysis. In order to establish that rape constitutes a war crime, for example, the ICRC favored an evaluation of severity of the crime itself over statutory definitions. It reasoned that “although rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in AP I but would have to be considered a grave breach on the basis that it amounts to inhuman treatment or willfully causing great suffering or serious injury to body or health.”

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194. Cottier, supra note 89, at 309.
195. Id.
196. Tadić Interlocutory Appeals Decision, supra note 102, ¶ 94.
197. HENCKAERTS & DOSWALD-BECK, supra note 100, at 585. In Blaškić, the Appeals Chamber focused on whether certain conduct “causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.” Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 595 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004). In the Jokić sentencing judgment, the Trial Chamber “focus[ed] on the seriousness of the crimes to which Miodrag Jokić has pleaded guilty, in light of the specific circumstances of their commission.” Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Trial Chamber Sentencing Judgment, ¶ 32 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004). In Kordić & Ćerkez, the Trial Chamber required a showing of serious injury, holding that a war crime is “distinguished from . . . inhuman treatment in that it requires a showing of serious mental or physical injury.” Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶ 245 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). For the crime of outrages...
Taking a related approach, the Galić Trial Chamber explained that “this third condition [of Tadić], correctly interpreted, is not that the rule must be inherently ‘serious,’ which would mean that every violation of it would also be serious, but that the alleged violation of the rule—that is, of a recognized humanitarian rule—must be serious for the violation to come within the jurisdiction of the Tribunal.”198 In applying severity to the case, the Trial Chamber “considered the large number of victims when assessing the gravity of the crime.”199 In addition to the scale and choice of victims, the Trial Chamber also focused on the “particular cruelty” of the crimes committed, in addition to whether or not the violations themselves were serious.200 On the specific crime of terror bombing at issue, the Chamber evaluated the seriousness of the consequences in order to deem it a war crime. The majority wrote it was properly criminalized “where the serious violations took the form of serious injury or death caused to civilians,”201 while leaving open the question whether the same conduct would be a war crime if the results were less grave.

Other tribunals have also focused on seriousness as applied to the facts of the case. For example, in Naletilić & Martinović, the ICTY Trial Chamber used the criterion of seriousness to elevate a violation of IHL to the war crime of “willfully causing great suffering or serious injury to body or health.”202 It assessed seriousness based on the resultant impact on the victims, holding that the crime “usually uses as a criterion of seriousness the length of time the victim is incapacitated for work.”203 The Chamber took great pains to define seriousness in this context; though the “serious harm” need not be permanent and irreversible, “it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”204 In Kvocka et al., the Trial Chamber similarly held that a key element of the war crime of torture is “severity of the pain or suffering,” and that “[i]n assessing the seriousness of any mistreatment,” the Trial Chamber must first consider the objective severity of the harm inflicted in addition to subjective criteria.205

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198. Galić Trial Chamber Judgment, supra note 112, ¶ 107.
199. Galić Appeals Chamber Judgment, supra note 116, ¶ 446.
200. Id. ¶ 447.
203. Id.; see also Aleksovski Trial Chamber Judgment, supra note 154, ¶¶ 56-57 (considering the impact to the victim’s dignity and the resulting suffering).
In some cases, tribunals discuss severity both in terms of “severe IHL breach” and as applied. In Tadić, the Appeals Chamber noted in one breath that seriousness is satisfied if there is a “breach of a rule protecting important values,” and in the next added that the breach “must involve grave consequences for the victim.”\(^{206}\) As suggested by the possibility that severity is introduced at multiple places in the analysis, the severity inquiry is overall subjective.\(^{207}\) Looking across the extant case law, scholars have lamented that there exists no clear test for determining which crimes are properly considered serious.\(^{208}\) Indeed, when severity is discussed, many different words have been employed to connote the same concept, including “seriousness,” “severe,” “brutality,” “inhumanity,” “gravity,” and “suffering.”\(^{209}\)

The severity element is generally considered essential to a war crime. In all the cases discussed above, severity was central to the court’s determination that the breach of IHL was criminal in nature. As Meron put it, “the gravity of the act, and the interests of the international community . . . [among other] factors are all relevant for determining the criminality of various acts.”\(^{210}\)

In fact, severity is so central to defining a war crime that it has sometimes been treated by tribunals as a stand-in for “criminalization.” If the violation is severe enough, the reasoning goes, it is not essential for the violation to have been previously criminalized. In the aforementioned *Hinga Norman* case, for instance, the SCSL’s landmark conviction for recruitment and use of child soldiers,\(^{211}\) the Appeals Chamber reasoned that because international law violations of similar severity were criminal, the breach of the prohibition of child recruitment must also itself be criminal.\(^{212}\) In so reasoning, according to Matthew Happold, “the Appeals Chamber seems to have elided the third and fourth criteria in Tadić.”\(^{213}\) Similarly, in *Prosecutor v. Galić*, the ICTY Trial Chamber reasoned that the question of whether a separate rule exists providing for criminalization “can be answered in the affirmative where the serious violations took the form of serious injury or death caused to civilians.”\(^{214}\) As Cryer has suggested, the Chamber thereby relied upon the uncontentious position regarding the severity

\(^{206}\) Tadić Interlocutory Appeals Decision, supra note 102, ¶ 94.

\(^{207}\) See, e.g., AMBOS, supra note 86 at 166 (“Of course, the determination of the seriousness threshold is not an easy task.”); WERLE & JESSBERGER, supra note 2, at 404-405 (“It is not always easy to determine when this threshold for criminal sanction is reached.”).

\(^{208}\) See, e.g., Abi-Saab, supra note 69, at 112.


\(^{211}\) Happold, supra note 145, at 291-92.

\(^{212}\) Id.

\(^{213}\) Id.

\(^{214}\) Galić Trial Chamber Judgment, supra note 116, ¶ 127. See Cryer, supra note 145, at 102.
of injuring civilians in order to satisfy, problematically, the fourth Tadić criterion.\textsuperscript{215}

Yet when international criminal tribunals treat the seriousness of a particular IHL breach as a substitute for criminalization, it has the effect of eliminating any limits on non-retroactivity—which, under the standard approach to war crimes prosecution, is satisfied by looking to prior “criminalization.”\textsuperscript{216}

That is a very dangerous course. Indeed, as already noted, a key critique of the Nuremberg decision is that it focused on the barbarity of the defendants’ acts and ignored legitimate concerns about prior notice.\textsuperscript{217} More recently, in his dissenting opinion in the \textit{Hinga Norman} case, Judge Geoffrey Robertson persuasively identified in the majority’s approach a problematic tendency to conflate severity and criminality. Robertson rightly viewed this conflation as contrary to the very precepts underlying \textit{nullum crimen lege}. He wrote:

\begin{quote}
It must be acknowledged that like most absolute principles, \textit{nullum crimen} can be highly inconvenient - especially in relation to conduct which is abhorrent or grotesque, but which parliament has not thought to legislate against. Every law student can point to cases where judges have been tempted to circumvent the \textit{nullum crimen} principle to criminalise conduct which they regard as seriously antisocial or immoral, but which had not been outlawed by legislation or by established categories of common-law crimes. This temptation must be firmly resisted by international law judges . . . .
\end{quote}

We agree. While severity is a necessary component of a war crime, it does not itself constitute a sufficient or appropriate response to concerns about retroactive punishment and therefore about the legality of the criminal punishment. Instead, as the next section will show, this is one reason that the retroactivity concern should be approached as a separate and independent check on criminal prosecution for a war crime.

\textsuperscript{215} See Cryer, \textit{supra} note 145, at 93 (“The argument was: it is clear that attacks on civilians causing death or serious injury were criminal; and the Conference adopting Additional Protocol I also made clear their condemnation of acts intended to inflict terror. The violation at issue in Galić included both. This argument does not prove that there is a separate criminalised violation of the Additional Protocol, of violence the primary purpose of which is to inflict terror, instead of a particularly serious breach of Article 52(1)’s prohibition of attacking the civilian population, which would justify a particularly high sentence.” (citation omitted)).

\textsuperscript{216} Grover, \textit{supra} note 95, at 175-83. The aforementioned Galić and \textit{Hinga Norman} cases reflect this tendency. An even more explicit example of modern international criminal tribunals’ appealing to the immorality of the conduct in order to justify the lack of notice to the defendant is the reasoning of the ICTY Trial Chamber in \textit{Prosecutor v. Milutinović & Others}: “Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.” Prosecutor v. Milutinović & Others, Case No. ICTY-99-37- AR72, Decision on Dragoljub Ojdani’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 42 (May 21, 2003).

\textsuperscript{217} See, e.g., Hathaway & Shapiro, \textit{supra} note 48, at 290-93; Van Schaak, \textit{supra} note 122, at 101.

\textsuperscript{218} Dissenting Opinion of Justice Robertson, Prosecutor v. Samuel Hinga Norman, Case No. SCSL-2004-14-AR729E, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 12 (Special Ct. for Sierra Leone May 31, 2004) (emphasis added).
C. Non-Retroactivity without Criminalization

As noted earlier, prior criminalization is largely motivated by a desire to address concerns about retroactivity—what some have referred to as the “legality” condition. Yet because it is inconsistently applied, and the sources to which courts appeal so varied, it fails to truly serve this function. The concern nonetheless remains: it is generally understood that it is only permissible to hold individuals criminally responsible for conduct that was criminal at the time the act was committed. An ex post facto law, one that changes the legal consequences of actions that were committed before the change in the law, violates basic principles of legal legitimacy. If we dispense with the prior “criminalization” requirement, does that mean dispensing with this condition as well?

The concern about retroactivity has been a challenge since the inception of modern international criminal law. In the preparations for the Nuremberg trials, the prosecution was deeply concerned with precisely this difficulty. One solution was developed by a Czech lawyer, Bohuslav Ečer. All those involved agreed that the Axis powers had violated the prohibition on the waging of aggressive war in the Kellogg-Briand Pact, which each of the States had signed. But the difficulty the prosecution faced was figuring out how to translate that violation of law into individual criminal responsibility. Ečer’s solution, which he put in a memo to the London Assembly in 1942, was that the trial would not be holding the Nazis responsible for a new criminal act, but simply removing the immunity that they would otherwise enjoy.219 As he put it a year later, “[a]s soon as international law, as law of a higher order, deprived aggressive warfare of its legality, it was seen in its original, true likeness: a chain of forbidden crimes punishable by the heaviest penalties in the criminal law of the countries affected.”220 They were guilty, in other words, of “mass murder, arson, robbery, etc.” and they could therefore be sent “to the only place where the national court sends those guilty of murder, namely to the scaffold.”221

Ečer’s solution, while clever, was, for a variety of reasons, not adopted by the IMT.222 Nor does it likely solve the dilemma facing modern courts. It attempts to solve the non-retroactivity problem by lifting a shield, leaving the defendant to be prosecuted for the ordinary domestic crimes that an actor in war engages in without protection from the cloak of combatant immunity. True, that

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221. Id. at 172(f). Though Ečer did not expressly reference it, this approach resonated with Oppenheim’s 1906 definition of war crimes, which treated hostilities committed by individuals not members of enemy armed forces as criminally punishable because the individuals did not enjoy privileged treatment of members of armed forces. Such acts were, Oppenheim had made clear, “war crimes, not because they really are violations of recognized rules regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare.” OPPENHEIM, supra note 41, ¶ 254.

222. For more on why, see HATHAWAY & SHAPIRO, supra note 48, at 257-75.
domestic jurisdiction remains—in domestic courts. But international courts, or domestic courts with jurisdiction to prosecute or provide compensation for violations of international law, not for ordinary domestic crimes, would be deprived of jurisdiction over all such war criminals if this approach were correct. After all, any court with jurisdiction over only international law violations would not have jurisdiction over domestic law violations.

Hans Kelsen, a leading legal thinker who was also involved in preparations for Nuremberg, offered his own solution to the retroactivity problem: the Axis leaders were collectively responsible because Germany had waged an illegal war, rendering all Germans liable for that violation under international law. Germany’s victims were entitled to wage war in response to the illegal war waged by Germany. In other words, all Germans could already be understood as collectively responsible and even subject to the penalty of death. Hence the Allies could subject German leaders to the lesser sanction of criminal prosecution, and even execution, instead of waging all-out war. Indeed, doing so was morally preferable, because it would limit punishment to those who had been in a position to prevent the illegal action. The problem of individual responsibility, Kelsen advised, could be addressed by adding language to the tribunal’s Charter that any person who violates “international law forbidding the use of force . . . may be held individually responsible for these acts . . . and brought to trial and punishment before the court.”223 Yes, this would create new law, but it would not subject defendants to any penalties to which they could not already be subject. The Allies could drop a bomb on Germany as a result of its violation of the law, so its leaders could be hanged instead.

The tribunal did not adopt either Echer’s or Kelsen’s solution. Instead, in an approach that has long been criticized—and rightly so—it concluded that it was enough that the war waged by the Germans was an illegal war. It was not necessary to find that waging an illegal war was criminal, the tribunal held, because “in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”224 Far from addressing the retroactivity problem, the tribunal simply flung it aside. It is perhaps no surprise that modern international criminal law has subsequently found itself flummoxed by this same challenge.

Part of the problem with the retroactivity issue in modern international criminal law is that it has been treated as if it is a single problem, when, in fact, it is several distinct problems. Today, there are several types of criminal prosecutions for war crimes: (1) ad hoc tribunals (the ICTY and the ICTR, and the residual Mechanism for International Criminal Tribunals); (2) domestic war crimes prosecutions under domestic statutes (including domestic military commissions); (3) hybrid domestic-international courts (including the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for

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Lebanon, and the SCSL); and (4) the International Criminal Court. The retroactivity problem is different—and the solution different—for each.

Before explaining how the non-retroactivity condition is met in each of these contexts, it is worth addressing a possible objection: Isn’t this just as fragmented as the criminalization approach criticized above? The key difference here is that the solution to the retroactivity problem is not incorporated into the definition of a war crime. It is, instead, addressed as an independent check on the appropriateness of criminal liability. Rather than changing the range of conduct that might constitute a “war crime,” the definition of a “war crime” remains constant—it is a violation of IHL that is serious. But the legality condition constrains prosecution of a war crime in a jurisdiction where the conduct was not sanctionable at the time it took place.

Let’s consider each context briefly in turn. First, the ad hoc tribunals were created by the U.N. Security Council acting under its Chapter VII authority. Here, a Kelsenian solution is available to justify the establishment of the ad hoc tribunals: the U.N. Security Council had the legal authority to authorize the use of force against the aggressors in the former Yugoslavia and Rwanda. Had it done so, States could have used force to prevent the violence in those States—even killing the aggressors, if necessary. Just as the States that established the IMT established individual criminal responsibility where there was already collective legal responsibility, so too here could the Security Council establish individual criminal responsibility where there was already collective legal responsibility. Indeed, the ICTY and ICTR statutes were expressly established by the Security Council acting under Chapter VII of the U.N. Charter. Under the Kelsenian approach, because the defendants could have been held collectively responsible for participating in an armed conflict to which the Security Council could have responded, they were sufficiently on notice that their actions could subject them to legal penalty.

Second, domestic war crimes prosecutions under domestic statutes can be justified in the way that domestic criminal law jurisdiction is generally justified. As long as the statute under which the defendant is prosecuted is forward-looking, then the defendant who fell within the scope of the statute has no legitimate claim of impermissible retroactivity. As with any ordinary domestic crime, it is not necessary to establish that the defendant actually knew that he or she could be prosecuted. It is enough that the domestic law subjecting the behavior to criminal sanction was on the books at the time the crime was committed. Domestic courts may not only prosecute actors for war crimes, but also for ordinary domestic criminal offenses, as long as they are not members of the armed forces of a high contracting party of the Geneva Conventions. Hence, unprivileged combatants may be subject to prosecution for such acts as rape, murder, assault, and kidnapping committed in the course of war. Once again, as long as the law preceded the action, the defendant cannot make any legitimate claim of retroactivity.

Third, hybrid courts, which include a mix of domestic and international

225. ICTY Statute, supra note 71; ICTR Statute, supra note 72.
authorities, vary depending on the way in which they are constituted. The SCSL, for example, was set up by the government of Sierra Leone and the United Nations jointly to “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law” committed in Sierra Leone after November 30, 1996 and during the Sierra Leone Civil War. It was established both under the authority of the U.N. Security Council, acting under Chapter VII (as with the ad hoc tribunals), and by the Sierra Leone government. Accordingly, it has the authority to prosecute both serious violations of IHL and Sierra Leonean law that predated the establishment of the court.

Fourth, the International Criminal Court, established by treaty among the States, exercises prospective jurisdiction over States that have accepted its authority. Article 11 of the Rome Statute makes this explicit: “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.” Moreover, if a State becomes party to the statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the statute for that State. The Court may also exercise jurisdiction over a crime that would otherwise fall outside its jurisdiction if the matter is referred to the Prosecutor by the Security Council acting under Chapter VII of the U.N. Charter. Such referrals are subject to the same analysis as the ad hoc tribunals: to the extent that the Security Council could have authorized a use of force to respond to the violation, the criminal jurisdiction is justified as an exercise of that already existing authority to penalize illegal behavior.

This brief treatment of each category of international criminal jurisdiction illustrates that retroactivity is best addressed in context. Rather than treating prior “criminalization” as essential to the definition of a war crime, non-retroactivity should be considered as a distinct issue to be addressed in each given situation. As long as the defendant was subject to sanction for the illegal act prior to the commission of the act, the principle of legality is satisfied.

It is important to note that, under this approach, an act that meets the definition of a war crime—that is, that violates IHL and is serious—could not be criminally prosecuted if the act was not subject to criminal liability at the time it was committed. In that case, prosecution would be impermissibly retroactive. In other words, there can be war crimes that cannot be prosecuted. But this is no different from any situation in which previously non-criminal acts become criminal. Before 1994, for example, there was no crime of “material support for terrorism” in the United States. The Violent Crime Control Act of 1994

227. Id.
228. Rome Statute, supra note 73, art. 11.
229. Id. There is an exception for States that accept the jurisdiction of the Court. There may be retroactivity concerns if a State were to accept jurisdiction of the Court over a crime that was not a crime under domestic law and for which the Court did not have jurisdiction at the time the act was committed—unless it was subject to Security Council referral.
230. Id. art. 13.
established it as a new crime. But because of the principle of legality, which prohibits retroactive punishment of behavior not criminal at the time it was committed, those who had provided “material support” for terrorists before the passage of the new statute could not be prosecuted for committing that new crime. That prohibition on criminal prosecution for behavior not criminal at the time it occurs—whether in the domestic or international context—is necessary to preserve justice.

IV. THE BENEFITS OF DEFINING WAR CRIMES

The alternative approach to defining war crimes outlined in Part III is not subject to the infirmities of the prevailing prior “criminalization approach.” As noted in Part II, the criminalization approach is subject in particular to circularity, fragmentation, and retroactivity concerns. The approach to defining war crimes in Part III addresses circularity by decoupling the definition of war crimes from prior statutes and prosecutions; it addresses fragmentation by providing a uniform standard for assessing war crimes; and it addresses retroactivity by tackling it directly, as a concern distinct from the definition of a “war crime.”

There are a number of practical doctrinal implications that follow. First, a uniform, trans-jurisdictional definition for war crimes provides a clearer standard for domestic courts holding individuals accountable for war crimes. It also helps resolve questions about the appropriate scope of civil liability for war crimes under domestic foreign affairs statutes, including the ATS and the U.S. Foreign Sovereign Immunity Act (FSIA). Second, it clarifies the reach of international legal obligations requiring States to investigate violations of the law of war. Third, it provides clearer guidance for determining whether charges lodged in military commissions are in accordance with the “law of nations,” as required by Article I of the U.S. Constitution. And fourth, it helps to clarify the extent to which combatants can be subject to war crimes prosecutions.

A. Guiding Domestic Courts

As important as international criminal courts and tribunals are for the development of international criminal law, ultimately war crimes prosecutions before international fora comprise just a narrow slice of all present-day war crimes prosecutions. Under Article 1 of the Rome Statute, prosecutions before the International Criminal Court are intended to be “complementary to [those of]
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national criminal jurisdictions.” The Preamble to the Rome Statute also recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” The Geneva Conventions state the principle of complementarity as an obligation of States to search for persons alleged to have committed, or ordered to have committed, grave breaches of the law of war, and to try or extradite them. A number of treaties similarly require States to investigate and prosecute war crimes committed in IAC and NIAC. The U.N. Security Council, U.N. General Assembly, and U.N. Commission on Human Rights have all affirmed such obligations, while the ICRC considers the obligation to prosecute war crimes to be a rule of customary international law. As a result, the majority of war crimes prosecutions take place in domestic courts. Moreover, in exercising civil jurisdiction over war crimes, domestic courts—including U.S. federal courts—are called to reference and interpret the basic elements of war crimes.

A trans-jurisdictional understanding of war crimes guides application by domestic courts of international law and supplies the conditions under which the international community and international courts and tribunals can rely on domestic courts for prosecutions of international war crimes.

1. European Domestic War Crimes Prosecutions

A clear definition of international war crimes is important to domestic prosecutions on multiple levels. On a formal level, a minimum standard helps
answer the threshold question of whether domestic criminal jurisdiction over the offense in question is appropriate as a matter of international law. Under international law, States can exercise jurisdiction in criminal proceedings concerning activities outside of their territory when either of the two following conditions are met: (1) the perpetrator is a national of the State in which the legal proceedings are initiated or (2) the victim is a national of the State in which the legal proceedings are initiated.\textsuperscript{240} Absent these conditions, jurisdiction may only be found when the violations at issue constitute crimes of such international abhorrence to justify an invocation of universal jurisdiction—such as in the event of war crimes.\textsuperscript{241}

Contemporary examples of domestic war crimes prosecutions can be found in prosecutorial efforts currently under way in many European States to prosecute perpetrators of war crimes in Syria. These prosecutions are often pursued by specialized prosecutorial authorities or war crimes units. However, the crimes being charged are defined as international crimes, even though they are incorporated into domestic statutes or penal codes. To date, there have been at least three successful convictions in Sweden and three in Germany, with more trials underway.\textsuperscript{242} There are a small number of trials, and some other convictions, in other countries as well.\textsuperscript{243}

A number of States in Europe explicitly tether parts of their domestic criminal codes concerning war crimes to international law.\textsuperscript{244} While some States include only the crimes outlined in Article 8 of the Rome Statute, the domestic statutes of many States include a much broader set of crimes as prosecutable “war crimes.” Through implementing legislation that diverges from the Rome Statute, these national legislatures provide their judiciaries with the ability and leeway to define and apply the crime through such means as an assessment of the evolution of customary international law. The criminal code of Finland, for example, not only contains an explicit reference to the Rome Statute, but it also states that war crimes may include “provisions of [another] international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law.”\textsuperscript{245} The sweeping reference to IHL is intended to leave to

\begin{itemize}
\item \textsuperscript{240} See Werle & Jessberger, supra note 3, at 75.
\item \textsuperscript{242} See generally HUMAN RIGHTS WATCH, THESE ARE THE CRIMES WE ARE FLEEING (Oct. 3, 2017), https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts [hereinafter HUMAN RIGHTS WATCH, THESE ARE THE CRIMES WE ARE FLEEING].
\item \textsuperscript{244} For a helpful summary of divergent approaches by European States to implementation of the Rome Statute’s war crimes provisions into their domestic law, and complementarity in the European context generally, see Matthias Goldmann, Implementing the Rome Statute in Europe: Sovereign Distinction to Convergence in International Criminal Law, 16 FINNISH Y.B. INT’L L. 1, 5–29 (2005).
\item \textsuperscript{245} Code Crim. ch. 11, § 5(2) (Fin.) (A full translation of the provision is: “Also a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law shall be sentenced for a war crime.”); see
\end{itemize}
Finnish courts room to allow war crimes prosecutions that would fall outside the Rome Statute’s jurisdiction. In Bulgaria, the requirement in the Rome Statute’s Article 8 that the war crimes be part of “a plan or policy” or “large-scale commission” is omitted entirely from the domestic war crimes legislation.

Perhaps of greatest practical significance, many domestic statutes go beyond Article 8 by not limiting the corpus of war crimes based on conflict classification. In Germany, for instance, the “Code of Crimes against International Law” (CCIL) also goes beyond Article 8 by including offenses applicable only to IAC under the Rome Statute. Other European domestic penal codes and statutes employ explicit language to include as war crimes NIAC violations while some other countries likewise diverge from international statutes by articulating a set of war crimes without clearly distinguishing between IACs and NIACs. The removal of the IAC-NIAC distinction reflects the domestic jurisdiction’s view that this approach better reflects customary international law.

...
A trans-jurisdictional approach to war crimes helps delineate which IHL violations may serve as the basis for domestic prosecution in instances where the domestic codes refer to “war crimes.” Domestic courts, which are often unfamiliar with international law, may seek to simplify the project of identifying what a war crime is by looking to a definition offered in a particular jurisdictional statute—the Rome Statute, for example—to guide the determination of what constitutes a war crime. But the Rome Statute provides jurisdiction over a limited subset of war crimes. Hence an approach that treats the Statute as if it were a complete and accurate compilation of war crimes unnecessarily constrains domestic war crime prosecution.

As Dapo Akande has pointed out, drafters of the Rome Statute, in an effort to avoid being over-inclusive of all customary international law crimes, specifically omitted from Article 8 crimes that might qualify as war crimes under general international law. A substantive standard helps show that some of the conduct not included in Article 8 still may be properly prosecuted as “war crimes.” One notable example of a war crime for which there is no jurisdictional authority under the Rome Statute is the crime of infliction of terror on a civilian population. In the Galić case, the ICTY held in clear terms that terror constituted a war crime under international law. But this crime was deliberately (and controversially) omitted from the Rome Statute.

The crime of infliction of terror on a civilian population is not an isolated case. There are a number of customary IHL prohibitions that are not included in the Rome Statute that might give rise to a war crime. Beth Van Schaack has

“Although the Rome Statute only contain such provisions insofar as international conflicts are concerned, the provisions herein apply to both international and domestic conflicts. This is in accordance with general international law . . .” (citing the Tadić Interlocutory Appeals Decision, supra note 102). JUSTIS - OG POLITIDEPARTMENTET, HØRINGSNOTAT – STRAFFEBESTEMMELSER OM FOLKEMORD, FORBRYTELSE MOTE MENNESKEHETEN OG KRIGSFORBRYTELSE, Saksnr. 200701831 EO HI/TRR at 83-84 (April 2007), https://www.regjeringen.no/globalassets/upload/jd/vedlegg/horingsnotatfolkemordforbrytels.pdf (translated for authors by Siri Opsal).

250. See Akande, Customary International Law, supra note 128 (“The general tenor of the Statute adopted at Rome was, if anything, to be under-inclusive of customary international law crimes, rather than over-inclusive.”); see also Grover, supra note 95, at 246-302; Peter Rowe, War Crimes, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 203, 208–10 (McGoldrick, Rowe and Donnelly, eds., 2004).

251. Beth Van Schaack, Mapping War Crimes in Syria, 92 INT’L L. STUD. 282, 295 (2016) (“[T]he ICC cannot prosecute the crime of deliberately inflicting terror among the civilian population, even though this crime has a strong treaty basis in both IACs and NIACs and in CIL.”); see Antonio Cassese, The Multifaceted Criminal Notion of Terrorism in International Law, 4 J. INT’L CRIM. JUST. 933, 945 (2006) (“[O]ne could object that the Statute of the International Criminal Court (ICC), which carefully and extensively lists in Article 8 the various classes of war crimes, fails to mention resort to terror against civilians. This argument would not, however, be compelling. Indeed, the various provisions of the ICC Statute are not intended to codify existing customary rules; this is borne out by Article 10 of the Statute . . . .”).

252. Should international courts in the future have occasion to examine these domestic Syrian war crimes cases, the trans-jurisdictional standard provides a framework through which to assess whether the prosecuted crimes were indeed international war crimes, as opposed to domestic variants that might not be appropriate precedents in international trials. This is particularly significant because in Syria the accumulation of evidence for any war crime has proven extremely difficult. Indeed, the convictions that have thus far survived the evidentiary hurdles have concerned crimes that are highly unusual and idiosyncratic (for instance, desecration of dead bodies). See HUMAN RIGHTS WATCH, THESE ARE THE CRIMES WE ARE FLEEING, supra note 243. The hope is that future prosecutions address even more destructive and common crimes.
explained that many of the IHL prohibitions most frequently violated in the Syrian conflict are precisely those over which the Rome Statute does not assert ICC jurisdiction. Since 2012, Syrian and ISIL forces have subjected civilians to many forms of indiscriminate and disproportionate attacks. The Rome Statute, however, contains no provision criminalizing indiscriminate attacks, regardless of whether the conflict is an IAC or NIAC. Moreover, the crime of disproportionate attacks can be prosecuted only when committed within an IAC under the Rome Statute. As a result of these omissions, for NIACs like Syria, the ICC Prosecutor can only bring charges for intentional attacks on civilians and civilian objects, a crime that might be more difficult to prove than disproportionate attacks (because intentionality implies that evidence of direct targeting is required) According to Van Schaack, “[t]hese gaps . . . have implications for the Court’s ability to prosecute a range of crimes being committed in Syria, including those involving unconventional, improvised, and prohibited weapons and weapon systems in the absence of sufficient evidence establishing that civilians were directly targeted.”

For these crimes and others, European domestic courts might provide the only forum for redress.

The Rome Statute is best understood as providing jurisdiction in the ICC over a subset of possible war crimes—not as defining the complete set of possible war crimes. Seen this way, Article 8 is not a constraint on prosecution in domestic court. Instead, it simply defines the scope of war crimes for which the ICC might exercise jurisdiction, and those which, by contrast, the court leaves to domestic courts. Viewing war crimes as separate from their particular jurisdictional context avoids importing jurisdictional decisions made for particular political or legal purposes into domestic law.

In July 2016, for example, the Higher Regional Court of Frankfurt convicted a German national under the German Code of Crimes against International Law for atrocities committed in Syria. Likewise, in the case against Mouhannad Droubi—the first Swedish conviction for a Syrian war crime—the defendant, who fought for the Free Syrian Army and then emigrated to Sweden, was charged with torture as an international war crime for his assault and battery of a soldier while he was in Syria. The court found he had committed crimes against international law, which are defined by chapter 22, section 6 of the Swedish Penal Code as “serious violation of a treaty or agreement . . . or an infraction of a generally recognized principle or tenet relating to international humanitarian law.”

253. Van Schaack, supra note 251, at 286.
254. Disproportionate attacks are those that generate “incidental loss of civilian life and damage to civilian objects [that is] excessive in relation to the concrete and direct military advantage anticipated.” Additional Protocol I, supra note 71, art. 57.
255. Van Schaack, supra note 251, at 298. As one other example, the crime of attacking an undefended site is only included in the Rome Statute as punishable in IACs, not NIACs. Rome Statute, supra note 73, art. 8(2)(b)(v).
256. Anne Barnard, Syrian Soldier is Guilty of War Crime, A First in the 6-Year Conflict, N.Y. TIMES (Oct. 3, 2017), https://nyti.ms/2xRvZBd; see also VÖLKERSTRÄFGESETZBUCH [VSTGB] [CODE OF CRIMES AGAINST INTERNATIONAL LAW], http://www.gesetze-im-internet.de/vstgb/index.html (Ger.).
257. HUMAN RIGHTS WATCH, THESE ARE THE CRIMES WE ARE FLEEING, supra note 242.
258. Prosecutor v. Mouhannad Droubi, Södertörn District Court, Case B 2639-16, Judgment of
Allowing Syrian war crimes to be prosecuted as international war crimes may be important for victims. In some instances, European prosecutors have resorted to domestic terrorism law to try Syrian perpetrators, because the evidentiary hurdles under domestic terrorism law can be less significant than for war crimes. However, many victims hope to see that crimes committed by the perpetrators are acknowledged as war crimes and/or crimes against humanity—that is, as crimes of an international nature. As Human Rights Watch has noted, “terrorism charges often do not reflect the scope and nature of abuses committed, and risk undermining efforts to promote compliance with international humanitarian law.”

Meron usefully observed that “[t]he fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes.” Indeed, the defining characteristic of the grave breaches regime was that the “grave breaches” were crimes of such concern that state parties to the Convention would prosecute them in both domestic and international fora. The approach offered here allows the two forms of prosecution to proceed in parallel, without constraining the domestic forum to the limits established for an international court’s jurisdiction.

2. U.S. Alien Tort Statute

In addition to penal jurisdiction, domestic courts may also exercise civil jurisdiction over war crimes. Many States allow individuals to append civil suits to criminal suits, permitting recovery of civil damages for any matter over which the court may exercise criminal jurisdiction. Some also exercise stand-alone civil

May 11, 2016, Prosecutor v. Mouhannad Droubi, Svea Court of Appeal, Case B 4770-16, Judgment of Aug. 5, 2016; see Prosecutor v. Mouhannad Droubi, Summary, INTERNATIONAL CRIMES DATABASE (2013), http://www.internationalcrimesdatabase.org/Case/3296/Prosecutor-v-Mouhannad-Droubi. Not addressed here are retroactivity concerns. The court had to address whether it had jurisdiction over the defendant's actions in Syria, which occurred before he entered Sweden. The court determined that Mouhannad Droubi had obtained a Swedish permanent resident status in December 2013, and therefore it could adjudge the case. Prosecutor v. Mouhannad Droubi, Summary, INTERNATIONAL CRIMES DATABASE. However, the actions took place in 2012, before Droubi emigrated. Hence, while the prosecution meets the definition of a war crime—a serious violation of IHL—there are real questions as to whether it would meet the separate non-retroactivity requirement.

259. See, e.g., Pauline Brosch, Here’s How German Courts Are Planning to Prosecute Syrian War Crimes, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/04/04/heres-how-german-courts-are-planning-to-prosecute-syrian-war-crimes/?utm_term=.c4ce6b905e (“Yet these particular verdicts bring little solace to the victims and have done little to restore justice in Syria. The majority of cases concerning Syria are prosecuted under terrorism charges, not framed as international crimes, and the few war crimes cases tend to involve unusual and specific incidents.”).

260. See Öberg, supra note 69, at 165.
jurisdiction. Most notably, the ATS allows for a “civil action” filed by an “alien,” “for a tort only,” and looks to international law to determine whether the tort is “committed in violation of the law of nations.” War crimes are among the violations of the “law of nations” for which courts have held that the ATS provides jurisdiction.

Because the ATS applies only to acts in “violation of the law of nations,” a war crime must be a war crime under international law (not just under domestic law) in order to be subject to ATS liability. Yet there is significant uncertainty among U.S. courts about how best to identify an international “war crime.” U.S. courts have adopted a variety of methods over the years to establish whether a particular IHL offense constitutes a war crime, but the exact contours of ATS liability for war crimes remain elusive. Some courts simply point to the Geneva Conventions, influenced, perhaps, by the U.S. War Crimes Act, which defines war crimes by reference to the conventions. In Sarei v. Rio Tinto, for example, the Ninth Circuit stated: “War crimes are defined primarily by the Geneva Conventions, to which the United States, along with at least 180 nations, is a party and which constitute part of customary international law.”


266. See, e.g., Warfaa v. Ali, 811 F.3d 653, 658 (4th Cir. 2016); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010), aff’d, 569 U.S. 108 (2013) (“In short, because customary international law imposes individual liability for a limited number of international crimes—including war crimes, crimes against humanity (such as genocide), and torture—we have held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes.”).

267. A similar conceptual problem is encountered when interpreting another domestic statute, the FSIA, and in particular the boundaries of State immunity for property seizures thereunder. As under the ATS, a key challenge for plaintiffs is to convince the courts that a given offense in fact constitutes an international law violation. According to Section 1605(a)(3), a State may lose its immunity with respect to “rights in property taken in violation of international law.” 28 U.S.C. § 1605(a)(3) (emphasis added). There appears to be some uncertainty regarding the distinction between an international “crime” and an international law of war “violation” when interpreting references to “international law” in the statute. This issue has become relevant in the ongoing Ninth Circuit proceedings against the Turkish Government by descendants of Armenian Genocide victims, Bakalian v. Central Bank Republic of Turkey. See Oral Argument at 31-34, Bakalian v. Central Bank Republic of Turkey, No. 13-55664 (9th Cir. Aug. 4, 2016), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000016199 [hereinafter Bakalian Oral Argument] (starting at 51:50). Some uncertainty was likewise evident in an earlier case, Simons v. Hungary, 812 F.3d 127 (D.C. Cir. 2016), relied on by the Turkish Government. There, the D.C. Circuit determined that 1605(a)(3)—which references a “violation” of international law—was triggered for acts taken against Hungary’s own nationals because “genocide had long been identified as an international law crime” by that time, as indicated by the 1948 Genocide Convention. Id. at 145. While this Article’s analysis does not address either the issue of genocide or the FSIA directly, defining a war crime as a serious violation of IHL (without resort to the idea of criminalization), could also help clarify the scope of FSIA immunity.


269. Sarei v. Rio Tinto, PLC, 671 F.3d 756, 763-64 (9th Cir. 2011), cert. granted, judgment vacated, 569 U.S. 945 (2013). In that decision, the Ninth Circuit adopted a definition of war crimes that was not limited to the grave breaches offenses. For example, the court included in its definition of war crimes violations of Common Article 3, which provides that “persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria” although there is no analogous offense included as a grave breach of the Geneva Conventions. Compare Fourth Geneva Convention, supra note 235, art. 3 with id. art. 147. In so doing, it mirrored the War Crimes Act, which includes grave breaches of Common Article 3 in its definition of war crimes.
Xe Services Alien Tort Litigation, the Ninth Circuit likewise observed that “[b]y ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes.” However, the court then went on to adopt a more substantive, elements-based approach to defining a war crime for ATS purposes, explaining that to allege a war crime under the ATS the plaintiffs must “show that defendants (i) intentionally (ii) killed or inflicted serious bodily harm (iii) upon innocent civilians (iv) during an armed conflict and (v) in the context of and in association with that armed conflict.” In identifying these elements, the court looked not only to the Geneva Conventions but also various domestic and international sources—including an international tribunal case discussing how to interpret the offense’s nexus to armed conflict. Still other courts have looked to the statutes of particular tribunals to try to identify the scope of war crimes, often confusing the scope of a particular statute with the proper definition of a “war crime” under international law as a general matter.

Moreover, in their recognition of war crimes, courts have sometimes failed to acknowledge that violations of IHL that are not war crimes could also provide the basis for ATS liability. After all, the statute refers not to “war crimes” but to violations of the “law of nations.” Accordingly, violations of IHL that do not rise to the level of a war crime (that are not, in other words, “serious”) could still provide the basis for ATS liability, because—though not “war crimes”—they constitute violations of the law of nations.

The Supreme Court’s recent holding in Jesner v. Arab Bank also reflects persistent confusion created by overreliance on the jurisdiction of particular international tribunals in the ATS context. There, the plurality relied on the “mechanisms of enforce[ment]” in the charters of international criminal tribunals to locate liability for foreign corporations. However, in focusing on narrower “forms of liability” rather than “substantive” international law, the plurality fails to recognize how the law of nations actually operates. The plurality’s preoccupation with enforcement mechanisms mimics the criminalization approach for war crimes, which allows jurisdictional limitations to obscure the simpler—and more important—question of what, substantively speaking, constitutes a war crime.

Understanding that the definition of a war crime is simply a violation of IHL that is serious makes it possible to clear away much of this confusion, thus

271. Id. at 582.
272. Id. at 588.
273. Id. at 582-88.
274. See infra note 279 and accompanying text.
275. See supra note 266.
278. Id. at 1420 (Sotomayor, J., dissenting).
279. Id. at 1423 (arguing that the plurality errs “by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument . . . confuses the substance of international law with how it has been enforced in particular contexts.”).
simplifying the courts’ inquiry and ensuring that the scope of liability is neither excessively broad nor unduly narrow.

B. Law of War Violations and the Duty to Investigate Under IHL

The trans-jurisdictional definition of war crimes also clarifies the reach of international law obligations requiring States to investigate violations of the law of war committed in armed conflict. The obligation to investigate violations of the law of war begins with the Geneva Conventions, which require States to “search for persons alleged to have committed, or to have ordered to be committed” grave breaches of the Convention,280 regardless of their nationality. For some commentators, this clause means that the obligation to investigate war conduct potentially violating international law is limited to the grave breaches specifically.281

However, it is not clear that the obligation to investigate is limited in this way. The Geneva Conventions indicate that “[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”282 Moreover, the 1977 Additional Protocol I requires state parties’ armed forces and other persons under their control “to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.”283 AP I, moreover, provides that those same parties shall require any commander who is aware of breaches “to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”284 States shall also “repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.”285 By their terms, these provisions would seem to extend the obligation to investigate beyond grave breaches of the Geneva Conventions, at least for parties to AP I.286

The ICRC has interpreted the obligation to investigate as an obligation to investigate war crimes, not just grave breaches. According to the ICRC, States “must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”287

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280. First Geneva Convention, supra note 67, art. 49; Second Geneva Convention, supra note 235, art. 50; Third Geneva Convention, supra note 81, art. 129; Fourth Geneva Convention, supra note 235, art. 146.
282. Fourth Geneva Convention, supra note 235, art. 146 (emphasis added).
284. Id.
285. Id. art. 86 (1977) (emphasis added).
Furthermore, they are required to “investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” 288 The Rome Statute also frames the obligation as one pertaining to crimes. 289 A plethora of United Nations General Assembly 290 resolutions, as well as comments by the U.N. Human Rights Committee, 291 have likewise recalled the obligation of States to investigate and punish perpetrators of “war crimes.” However, the ICRC notes that the General Assembly resolutions attracted substantial abstentions and some negative votes due to “insufficient clarity regarding the definition of war crimes.” 292

The duty to investigate flows alongside similar obligations to investigate imposed by human rights law and enforced by regional human rights courts in a number of contemporary conflicts. 293 In human rights case law, it is often suggested that the obligation to investigate is triggered when an “arguable claim” or a “credible” assertion of a violation is presented to a State, or when a State otherwise becomes knowledgeable about the potential for an offense. 294 In the Boskoski & Turcalovski case, the ICTY described the obligation to investigate as “an obligation to conduct an effective investigation with a view to establishing the facts.” 295

In the United States, the Department of Defense Directive Number 2311.01E, similar to a number of other military manuals around the world, suggests that the U.S. military understands the obligation to investigate as broader than an obligation to investigate grave breaches. Section 3.2 of the Directive defines a “reportable incident” as:

A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict. 296

Further, the Directive observes that “[a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.” 297 The Canadian Law of Armed Conflict Manual similarly

288. Id.
289. Rome Statute, supra note 73, pmbl. (noting “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”).
292. International Committee for the Red Cross, supra note 287.
296. U.S. DEP’T OF DEF., DIR. 2311.01E, LAW OF WAR PROGRAM, § 3.2 (May 9, 2006).
297. Id. at § 4.4.
suggests that commanders are required to “suppress and to report to competent authorities, breaches of the LOAC.”\textsuperscript{298} Those violations that appear upon review to constitute potential war crimes are then considered for prosecution.\textsuperscript{299}

Whether the duty to investigate is taken to extend to all potential law of war offenses or all potential war crimes, this Article helps to explain how the obligation to investigate law of war offenses is broader than an obligation to investigate war crimes. Meanwhile, an obligation to investigate war crimes should be understood to be broader than an obligation to investigate grave breaches. In this way, the definition helps bring clarity to this notoriously uncertain area of IHL.

C. Clarifying the Jurisdiction of Military Commissions

In the context of the U.S. program of post-9/11 military commissions prosecutions, courts have considered whether commissions are limited to prosecuting international war crimes, consistent with Congress’s power under Article I, Section 8 of the U.S. Constitution to “define and punish . . . Offences against the Law of Nations.”\textsuperscript{300} Related to this is the more general question of whether Congress can simply decide that certain domestic offenses are “war crimes” for the purposes of U.S. law. The Military Commissions Act of 2009 (MCA 2009) provides the U.S. military commissions with jurisdiction over any “alien unprivileged enemy belligerent” for any offense made punishable by the Military Commissions Act, namely, breaches of offenses listed in Articles 104 and 106 of the Uniform Code of Military Justice, as well as offenses provided for in “the law of war.”\textsuperscript{301}

The boundary between international law and domestic law pertaining to war has caused significant confusion, in part because the Supreme Court has in the past referenced both sources of law when determining the scope of Congress’s “define and punish” power. For example, in the landmark post-Civil War case \textit{Ex Parte Quirin}, the Court noted that the Supreme Court has historically “recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”\textsuperscript{302} In \textit{Hamdan v. Rumsfeld} in 2007, the plurality cited \textit{Quirin} and described conspiracy as being “recognized as an offense against the law of war” both “in this country and internationally,” citing international tribunals and treaties to support this position.\textsuperscript{303}

An examination of prosecutions before military commissions reveals


\textsuperscript{299} \textit{Id.} at §§ 6.1616-7.1620.

\textsuperscript{300} U.S. CONST. art. 1, § 8.


\textsuperscript{302} \textit{Ex Parte Quirin} v. Cox, 317 U.S. 1, 27-28 (1942).

\textsuperscript{303} \textit{Hamdan v. Rumsfeld}, 548 U.S. 557, 603 (2007) (plurality opinion).
significant deviations between the definition of war crimes advanced by the military commissions and the international definition of the term. These deviations not only call into question the substantive outcomes of these cases, but they indicate that these cases cannot be relied upon as examples of international war crimes. The following sections detail two areas of deviation: liability for inchoate crimes and interpretation of the IHL requirement’s nexus component.

1. Inchoate Liability

The seminal case addressing whether the military commissions can prosecute law of war offenses that are not international war crimes is the 2016 case of *Al Bahlul v. U.S.* before the D.C. Circuit. When addressing whether conspiracy was a charge that could be brought before a military commission, the court considered whether military commissions charges must accord with international law. In opinions from various stages of the litigation, judges disagreed about which crimes fall into the category of international war crimes, regardless of whether they considered it a necessity that crimes charged in military commissions constitute international war crimes in the first place. For example, Judge Wilkins concluded that al Bahlul’s conviction complied with the U.S. Constitution because the charges against him had sufficient roots in international law. As he remarked, “[w]hen I look at what [al] Bahlul was really convicted of, I see a war crime.” However, several of his colleagues disagreed. Concurring and dissenting in part in a 2014 decision, Judge Rogers found that “the international law of war does not recognize inchoate conspiracy as a law-of-war offense.”

According to her, “[f]or more than seventy years, the Supreme Court has interpreted the ‘law of war’ to mean the international law of war.” She noted that “[m]odern statutes defining international law-of-war offenses do not refer to conspiracy to commit such offenses” and cited to the statutes of the ICTY, ICTR, and the SCSL.

The distillation of the core war crimes elements in Part III of this Article supports Judge Rogers’s view. At present, “conspiracy” does not amount to a war crime. IHL treaties do not include offenses for inchoate activity, including conspiracy. As Cassese has explained, “in [international criminal law] no customary rule has evolved on conspiracy on account of the lack of support from civil countries for this category of crime.” While the Nuremberg Charter provided for the punishment of those “participating in a common plan or conspiracy,” both the Nuremberg Tribunals and the U.S. Military Tribunals at Nuremberg elected to take a very restrictive view of conspiracy.

304. *Al Bahlul*, 840 F.3d at 804; see also Lederman & Vladeck, *supra* note 11.
306. *Id.*
307. *Id.* at 41.
308. CASSESE, *supra* note 68, at 201-02.
309. *Id.* at 201.
310. *Id.* at 202.
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conspiracy does not violate IHL, it does not meet the first condition for an international war crime.

As a result, the war crimes definition offered here provides the basis for a compelling defense that al Bahlul should not be convicted for conspiracy as an international war crime. To the extent Article 1, Section 8 of the U.S. Constitution, when read in light of Article III, requires that offenses created under Congress’s “define and punish” power constitute crimes within the “law of nations,” al Bahlul should not have been charged in a military commission setting but should instead have been brought before an Article III court on domestic law charges.

2. Nexus to an Armed Conflict

IHL is only triggered in cases where the conduct in question has a nexus to an armed conflict. Where there is no such nexus, the conduct cannot be said to violate IHL, because IHL does not apply. And, of course, if IHL does not apply, then a given action cannot constitute an international war crime. If U.S. military commissions can only try international law violations, then putative “war crimes” to which IHL does not apply cannot fall within its jurisdiction.

The dangers posed by the possibility of using commissions to prosecute more than international law crimes was illustrated when President Donald Trump suggested that he would explore sending Sayfullo Saipov—the ISIS-inspired perpetrator of the October 31, 2017 truck attack in New York City—to the Guantánamo Bay detention center to face charges by military commission. When asked whether the defense could mount a compelling defense, Trump’s position received the support of at least two prominent senators.

As commentator Marko Milanovic rightly pointed out, in addition to the likely constitutional limitations on such a prosecution, there is no way that such a prosecution could ever be for an international war crime. Saipov was, as Milanovic points out, “essentially self-radicalized by looking at ISIS materials on the Internet and . . . , beyond professing allegiance to ISIS, was at no point subject to the chain of command of that armed group fighting in Iraq and Syria.” If he was not affiliated with ISIS, then it would be difficult—if not impossible—to prove that he possessed sufficient nexus to an armed conflict to trigger IHL. As Milanovic puts it, “[u]nder IHL . . . there is not even a remotely plausible, let alone genuinely persuasive, argument that this individual has a nexus to any armed conflict/... he is only a (vicious) criminal.”

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311. Of course, the lack of support in current customary international law for a war crime based on conspiracy does not suggest that IHL, or war crimes law, may not develop such an offense in future.


315. Id.
all, is triggered when an armed conflict “play[s] a substantial part in the perpetrator’s ability to commit” the offense at issue, including in the perpetrator’s “decision to commit it, the manner in which it was committed[,] or the purpose for which it was committed.” Here, Saipov claims to have never materially interacted with terrorist combatants, shared resources, or executed instructions. Perhaps advised by his lawyers that bringing Saipov to Guantánamo would have triggered a host of legal challenges, Trump ultimately backed down and allowed the prosecution to proceed in domestic court. There he pled guilty in order to avoid the death penalty.

A similar problem is raised by the case of Abd Al-Rahim Hussain Mohammed al Nashiri, the alleged orchestrator of the 2000 bombing of the U.S.S. Cole, the deadliest attack on an American vessel since 1987. On August 20, 2016, the D.C. Circuit denied al Nashiri’s motion for a writ of mandamus to dissolve the military commission that tried him. The role of “nexus” in triggering IHL figured importantly in the D.C. Circuit’s decision given that under Article I of the U.S. Constitution, the military commission trying al Nashiri only retained jurisdiction over crimes with a “nexus to hostilities.” Al Nashiri challenged the commission’s jurisdiction on the basis that his acts lacked a link to ongoing hostilities, and that he therefore had a right to be heard in an Article III court. The charges against him, he argued, involved alleged plots that occurred before the United States was engaged in an armed conflict covered by the military commissions law. His alleged actions therefore did not have a specific and cognizable nexus to an ongoing armed conflict, which is necessary to trigger IHL. And if IHL did not apply, it would be improper to prosecute him for violating it by committing an international war crime. The government responded that the United States had, in fact, been in hostilities with al Qaeda since at least 1998, well before the U.S.S. Cole attack, and therefore IHL did apply to al Nashiri’s actions.

The D.C. Circuit denied the writ of mandamus that al Nashiri sought, clearing the way for the military commission hearing against him to proceed. The court reaffirmed the decision below: the decision of whether al Nashiri’s conduct took place during hostilities governed by IHL should occur after any conviction, at which point he would be permitted to seek Article III review.

The questions raised by al Nashiri regarding the proper application of IHL therefore remain unresolved—and are likely to remain so for some time. When

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316. Kunarac, Appeals Chamber Judgment, supra note 170, ¶ 58. The Kunarac definition of nexus has been heavily relied on by subsequent tribunals. For example, in Rutaganda, both the ICTR prosecution and defense accepted the Kunarac definition as the relevant standard, though the defense appears to have adopted a stricter view. Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Appeals Chamber Judgment, n.1069 (Int’l Crim. Trib. for Rwanda May 26, 2003).


319. Id.


and if he does finally obtain review in an Article III court, the question will again arise: Is his conduct properly considered an international war crime? To answer that question, the court will need to consider whether the conduct was a violation of IHL (which requires a nexus to an armed conflict) that was serious.

D. “Unlawful Combatants” and War Crimes

The war crimes definition offered here also helps to clarify the extent to which civilians can be subject to war crimes prosecutions. This challenge has come up in two distinct but interrelated contexts. First, U.S. military commission prosecutors have alleged that acts of war carried out by “unlawful enemy combatants” amount to war crimes by virtue of the status of the perpetrators. Second, some have argued that CIA drone operators carrying out targeted killings are similarly guilty of war crimes simply because they are civilians engaged in military activity.

The case of Omar Khadr exemplifies the prosecution of “unlawful enemy combatants” before the U.S. military commissions. Khadr was charged with throwing a grenade at a tank during a firefight in Afghanistan in 2002.322 Killing an enemy combatant in the midst of ongoing battle is permissible under IHL. But military commission prosecutors argued that Khadr’s actions amounted to a war crime because Khadr committed the act as an “unlawful enemy combatant.”323 Critics challenged the prosecution’s argument by pointing out that killing on the battlefield is only a violation of IHL if the victim has protected status or if prohibited methods of killing are used. Khadr’s defense argued that Khadr’s act was not a war crime, because the victim (an opposing combatant) was not a protected person, and the method of killing was permissible.

The defense has the stronger case. IHL does not create a status of “unlawful enemy combatant.” IHL does provide immunity for the actions of lawful combatants. Article 82 of the Third Geneva Convention provides:

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed. . . . If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.324

But merely because an action is not subject to immunity does not necessarily make it a war crime. It simply means that the actions are not immunized from

323. Unlawful combatants can include civilians, non-combatant members of armed groups, or guerillas, who violate their protected status as civilians by actively engaging in hostilities. See Fraser, supra note 6.
324. Third Geneva Convention, supra note 81, art. 82.
criminal prosecution for domestic offenses—like murder. Terms like “unlawful enemy combatant” or “unprivileged combatant” do not have relevance in international war crimes prosecutions and cannot be used as a basis for identifying a war crime as a matter of international law. Instead, Khadr is more appropriately charged with domestic law offense of murder or terrorism—actions for which IHL provides no immunity. Notably, military commission prosecutors are loathe to admit to this infirmity because doing so would deprive them of jurisdiction over this and many other cases—for the commissions may only prosecute international law offenses, not domestic law offenses.

Similar concerns arise in the debate over whether civilian drone operators who carry out targeted killings could be held liable for war crimes. Commentators have in recent years asserted that CIA personnel who perform targeted drone killings should be considered “war crimes” perpetrators, because they are “unlawful combatants.” In a perhaps ironic turn, their contentions arguably draw support from the military commissions’ willingness to prosecute the “war crime” of “murder in violation of the law of war” on the basis that the perpetrator is an unlawful combatant.

Both arguments are in error. The claim that an actor is an “unlawful combatant” is insufficient, by itself, to justify a war crimes prosecution. For a civilian to have committed a “war crime,” his or her acts must have a sufficient nexus to an armed conflict to trigger the application of IHL. A civilian—whether a member of the CIA targeting a drone strike or a member of al Qaeda—may only be held responsible for a war crime if the act is a violation of IHL that is serious.

CONCLUSION

This Article has sought to provide a definition of war crimes that can be adopted as a baseline by commentators, militaries, courts, and tribunals. The common approach of defining war crimes as those IHL offenses that have been “criminalized” leads to unnecessarily convoluted analysis. It also undercuts the growth and development of a body of international offenses identifiable as “war crimes.” This Article advocates for a simpler approach: a definition of war crimes as serious violations of IHL. These elements are properly viewed as substantive in nature and not tied to jurisdictional statutes, the outputs of

325. See, e.g., Michael W. Lewis & Emily Crawford, Drone and Distinction: How IHL Encouraged the Rise of Drones, 44 GEORGETOWN J. INT’L L. 1127, 1158-59 (2013) (noting confusion resulting from the United States “prosecuting murder—which . . . is widely regarded as a purely domestic law violation—as an IHL violation,” and “taking the position that crimes committed by unprivileged belligerents rise to the level of war crimes”).


327. Id.

328. Lewis & Crawford, supra note 325, at 1158.

international tribunals, or other purported sources of “criminalization.” And rather than attempting to address concerns about retroactivity by relying on prior “criminalization,” this approach addresses the problem in context, asking in each case whether the defendant is properly criminally prosecuted for an act that was at the time the subject of criminal liability.

Ultimately, the potential implications of a clear definition of war crimes span a host of contexts—international and domestic. A “minimum standard” of war crimes helps those advising combat forces to consider potential liability for international war crimes, especially since it serves as the baseline for international war crimes prosecution in either domestic or international court. A general category of war crimes also enables a clearer dialogue between international and domestic prosecutions of IHL offenses—clarity that is especially critical when crimes like those taking place in Syria are being pursued in a variety of fora. The minimum standard also assists in a critical analysis of whether domestic prosecutions are properly styled as prosecutions of international—as opposed to merely domestic—war crimes. Moreover, the definition has civil consequences: it illuminates the extent to which liability for war crimes is permissible under the ATS, as well as the extent to which prosecutions in the U.S. military commissions system adhere to international law standards.

Violations of the laws of war unfortunately continue to be numerous and grave. As international institutions and states redress these wrongs, a simplified approach to an international war crimes definition will help ensure the coherence of a body of “war crimes” law amidst chaotic evolutions in warfare and continuing developments of the rules regulating conduct in war.