

ARTICLE

INVENTING THE WAR CRIME: AN INTERNAL
THEORY

Jessica Laird & John Fabian Witt*

This Article offers a novel account of how and why the war crime arose as a legal concept in the late nineteenth and twentieth centuries. The reason was not new horrors and atrocities, though to be sure there were all too many of those. Nor was the war crime born of any special moral insight. Instead, new procedural and jurisdictional imperatives internal to the constitutional law of the United States—the most bellicose State in the Euro-American world during the mid-nineteenth century—presented the occasion for the war crime idea. Jurists and soldiers elaborated the war crime as a category separate and distinct from ordinary crime in order to manage the special constraints placed by the United States Constitution on criminal prosecutions. While navigating such constitutional obstacles to the punishment of Mexican guerrillas and Confederate soldiers, American jurists coined the phrase “war crime” and cemented the modern concept to which it is attached.

* J.D., Yale Law School, 2019, Law Clerk, Hon. Cheryl Ann Krause, 3rd Circuit (2020-21); Allen H. Duffy Class of 1960 Professor of Law, Yale Law School. Many thanks to Oona Hathaway, Scott Shapiro, Will Smiley, and a team of research assistants including Marissa Doran, Kellen Funk, Jeff Lingwall, and Arjun Ramamurti.

I. INTRODUCTION	53
II. PRE-HISTORY OF A CONCEPT	57
A. <i>Medieval Red Herrings</i>	58
B. <i>The State of War in the Age of Retaliation</i>	59
1. <i>The State of War and the Law of War Crimes</i>	60
2. <i>The Age of Retaliation</i>	61
C. <i>Glimpses of Punishment</i>	64
II. THE UNITED STATES AND THE EMERGENCE OF THE MODERN CONCEPT OF THE WAR CRIME	66
A. <i>The Mexican-American War</i>	67
1. <i>Disciplining the U.S. Volunteers in Mexico: The Fitzsimmons Problem</i>	68
2. <i>Winfield Scott and General Orders, No. 20: Answering the Jurisdictional Puzzle</i>	69
3. <i>Councils of War and International Law Offenses in Mexico</i>	71
4. <i>A Mexican Coda: The Case of Foster and Goff</i>	75
B. <i>The American Civil War</i>	76
1. <i>The Commissions and a Looming Constitutional Dilemma</i>	77
2. <i>Vallandigham and the “Common Law of War” Solution</i>	82
3. <i>The Lincoln Conspirators: Offenses, Not Crimes</i>	83
4. <i>The Wirz Trial Was Not a Special Case</i>	84
C. <i>Lieber Coins the Phrase</i>	85
III. PROLIFERATION AND INVERSION: THE CAREER OF A CONCEPT ...	87
A. <i>The Persistence of Older Models: Conceptual Confusion and Pluralism</i> . 87	
B. <i>Diffusion of the International Conception</i>	89
C. <i>Inversions: Paris, Versailles, and Leipzig</i>	92
D. <i>Nuremberg and the Ironies of the Internal View</i>	96
IV. CONCLUSION: THE WAR CRIME IN THE INTERSTICES OF THE INTERNATIONAL SYSTEM	98

I. INTRODUCTION

In late January of 1865, a strange and novel proceeding commenced at Fort Lafayette in New York Harbor. A white southerner named John Yates Beall stood trial for violating the laws of armed conflict. His Union captors accused him of carrying out “irregular and unlawful warfare as a guerrilla” by destroying a vessel on the Great Lakes and plotting to derail passenger trains in upstate New York.¹ But Beall and his lawyer protested. Beall had a commission from the Confederate States of America, signed by its president, Jefferson Davis. Beall said that he was a soldier of the Confederacy, an independent State in the international sense of the word. Beall’s lawyer conceded that in combat his client could be shot, taken prisoner, or otherwise attacked. But he insisted that Beall could not be charged with a crime for acts performed in the war. As a soldier, his conduct was the responsibility of the State for which he fought, in this case the Confederacy, which the Union had treated as a State for at least some purposes since the beginning of the conflict in April 1861. If, on the other hand, Beall was not a soldier and his guerrilla conduct had carried him outside the sphere of soldiering, then Beall’s counsel contended that the Union was obliged to prosecute him as a civilian. Like other criminal defendants, Beall would be entitled to trial by jury in the federal courts as well as the complete catalog of protections afforded by the Bill of Rights. The Union, Beall contended, was impermissibly trying to have it both ways: to treat him as a soldier for some purposes and as a noncombatant for others.²

Major John Bolles, the judge advocate representing the Union, replied with an argument that was quietly becoming, though without much notice, one of the American Civil War’s most significant contributions to the history of international law. Bolles insisted that Beall was not being charged with ordinary crimes to be heard by juries in the federal or state court systems. Nor, Bolles contended, was Beall entitled to immunity for his conduct as a soldier. Instead, the Union judge advocate said that Beall had committed a special kind of offense: what we would today call a “war crime.” “By the theory of this case,” Bolles explained, Beall was “a military offender, a violator of the laws of war.”³ Though the phrase “war crime” did not exist yet (Civil War jurist Francis Lieber would coin it six months later), the special category of criminal violation created by Bolles and Lieber begins to answer one of the great puzzles in the history of international law: where did the concept of the war crime come from? How and why did it emerge? What dilemmas did it solve?

In the past two decades, a new generation of lawyers and historians has waded into the history of the war crime. Inspired by the controversies over

1. JOHN Y. BEALL, THE TRIAL OF JOHN YATES BEALL AS A SPY AND GUERRILLERO, BY MILITARY COMMISSION 7 (1865).

2. *Id.* at 51-53.

3. *Id.* at 77.

the International Tribunal for the Former Yugoslavia in the 1990s, by the Rome Statute of the International Criminal Court, and by the war crime prosecutions at Guantánamo Bay, these scholars have offered revisionist histories of the war crime that insist on the novelty of the concept.⁴ An earlier literature asserted that the prosecution of war crimes stretched back into the Middle Ages and beyond, even to antiquity in some accounts,⁵ but recent scholars have dated the concept to the late nineteenth or early twentieth century.⁶ Many focus on developments after World War II, at the International Military Tribunals held in Nuremberg and Tokyo in 1946, and the national tribunals that followed.⁷

Such accounts have nonetheless struggled to explain the war crime's invention and to account for its timing. There is nothing inevitable about the rise of the war crime. Combatants in history have found many ways to enforce the laws of war other than through punishment of enemy conduct as a special kind of crime. The traditional response to rule violations in wartime is not criminal punishment but retaliation: one side's breach of the rules of war produces mirrored responses by the other side. Another response to violations has been exclusion from the law's benefits—a kind of “outcasting.”⁸ For more than a millennium, the model of medieval Catholic just war theory meant that violations of the rules of war constituted simple ordinary crime: murder, assault, battery, and the like.⁹ None of these responses to rule violation—retaliation, outcasting, and ordinary criminal punishment—required the creation of the special concept of the war

4. See, e.g., KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); RONALD C. SLYE & BETH VAN SCHAACK, *INTERNATIONAL CRIMINAL LAW: ESSENTIALS* (2009); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* (2000); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005); Jan Martin Lemnitzer, *International Legal History: From Atrocity to War Crimes Tribunals—The Roots of Modern War Crimes Investigations in Nineteenth-Century Legal Activism and First World War Propaganda*, in *WAR CRIMES TRIALS AND INVESTIGATIONS* 111 (Jonathan Waterlow & Jacques Schuhmacher eds., 2018); Gerry Simpson, *Unprecedents*, in *THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS* 12, 12-29 (Immi Tallgren & Thomas Skouteris eds., 2019). The essays collected in Kevin Jon Heller and Gerry Simpson's recent volume are indispensable contributions. See *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* (Kevin Jon Heller & Gerry Simpson eds., 2013).

5. See, e.g., DAVID M. CROWE, *WAR CRIMES, GENOCIDE, AND JUSTICE: A GLOBAL HISTORY* (2014); Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Regime*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 31 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

6. See ANTONIO CASSESE & PAOLA GAETA, *CASSESE'S INTERNATIONAL CRIMINAL LAW* 63 (3d ed. 2013) (“This category of international crimes gradually emerged in the second half of the nineteenth century.”); GERRY SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* (2007); Oona Hathaway et al., *What is a War Crime?*, 44 *YALE J. INT'L L.* 53, 60 (2019) (“The idea of a ‘war crime’ was rarely referenced before the mid-twentieth century.”).

7. See Cassese & Gaeta, *supra* note 6, at 64-65 (“The creation of the IMT and the subsequent trial and Nuremberg of the major German criminals (followed in 1946 by the Tokyo Trial), marked a crucial turning point.”).

8. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011); see also Oona Hathaway & Scott J. Shapiro, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

9. See Ziv Bohrer, *International Criminal Law's Millennium of Forgotten History*, 34 *L. & HIST. REV.* 393, 436-37 (2016).

crime.¹⁰ Even today, not all violations of the laws of armed conflict are viewed as war crimes.¹¹ Why and how did the late nineteenth and early twentieth centuries witness the advent of the war crime as a tool in the regulation of warfare?

This Article explains the rise of the distinctive concept of the war crime that connects the main currents of western international law with the peculiar position of John Yates Beall in 1865. Much has been made of the limits of American Civil War precedents for the law of war crimes. Even as various international law rules were adopted and adapted to govern the American Civil War, it was a non-international armed conflict—an internal conflict, rather than an international war.¹² Yet the constitutional structure of the United States produced a legal dilemma that anticipated the problems arising in subsequent international armed conflicts like the world wars of the twentieth century.

In the United States, wartime defendants like Beall found themselves charged with offenses in a legal regime that posed obstacles to prosecution for simple crime. The Bill of Rights guarantees criminal defendants (at least those in the federal system) indictment by grand jury¹³ and a trial by jury in “the state and district wherein the crime shall have been committed.”¹⁴ The imperatives of the American Civil War, however, made such constitutional guarantees impracticable when prosecuting actions of Confederate soldiers. This tension between existing legal frameworks and practical challenges offers insight into the development of the modern concept of the war crime. The Constitution’s constraints pressed the Lincoln Administration to produce a new category of substantive law to explain the extraordinary jurisdiction of the military commissions it utilized to try violations of the laws of war.

Before the war was over, Francis Lieber, one of President Lincoln’s key legal advisors, coined the phrase “war crime” to explain a category of offenses that warranted criminal punishment, but that did not fall into the category of ordinary “crimes” for purposes of the protections guaranteed by the Constitution and the Bill of Rights.¹⁵ The phrase soon spread, thanks in part to Lieber’s wide network of European legal correspondents, and the desire among these and other European jurists to give weight to the

10. The traditions of outcasting and ordinary criminal punishment are related, since a principal privilege of the laws of war is the immunization of privileged combatants from criminal prosecution for what would ordinarily be criminal conduct. When a combatant breaches the restraints built into the privilege, that immunity simply falls away, leaving the combatant exposed to the underlying criminal law. The important point here is that none of these traditions—retaliation, outcasting, or criminal punishment—requires a concept of the war crime as such.

11. Oona Hathaway et al., *supra* note 6, at 55 (“[T]o be an international war crime, an act must meet two substantive criteria: it must be (1) a breach of IHL (2) that is serious.”).

12. Int’l Comm. for the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, at 1 (Mar. 2008).

13. U.S. CONST. amend. V.

14. *Id.* amend. VI.

15. JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 270 (2012).

international humanitarian law norms they were establishing in treaties.¹⁶ Throughout the twentieth century, the concept experienced revival and revision with major developments in the international legal order. And as in the American Civil War, jurisdictional considerations pressed the concept forward. After post-World War I efforts by the Entente Powers to prosecute wartime violations in national courts crumbled, international jurists looked increasingly to the unique jurisdictional virtues of the war crimes concept. In fact, jurists after World War II seized upon the war crime idea as a special concept to explain why international and national military tribunals (rather than the domestic criminal courts) had jurisdiction to try enemy conduct in violation of the laws of war.

We call this account an “internal theory” of the history of the war crime because it resists two forms of externalism that have become dominant in the field. First, many histories of war crimes treat the question of external jurisdiction – the jurisdiction of one State over another – as the great challenge of the field.¹⁷ Our account offers an internal alternative because it shows that the modern concept of the war crime arose from the problem of domestic jurisdiction internal to American constitutional law. Histories of war crimes are often externalist in a second sense, too. They often imagine that the law is a product of horrors outside the law, or of shifts in attitude toward armed conflict, external to the law. Accounts of gruesome atrocities and genocides, along with new ideas of justice or humanitarianism fill the literature, and understandably so.¹⁸ Scholars also cite changes in economics, in military tactics, or in military and communications technologies as driving the development of the legal concept of war crimes.¹⁹ Our account is importantly different. We proceed by reference to institutions and ideas internal to the legal system.²⁰ Problems of procedure and jurisdiction

16. See *infra* Section III.B.

17. E.g., Martti Koskeniemi, *Foreword*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at v, viii (citing the “justification of international jurisdiction” as a central problem in the literature); Immi Tallgren & Thomas Skouteris, *Editors’ Introduction*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at 1, 4 (“International criminal law histories are . . . histories of how people imagine or have imagined the ‘international.’”).

18. Examples here are too numerous to list, but for accounts in this tradition from an important new volume in the field, see Lawrence Douglas, *From the Sentimental Story of the State to the Verbrechenstaat, Or, the Rise of the Atrocity Paradigm*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at 54–71; Heidi Matthews, *Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at 90–109; Franziska Exeler, *Nazi Atrocities, International Criminal Law, and Soviet War Crimes Trials: The Soviet Union and the Global Moment of Post-Second World War Justice*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at 189–219; Alekski Peltonen, *Theodor Meron and the Humanization of International Law*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS, *supra* note 4, at 220–36.

19. See, e.g., Michael Howard, *Constraints on Warfare*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 1, 1–11 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994); see also Paul Kennedy & George J. Andreopoulos, *The Laws of War: Some Concluding Reflections*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *id.* at 214–26.

20. On the practice of internal legal history, see Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC. REV. 9, 11 (1975). See generally David Ibbetson, *Historical Research in Law*, in OXFORD HANDBOOK OF LEGAL STUDIES 863 (Mark

produced the idea of the war crime in its modern form.

One final observation. The prominence of the American experience in the existing literature on the history of the war crime is striking, even in literature written by non-American authors.²¹ Our answer to the origins question offers a non-parochial explanation for the prominence of American materials and precedents in the modern history of the war crime. The United States was the first regime to produce the distinctive jurisprudential dilemmas that made the modern idea of the war crime necessary.

Part I traces the roots of the war crime concept often proposed by scholars from early medieval traditions through the French and American Revolutions. Part II takes up the nineteenth-century American cases of the Mexican-American War in the 1840s and the Civil War in the 1860s and describes the way in which distinctively American jurisdictional dilemmas created conditions for inventing the modern concept of the war crime. Part III follows by tracing the spread of the nineteenth-century concept, ultimately as the dominant mechanism for enforcing the international laws and customs of armed conflict.

Ironically, as we shall see, the key developments in twentieth-century international criminal law at Versailles and at Nuremberg arose out of inverted versions of the same process. Nineteenth-century jurists, as we will show here, crafted the modern concept of the war crime as a special creature of international law—a creature distinctive to the state of war—in order to solve problems that otherwise would have arisen in the operations of the underlying criminal law. At Nuremberg, twentieth-century jurists crafted new concepts like crimes against humanity and the crime of aggressive war in a reverse operation. That is, problems that would otherwise have arisen in a distinctively international law of crime were solved by falling back on the background criminal law.

II. PRE-HISTORY OF A CONCEPT

Scholarship on the history of war crimes regularly repeats a spectacular mistake. Starting during the Second World War, those who sought to defend the legality of the post-war tribunals at Nuremberg and Tokyo ransacked the history of wartime tribunals for models.²² More recently, the distinguished historian Geoffrey Parker asserted that European “rules of war” have been continuous “for at least four centuries.”²³ “War crimes . . . are as old as history itself,” says one leading scholar.²⁴ And one recent article

Tushnet & Peter Crane eds., 2005); PAUL KNEPPER, WRITING THE HISTORY OF CRIME 10-12 (2015).

21. See CASSESE & GAETA, *supra* note 6; SLYE & VAN SCHAACK, *supra* note 4.

22. See Lemnitzer, *supra* note 4, at 112; see also M.W. Mouton, *War Crimes and International Law-The Netherlands Share in the Detection and Punishment of War Criminals*, 1940 GROTIIUS ANNUAIRE INT'L 38 (1940-46) (providing a history of war crimes that supported the post-WWII prosecutions of violators).

23. GEOFFREY PARKER, EMPIRE, WAR, AND FAITH IN EARLY MODERN EUROPE 168 (2002).

24. DAVID M. CROWE, WAR CRIMES, GENOCIDE, AND JUSTICE: A GLOBAL HISTORY 1 (2014).

in a leading journal purports to find a “millennium of forgotten history” for international criminal law more generally.²⁵

But the deep roots view is intensely and irretrievably misguided. Critics have attacked such accounts of the history of war crimes as offering a “disjointed parade of historical precedents.”²⁶ To be sure, people have committed terrible acts during war for all of recorded human history. It would be foolish to imagine otherwise. But the project of attaching special criminal punishments to the violation of norms in war is a distinctly modern one.

A. Medieval Red Herrings

During and after World War II, defenders of the conflict’s war crimes tribunals established and operated a cottage industry for identifying historical precedents for the post-war prosecutions at Nuremberg and Tokyo.²⁷ A virtual rogues’ gallery of ostensible medieval and early-modern war criminals emerged.

The first of these supposed precedents comes from the case of Peter Von Hagenbach, the Bailiff of Upper Alsace for the Burgundian duke Charles the Bold in the Holy Roman Empire. Hagenbach, who stood out for his brutality, oversaw the murder and rape of the people of the Duke’s Alsatian territory. Eventually, in 1474, towns also within the Holy Roman Empire banded together and arrested the widely detested Hagenbach, trying him for his crimes before a collective tribunal constituted by the confederated towns.²⁸ Scholars continue to cite his case to this day as “the first international war crimes trial in history”²⁹ on the theory that the confederated towns functioned as quasi-independent States in the late Holy Roman Empire.³⁰

On a more serious examination, however, the Hagenbach precedent largely collapses. There was no armed conflict in process at the time of Hagenbach’s crimes or at the time of his arrest and execution. It was not a war crime case at all. Nor was it an international criminal case in any meaningful sense. The league of towns that assembled to prosecute him were, like Burgundy, squarely within the Holy Roman Empire. Indeed, trials and executions for brutal violence in the Middle Ages typically arose out of conflicts viewed by the victors as civil wars or uprisings—not international armed conflicts. The standard charge was high treason, not war crimes.³¹

25. See generally Ziv Bohrer, *International Criminal Law’s Millennium of Forgotten History*, 34 L. & HIST. REV. 393 (2016).

26. Lemnitzer, *supra* note 4, at 112.

27. See *id.* at 112-13.

28. Gregory S. Gordon, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography and International Criminal Law*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS, *supra* note 4, at 32-33.

29. *Id.* at 13.

30. *Id.*; see generally M. Cherif Bassiouni, *Perspectives on International Justice*, 50 VA. J. INT’L L. 269 (2010); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 517 (2d ed. 1999).

31. For example, William Wallace of Scotland—remembered in the film *Braveheart* and often said

Despite the poor fit of Hagenbach's and other medieval cases, commentators regularly cite the medieval law of arms and the chivalric courts of the Middle Ages as another line of precedent for modern war crimes prosecutions.³² In important respects the analogy is quite close. Chivalric courts entertained charges arising out of the violation of a specialized body of trans-jurisdictional law, and they did so in specialized courts.³³ But in crucial respects the chivalric code was not a law of war as we know it today. Chivalric courts enforced a law of status, which bound members of the knightly class without regard to whether the relevant conduct arose during wartime or otherwise.³⁴

Yet the medieval chivalric courts hold valuable lessons for the history of the war crime. First, the advent of particular legal forms relating to crime and combat seems to be highly contingent on political and social structures. The feudal system with its knightly class produced a particular form of legal sanction for violations of its constitutive norms. The same, as we shall see, is true for our contemporary notion of the war crime.³⁵ It, too, is contingent on a particular arrangement of States. Second, chivalric courts contain a clue to the historical process by which the modern war crime emerged. In particular, the special law of chivalric crimes arose in close connection with the special jurisdiction of the chivalric courts.³⁶ And as we shall see, the modern war crime arose in close conjunction with the imperatives of special military tribunals and later special international tribunals.

B. The State of War in the Age of Retaliation

Few subjects in the history of the laws of war are more closely studied than the transition from medieval just war theory to the early modern invention of a state of war. For Augustine and Aquinas and those who worked and thought in their tradition, the question of when a war was "just" was akin to questions of necessity and justification in the ordinary law of crime. The question of whether particular acts of violence in war were lawful or not, in turn, rested on the righteousness of the underlying conflict.

The medieval model of the just war was commendable in many respects. It insisted on giving rights to those who fought on the side of religion. And it refused to license the use of force by those who resorted to armed conflict for pernicious ends. But the medieval model also had a grave difficulty. It became increasingly clear that virtually all sides in war believe that they fight

to have been the first war crimes defendant—was indeed charged with "sparing neither age nor sex, monk nor nun" in 1305. But these crimes were attendant on the crime of treason against the English King Edward II, not with any war among sovereigns. See TIMOTHY L.H. MACCORMACK & GERRY J. SIMPSON, *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 37 (1997); Devin O. Pendas, *War Crimes Trials: Between Justice and Politics*, 49 *TULSA L. REV.* 557, 557 (2013).

32. See, e.g., BASSIOUNI, *supra* note 30, at 517.

33. M. H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 19, 22-24 (1965).

34. MICHAEL BRYANT, *A WORLD HISTORY OF WAR CRIMES: FROM ANTIQUITY TO PRESENT* 8-9 (2016); MAURICE KEEN, *CHIVALRY* 239 (1984); KEEN, *supra* note 33, at 19.

35. See *infra* Section II.A-B.

36. KEEN, *supra* note 33, at 45-59.

for a just cause, and that their enemy's position is as unjustified as their own is just.

In the Thirty Years War, European observers witnessed the effects of this basic psychological fact of warfare. Convinced of the righteousness of their cause and the injustice of their enemies, the belligerents of the Thirty Years War were motivated to wreak the greatest destruction.³⁷ Moreover, each side understood that the other felt certain of its righteousness. That mutual recognition risked a downward spiral of violence. It was well-known that capture meant execution: surrender was suicide, so belligerents were motivated to fight to the death. And in the Thirty Years War they seemed to. By the end of the conflict, an estimated 450,000 soldiers had died in battle.³⁸ Between 1618 and 1648, as many as eight million total deaths may have occurred in the Holy Roman Empire.³⁹ Atrocities against civilians, too, formed part of the coercive mechanisms governing each side's conduct in war. Rape, torture, pillage, and destruction came to represent the military violence that permeated medieval conflicts.⁴⁰

The crisis of the seventeenth century helped produce a new synthesis in European just war theory. Beginning with jurists like Hugo Grotius, and coming to fruition more fully a century later in the writing of Emer de Vattel, the new view held that war-making by both sides would be considered just. God might view one side as righteous and the other not. But we sinners on earth cannot tell; we all think we fight on the side of the angels. And so the Enlightenment model for the laws of war dropped the inquiry into who had just cause for war, instead regulating armed conflict as if both sides were just.

1. *The State of War and the Law of War Crimes*

The modern laws of armed conflict as we know them came from the basic Enlightenment move. Jurists like Hugo Grotius and especially Emer de Vattel write about an identifiable state of affairs that we call the state of war, one in which the basic question of right and wrong is abandoned (at

37. MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* 37-46 (1976); PETER H. WILSON, *EUROPE'S TRAGEDY: A HISTORY OF THE THIRTY YEARS WAR* 301-02, 851 (2009); *id.* at 829 (describing the Christian oath of loyalty to enlist, supporting the narrative that militants were fighting God's war).

38. WILSON, *supra* note 37.

39. M. CLODFELTER, *WARFARE AND ARMED CONFLICTS: A STATISTICAL REFERENCE TO CASUALTY AND OTHER FIGURES 1500-2000*, at 5 (2001). As Peter Wilson describes, a significant portion of the population loss actually resulted from famine, plague, and emigration caused by instability and the narrative of enemy violence spread throughout rural and urban communities. *See* PETER H. WILSON, *EUROPE'S TRAGEDY: A HISTORY OF THE THIRTY YEARS WAR* 779-81, 791-95, 841 (2009). And while scholars continue to debate the "myth of absolute destruction" that emerged during and after the conflict, *id.* at 779, later campaigns saw an abundance of soldier-on-soldier and soldier-on-civilian violence, *id.* at 592 (describing how Imperialists torched 300 villages to intimidate the enemy).

40. WILSON, *supra* note 39, at 467-70 (recounting the violence that occurred during the "sack of Magdeburg").

least as to underlying causes).⁴¹ The new model identified rules peculiar to the amoral state of war: rules designed to make war work better for the participants.⁴² Under the medieval regime, which encouraged the pursuit of justice, necessity served as the fundamental mechanism for the law.⁴³ A growing distaste for armed conflict and an understanding of its inevitability, however, shifted the goals of regulation. Under the Enlightenment regime, the law of war aimed to regulate the conduct of belligerents without regard to their righteousness, leading to a wild proliferation of new hard-and-fast rules.⁴⁴

So much is familiar in the literature on the history of the laws of war and the theory of just war. Less often noted are the implications this revolution in the laws of armed conflict had for a law of war crimes. The advent of the state of war made the modern concept of the war crime possible. Before the invention of a separate state of war, there could be no special category of a war crime. There was only a law of crime. Acts of violence in a wrongful war were unjustified and therefore criminal. The law needed no separate category of war crime. The ordinary concept of crime would do. But once the laws of armed conflict became a special body of rules applicable to the condition of war, a new idea became possible, an idea of crimes distinctive to war.

2. *The Age of Retaliation*

Yet even then the war crime as we know it today did not immediately emerge. The legal regime of the state of war made the modern war crime concept possible. But the state of war did not require the modern war crime.

Indeed, in one respect the very idea of a law of war crimes seemed like it might undercut the effort to separate crime and war. One of the central rationales for developing the state of war had been that men facing penalty of death after their capture would fight to the death rather than surrender. War crime liability threatened to restore this risk—all the more so because of the prevalence of execution as a penalty for crime in the era before the invention of the prison.

Whether for this reason or others, the advent of the state of war gave rise principally not to a law of war crimes, but to a law of collective retaliation and reprisals. Hugo Grotius, writing in the seventeenth century, described reprisals as the paradigmatic way of enforcing the new modern limits on permissible conduct in war. Crucially, for Grotius as for others, retaliation was a collective form of norm enforcement, not an individual

41. See 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* §§ 2-4 (Jean Barbeyrac & Richard Tuck eds., 2005); 3 EMER DE Vattel, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* §§ 1, 26 (Bela Kapossy & Richard Whatmore eds., 2008).

42. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 73-82 (2009).

43. See David Luban, *Military Necessity and the Cultures of Military Law*, 26 *LEIDEN J. INT'L L.* 315, 340 (2013).

44. See Neff, *supra* note 42, at 99-103; JOHN FABIAN WITT, *LINCOLN'S CODE* 17 (2013).

one. Grotius argued that “in war, what is called retaliation frequently redounds to the ruin of those, who are in no way implicated in the blame.”⁴⁵ When an enemy soldier engaged in non-privileged conduct, he subjected himself, his family, his neighbors, and all of his community to collective retaliation. When an individual offender violated the law of war, his acts were met with sanctions “to compel the enemy to return to the observance of the law which he has violated.”⁴⁶

Emer de Vattel, the eighteenth-century jurist famed for his popular treatise on the law of nations, classified this “kind of retaliation sometimes practiced in war, under the name of reprisals.”⁴⁷ Vattel spent far more time writing about retaliation and its many variations than he did on individualized punishment for violations of the laws of war. An elaborate eighteenth-century taxonomy spelled out the complex array of enforcement mechanisms—retaliation, retortion, and reprisal, but not tribunals—by which states enforced international law standards.⁴⁸ Indeed, Vattel clearly expressed that criminal punishment was not the preferred path for dealing with violations of the new rules for the state of war. The termination of a war, he explained, put an end to any criminal liability. “The effect of the treaty of peace,” he wrote, “is to put an end to the war.”⁴⁹ Peace treaties created “an amnesty,” which was in turn “a perfect oblivion of what is past.”⁵⁰ “All the damages caused during the war are likewise buried in oblivion . . . they are looked on as if they never happened.”⁵¹

Retaliation during war functioned as a kind of collective punishment. Georg Friedrich von Martens, writing in 1795, maintained that “in time of war, a prisoner of war may sometimes be put to death in order to punish a nation that has violated the laws of war . . . [W]ar being of itself the last state of violence, there often remains no other means of guarding against future violations on the part of the enemy.”⁵² Henry Wheaton likewise wrote that when “the established usages of war are violated by an enemy . . . retaliation may be justly resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated.”⁵³

45. 3 GROTIUS, *supra* note 41, ch. 4, § 13.

46. MARK W. JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789-1914* (2004); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 83-84, 254 (Coleman Phillipson ed., 5th ed. 1916); *see also* MARK W. JANIS, *AMERICA AND THE LAW OF NATIONS, 1776-1939* (2004).

47. 3 VATTEL, *supra* note 41, § 142.

48. Self-help redress for violations ranged from the extraction of an eye-for-an-eye (which was “retaliation” in the technical sense), to the suspension of wartime privileges for enemy nationals (which went by the label “retortion”). Lawyers characterized the wartime seizure of enemy property as “reprisal.”

49. 4 VATTEL, *supra* note 41, § 19.

50. *Id.* § 20.

51. *Id.* § 22.

52. G.F. VON MARTENS, *THE LAW OF NATIONS: BEING THE SCIENCE OF NATIONAL LAW, COVENANTS, POWER, &C.* 273 (William Cobbett trans., 4th ed. 1829).

53. WHEATON, *supra* note 46, at 439.

Property was also a fair target of collective retaliation. Whereas the private individual could not suffer personal reprisals for the acts of his countrymen on the battlefield, he was responsible “as a member of the state, in his property, for reparation in damages for the acts of others.”⁵⁴ The diplomat Wheaton reduced Vattel’s philosophizing to an everyday rule: “As the object of [a just] war is to obtain satisfaction for injuries done by the enemy, the things taken from him may be confiscated for that purpose.”⁵⁵

Crucially, retaliation’s collective form distinguished it from criminal punishment as such. Throughout the War of American Independence, for example, the predominance of retaliation’s collective model was abundantly apparent. For instance, in 1779, Thomas Jefferson defended the “strict confinement” of royal governor of Detroit, Henry Hamilton, for cruelty to American prisoners “on the general principle of National retaliation.”⁵⁶ And when the British burned New London, Connecticut in 1781, the Continental Congress resolved (in a manifesto drafted by a young James Madison) to put British officers held as prisoners “to instant death” for every further attack on a defenseless American town.⁵⁷

The retaliation paradigm also characterized the conflicts following the French Revolution. The British and the French traded angry charges that the other was violating cardinal principles of the law of war at sea by, for instance, unlawfully seizing vessels in an illegal blockade or sinking merchant vessels in impermissible raids. However, no one charged that the violations amounted to special crimes warranting punishment of the individuals involved.⁵⁸

The language of retribution and retaliation continued until as late as the middle of the nineteenth century. The American jurist Wheaton’s 1836 treatise on international law asserted that when “the established usages of war are violated by an enemy . . . retaliation may be justly resorted to by the suffering nation.” In 1861, Henry Halleck (soon to be the General-in-Chief of the Union Army) praised retaliation as more than merely “vindictive.”⁵⁹ Halleck’s treatise on international law described reciprocity and retaliation as the central enforcement mechanism regulating peace and war between States: “Redress,” he wrote, “must then be sought from retaliation.” Retaliation among independent States, he insisted, was “not to be considered as vindictive,” but instead as “the just and equal measure of civil retribution.”⁶⁰

54. JAMES KENT, COMMENTARIES ON AMERICAN LAW 47 (1894).

55. HENRY WHEATON, SKETCH OF THE HISTORY OF THE LAW OF NATIONS IN EUROPE FROM THE EARLIEST TIMES TO THE PEACE OF WESTPHALIA, 1648, at 41 (1842).

56. Letter from Thomas Jefferson to William Phillips (July 22, 1779), in JULIAN P. BOYD, THE PAPERS OF THOMAS JEFFERSON (1950).

57. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1029-30 (1912).

58. See EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 138-45 (1948); Witt, *supra* note 44, at 63-64.; see also GARY J. BASS, STAY THE HAND OF VENGEANCE (2000).

59. H.W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 512 (1861).

60. *Id.*

The retaliation model had critics, of course. Retaliation (like the just war model of the middle ages) posed a real risk of ever-downward spirals of violence. One belligerent's retaliation was another belligerent's outrage. And so some jurists and statesmen cautioned strongly against too great a reliance on the use of retaliation, especially in contested cases.⁶¹

Moreover, collective retaliation offended the liberal sensibilities of the Age of Enlightenment and the period that followed. Vattel cautioned that it was "a dreadful extremity" to condemn a soldier "for his general's crime." An enemy who violates the laws of war, Vattel wrote, was best sanctioned "not by causing the penalty due to his crime to fall on innocent victims."⁶² Chancellor James Kent of New York channeled Vattel's approach in his widely read *Commentaries on American Law*, asserting that there was no longer any justification for "putting innocent prisoners or hostages to death, for no individual is chargeable by the law of nations, with the guilt of a personal crime, merely because the community of which he is a member, is guilty."⁶³

Liberal or humanitarian institutions put the laws of war on the verge of a criminal punishment model: the laws of armed conflict would be enforced by retaliation aimed at the wrongdoer himself. Whether styled as specific retaliation or punishment, the effect was essentially the same. It would be only a short step from there to adopting a system of fact-finding tribunals to be sure that the target of some sanction was indeed the wrongdoer himself. However, this step remained elusive as jurists had not yet banished the medieval model of ordinary criminal punishment in war.

C. Glimpses of Punishment

There were at least a few scattered examples of punishment in the early-modern laws of war. The German jurist Georg Friedrich von Martens, writing in 1789, explained that "soldiers who employ means which are contrary to the laws of war" could "be punished" by the enemy.⁶⁴ Vattel, too, observed "one case in which we may refuse to spare the life of an enemy who surrenders."⁶⁵ When the enemy "has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war," then refusing quarter was not merely a "natural consequence of the war," but instead "a punishment for his crime," a "punishment which the injured party has a right to inflict."⁶⁶ Yet none of these stray references added up to anything like the modern conception of the war crime.

Authorities in the eighteenth-century laws of armed conflict made clear that assassins were subject to execution. But Vattel, for example, contended that the real offender was not the assassin but the sovereign on whose behalf

61. See, e.g., KENT, *supra* note 54, at 47; 3 VATTEL, *supra* note 41, § 142, ch. XVIII, § 339.

62. 3 VATTEL, *supra* note 41, ch. VIII, § 142.

63. KENT, *supra* note 54, at 47.

64. VON MARTENS, *supra* note 52, at 290.

65. 3 VATTEL, *supra* note 41, § 121.

66. *Id.*

the assassin worked. Spies, too, were subject to execution when captured in the act. But the law of war authorities did not treat them as criminals. If a spy was able to return to his lines safely, the right of the enemy to execute him for spying came to an end. As Vattel put it, execution for spying was simply a means “of guarding against the mischief” that spies do.

Like spies and assassins, a variety of armed men in wartime fell outside the scope of the soldier’s privilege. Vattel compared military recruiters caught enlisting their enemies’ men to kidnapers.⁶⁷ Wheaton noted that “in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations.”⁶⁸ In all such cases, the ordinary criminal laws applied.

Together, these categories of punishable persons in the laws of war in the late eighteenth and early nineteenth centuries illustrate the way in which punishment (as opposed to retaliation) tended to work in combat and combat-related settings. Punishment of individual infractions took place when the target of the punishment had engaged in conduct that for one reason or another failed to qualify for the special immunity afforded by the laws of armed conflict, and so could be prosecuted under the default criminal law. As Hathaway and her co-authors have recently put it, war crimes in this sense “are best understood as criminal acts not immunized by international law,” rather than as acts in violation of international law.⁶⁹

To see this point, it is useful to discard a common but sometimes misleading conception of the laws of war. Some see such laws as a set of humanitarian limits on the use of force—thus the label “international humanitarian law,” which humanitarians began using to describe the laws of war in the middle of the twentieth century.⁷⁰

A different and often more accurate account of the laws of armed conflict starts with the fact that these laws offer a permission for the use of force.⁷¹ The laws of war privilege lawful combatants to use force without being subject to the ordinary criminal laws that prevent the type of conduct occurring in war—domestic laws that prohibit shooting or firing missiles at

67. 3 VATTEL, *supra* note 41, ch. 2, § 15.

68. WHEATON, *supra* note 46, pt. 4, ch. 2, § 8. Vattel concurred, citing what he called “informal and illegitimate war,” which was “more properly called depredation.” 3 VATTEL, *supra* note 41, ch. 4, § 68.

69. Hathaway et al., *supra* note 11, at 57.

70. Although Professor Friedrich von Martens introduced the “principles of international law” and “the laws of humanity” as a binding declaration at the 1899 Hague Peace Conference, see Rupert Ticehurst, *The Martens Clause and The Laws of Armed Conflict*, 317 INT’L REV. OF THE RED CROSS 125, 125 (1997), the term “international humanitarian law” did not come into usage until the late 1960s. See Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT’L L. 109, 118-21 (2015). Previously, scholars referred to the ‘laws of war’ or the ‘law of armed conflict’ to describe “the rules of the Law of Nations respecting warfare.” L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 84 (R.F. Roxburgh ed., 3d ed. 1921). The fairly recent shift in terminology reflects the advances of humanitarian values over a tradition of military necessity within international law organizations such as the United Nations and the International Committee of the Red Cross. See Alexander, *supra*, at 117-18, 120-23.

71. See, e.g., JEFF McMAHON, *KILLING IN WAR* (2009).

people. But the laws of war do not license all uses of force in wartime. Some acts remain unauthorized. And at the boundary between authorized and unauthorized acts lies a residual role for the ordinary criminal law. Indeed, this offers a simple and economical way to understand punishment for conduct not permitted in the state of war. Such acts could be subject to the inquiry of the default criminal law. Not being privileged by the laws of armed conflict, these acts would fall back into the same position as the conduct of unjustified combatants in the medieval model.

Call it the default criminal law model: for those who fail to satisfy the laws of armed conflict, the special immunity of the state of war offers no protection and the criminal law can be asserted.

The famous *Caroline* case from upstate New York in the early nineteenth century offers a useful illustration.⁷² Scholars have made much of the case of the *Caroline* for what it might have to say about the law of national self-defense.⁷³ But here it serves another purpose—it highlights the persistence of the default criminal law model of crimes well into the nineteenth century. When Canadian militiamen attacked an American steamboat known as the *Caroline* in pushing back a rebellion against British rule in Quebec, the trials that followed did not take place in a military tribunal and did not entail law of war charges.⁷⁴ New York authorities, believing the conduct of the British in Canada not to have arisen in a state of war and not to be within the authorized bounds of the laws of armed conflict, launched a standard criminal prosecution.⁷⁵

II. THE UNITED STATES AND THE EMERGENCE OF THE MODERN CONCEPT OF THE WAR CRIME

In the history of the concept of the war crime in the extended European world, the long peace of the European continent in the nineteenth century plays a little-understood role. Prolonged armed conflict rarely occurred on the European continent from the Battle of Waterloo in 1815 to what Barbara Tuchman memorably called “the guns of August” in 1914. Not so in the United States. Two major wars characterized the heart of the century. Military historians have long observed that American conflicts at mid-century presaged the destructiveness of twentieth-century conflicts; some

72. KENNETH R. STEVENS, BORDER DIPLOMACY: THE CAROLINE AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS 1837-1842 (1989); Papers of Daniel Webster: Diplomatic Papers 67 (Charles M. Wiltse ed., 1974-89).

73. See, e.g., ONDER BAKIRCIOGLU, SELF-DEFENCE IN INTERNATIONAL AND CRIMINAL LAW 138 (2011); CRAIG FORCESE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR (2018); Howard Jones, *The Caroline Affair*, 38 THE HISTORIAN 485, 500 (1976); Kenneth W. Kemp, *Punishment as Just Cause for War*, 10 PUB. AFF. Q. 335, 342 (1996). A White House spokesperson even invoked Daniel Webster’s doctrine of anticipatory self-defense—which he created in response to the *Caroline Affair*—in an attempt to justify the presence of preemptive force in the United States’ 2002 National Security Strategy. See Press Briefing, The White House, Office of the Press Sec’y, National Security Strategy Seeks to Defend Peace, Prosperity (Sept. 20, 2002).

74. See STEVENS, *supra* note 72; WITT, *supra* note 15, at 112.

75. See FORCESE, *supra* note 73, at 81-82.

have controversially characterized the American Civil War as the first total war.⁷⁶ Less often observed is that the American conflicts of mid-century anticipated not only the new technological and strategic structure of modern warfare, but also its new normative logic. In nineteenth-century America, a hothouse of jurisdictional pressures would nurture the concept of the war crime and coax it onto the international stage.

A. The Mexican-American War

The Mexican-American War began in the spring of 1846, when Mexican troops under the command of Colonel Anastasio Torrejon crossed the Rio Grande to attack U.S. forces under General Zachary Taylor.⁷⁷ Disputes arose immediately about whose soldiers had crossed into the other's territory. (Was the border at the Rio Grande? Or at the Nueces River 150 miles to the north?)⁷⁸ Yet as the conflict got underway, it proceeded more or less according to the standard customs of formal European conflicts. The Americans fought set-piece battles and won them against regular Mexican armies.⁷⁹

All this changed at the end of 1846 and the beginning of 1847. For one thing, U.S. volunteer forces often proved to be lawless and inclined to plunder Mexican nationals. Taylor called the volunteers "G-d d-----d" thieves.⁸⁰ General-in-chief Winfield Scott warned that the volunteers' conduct would "make Heaven weep" and cause every Christian American to "blush for his country."⁸¹

Around the same time, Mexican forces switched tactics. Defeat after defeat in major clashes led the acting president of Mexico, Pedro Maria Anaya, to commit to a new guerrilla strategy. Long supply lines for U.S. armies in Mexico created new vulnerabilities. Mexican guerrilla fighters began picking off stragglers and killing the Mexican teamsters who staffed the U.S. infrastructure.⁸² U.S. forces, in turn, began to fall back on brutal

76. See MARK E. NEELY, JR., *THE CIVIL WAR AND THE LIMITS OF DESTRUCTION* (2010); Mark E. Neely, Jr., *Was the Civil War a Total War?*, 50 *CIV. WAR HIST.* 434 (2004); see also EDWARD HAGERMAN, *THE AMERICAN CIVIL WAR AND THE ORIGINS OF MODERN WARFARE* XIII-XIV (1988); Daniel E. Sutherland, *Abraham Lincoln, John Pope, and the Origins of Total War*, 56 *J. OF MIL. HIST.* 567, 567 n.1 (1992) (listing scholars advocating the theory that the Civil War was total war).

77. Irving W. Levinson, *The Mexican-American War*, OXFORD RESEARCH ENCYCLOPEDIA (Sept. 2017), <http://oxfordre.com/latinamericanhistory/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-442>

78. *Id.*

79. PETER GUARDINO, *THE DEAD MARCH* (2017).

80. PAUL FOOS, *A SHORT, OFFHAND, KILLING AFFAIR: SOLDIERS AND SOCIAL CONFLICT DURING THE MEXICAN-AMERICAN WAR* 123 (2002).

81. ROBERT W. JOHANNSEN, *TO THE HALLS OF THE MONTEZUMAS: THE MEXICAN WAR IN THE AMERICAN IMAGINATION* 35 (1985).

82. See *Messages of the President of the United States with the Correspondence, Therewith Communicated, Between the Secretary of War and Other Offices of the Government*, H. EXEC. REP. NO. 60, 30th Cong., 1st Sess., 814-15, 871 (1848); Mark Saad Saka, *Peasant Nationalism and Social Unrest in the Mexican Huasteca 1848-1884*, at 179 (1995) (unpublished Ph.D. dissertation, University of Houston) (on file with the Virginia Journal of Int'l Law).

and usually unauthorized reprisals, killing Mexican prisoners and noncombatants in revenge for attacks on their comrades. In early February 1847 an especially violent reprisal led by Arkansas cavalry at Catona, Mexico, caused injuries to noncombatants “without regard,” as one American official put it, “to their age or sex.”⁸³

1. Disciplining the U.S. Volunteers in Mexico: The Fitzsimmons Problem

As the unauthorized reprisals mounted, U.S. commanders in Mexico encountered an odd lawyer’s problem. The difficulty arose out of a legal and jurisdictional dilemma. It was a problem only a lawyer could love.

The Articles of War, enacted in 1806, created the legal authority for U.S. forces to hold courts martial for violations of the rules contained in the Articles.⁸⁴ But those Articles offered the U.S. Army no authority to conduct courts martial for other crimes not enumerated in the Articles. Crimes like murder, rape, and theft were not listed. Such crimes were to be dealt with by the state courts in which the crime took place. In Mexico, of course, there were no American state courts.⁸⁵ Congress, it seemed, had never imagined that U.S. forces would fight beyond U.S. borders; at the very least, Congress had not prepared for such an eventuality. Commanders like Zachary Taylor and Winfield Scott were unwilling to leave crimes perpetrated by or upon U.S. forces to the Mexican courts.⁸⁶ But because of what Scott called “the strange omission of Congress,” they seemed to have no authority to deal with such crimes under the Articles of War.⁸⁷

The problem came to a head in the case of a U.S. soldier named Fitzsimmons, who brazenly murdered a Mexican national in plain view of multiple witnesses.⁸⁸ One U.S. lieutenant reported that he had watched Fitzsimmons shoot the man in broad daylight.⁸⁹ But there seemed to be no recourse. Taylor reported in November 1846 that “the competence of a military tribunal to take cognizance of such a case” was “so questionable” that he had asked Congress to supply him with a more definite authority to try the man.⁹⁰ When Congress declined to act, a hapless Taylor sent Fitzsimmons back home to the U.S. “I see no other course,” Taylor complained, “than to release him from confinement and send him away from the army.”⁹¹ Release from service, to be sure, was no punishment at all. To the contrary, being sent home was what many U.S. volunteers wanted most. For precisely this reason, Winfield Scott thought Taylor’s discharge

83. H. EXEC. REP. NO. 60 *supra* note 82, at 1138.

84. LT. COL. S. V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 402 (6th ed. 1868) (reprinting Articles of War from 1806 as amended and in force in 1868).

85. See Barry Goode, *The American Conquest of Alta California and the Instinct for Justice: The “First” Jury Trial in California*, 90 CAL. HIST. 4, 5 (2013).

86. MEMOIRS OF LIEUT.-GENERAL WINFIELD SCOTT 200 (Timothy D. Johnson ed., 2015).

87. *Id.*

88. *From the Camp at Monterey*, NORTH AMERICAN (Philadelphia), Nov. 13, 1846.

89. H. EXEC. REP. NO. 60 *supra* note 82, at 431.

90. *Id.* at 369.

91. *Id.*

of Fitzsimmons was absurd⁹²—and so Scott set out to solve the jurisdictional crisis.

2. *Winfield Scott and General Orders, No. 20: Answering the Jurisdictional Puzzle*

Scott's personal history positioned him well for seeing the nature of the problem. He was a lawyer and a soldier. Trained in law at the College of William and Mary, where he studied alongside future North Carolina jurist Thomas Ruffin,⁹³ Scott was also well-trained in military matters.⁹⁴ He read deeply in the literature of British military manuals as a young man.⁹⁵ He participated as an officer in the War of 1812, where he made a name for himself as a disciplinarian, insisting on rules and regulations as a way of turning his men into an effective unit.⁹⁶ Scott saw another side of war when he was captured. Being held as a prisoner aboard one of the notorious British prison ships, Scott insisted on the humane treatment of his fellow prisoners according to the conventions of European conflict.⁹⁷ After the war, Scott produced the important volume titled *General Regulations for the Army*, published as the definitive statement of rules for members of the U.S. Army.⁹⁸

Earlier than most American officers, Scott had seen the risk that the Mexican War might become a humanitarian crisis. The Mexican government, he had worried, would eventually turn to guerrilla tactics. And the United States' volunteer army might prove fatally undisciplined and lawless in its conduct. The results, he feared, would be disastrous on humanitarian and strategic grounds alike.⁹⁹

Scott knew the precedents well. He was a longtime student of Napoleon's campaigns on the Iberian Peninsula and Russia in the first decade of the nineteenth century. Mexico, Scott worried, might become for the U.S. the same kind of quagmire that Russia had been for Napoleon, especially if the conduct of the occupying American army produced resistance in the Mexican civilian population.¹⁰⁰ Indeed, Scott saw quickly that in at least one respect the American dilemma was worse than Napoleon's had been in places like the Iberian Peninsula. Napoleon's forces there acted as the sovereign thanks to the installation of puppet

92. 2 MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D., 392-93 (1864).

93. Ruffin would become infamous for his opinion in *State v. Mann*, reversing a criminal conviction for abusing a slave on the ground that property in slaves was absolute and the slaveholder "has also a right to all the means of controlling [the slave's] conduct." *State v. Mann*, 13 N.C. 263, 263 (1829).

94. ALLAN PESKIN, WINFIELD SCOTT AND THE PROFESSION OF ARMS 14 (2003).

95. *Id.*

96. See TIMOTHY JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 165, 187, 192-93 (1998).

97. See PESKIN, *supra* note 94, at 27-28.

98. *Id.* at 66-67.

99. See WILLIAM B. SKELTON, AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784-1861, at 211-12, 295 (1992).

100. JOHNSON, *supra* note 96, at 168-69.

governments.¹⁰¹ As a result, complex jurisdictional questions had not arisen in the Napoleonic and French experiences. But as Taylor's dilemma in 1846 suggested, such questions beset the U.S. invasion of Mexico. The U.S.'s status as a wartime army in enemy territory created thorny legal problems like the one Taylor had encountered in Fitzsimmons's case.

On February 19, 1847, Scott tried to fix the problem by issuing an order that would patch the hole in the army's jurisdiction. Scott issued General Orders No. 20 ("G.O. 20") from Tampico, Mexico, which Scott's forces occupied.¹⁰² Scott shared drafts of G.O. 20 with Secretary of War William Marcy, with Attorney General Nathan Clifford, and with General Zachary Taylor.¹⁰³ The administration of James Polk, however, had deemed the order (as Scott later wrote with disdain) "too explosive for safe handling."¹⁰⁴ High U.S. officials "touched the subject as daintily as a 'terrier mumbles a hedgehog,'" Scott later recalled.¹⁰⁵ So Scott went ahead on his own, issuing the order under his own authority at each city reached by his forces as they drove down the east coast of Mexico and then across to Mexico City.¹⁰⁶

G.O. 20 asserted the authority, resting in the laws of war and "supreme necessity," to hold trials and punish crimes committed by or against the persons or property of the U.S. Army in Mexico.¹⁰⁷ "Many grave offences," Scott's order announced, were "not provided for in the Act of Congress" creating the Articles of War. Scott listed them in the General Order's second paragraph:

[a]ssassination; murder; malicious stabbing or maiming; rape; malicious assault and battery; robbery; theft; the wanton desecration of churches, cemeteries or other religious edifices and fixtures, and the destruction, except by order of a superior officer, of public or private property.¹⁰⁸

The Articles of War were also silent as to violations of the laws of armed conflict. Scott's G.O. 20 observed that the Articles contained no provisions for "injuries which may be inflicted upon individuals of the army, or their property, against the laws of war, by individuals of a hostile country."¹⁰⁹ And so under the authority of the "unwritten code" of "martial law," G.O. 20 noted the importance of protecting inhabitants and their property from

101. *Id.* at 167-69.

102. Winfield Scott, General Orders No. 20 (Tampico), Feb. 19, 1847 (on file with Beinecke Library, Yale University).

103. 2 MEMOIRS, *supra* note 92, at 393-94.

104. Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 212 (2008).

105. David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2029 (2003).

106. *See, e.g.*, JOHN S. D. EISENHOWER, SO FAR FROM GOD: THE U.S. WAR WITH MEXICO, 1846-1848, at 303 (1989) (describing Scott terminating the liberal terms of surrender and reasserting control of Puebla through General Order No. 20).

107. General Orders No. 20, *supra* note 102, § 8.

108. *Id.* § 2.

109. *Id.* § 4.

“injuries contrary to the laws of war.”¹¹⁰

Scott’s main intention seems to have been to fix the Fitzsimmons problem and to create a mechanism for the discipline of U.S. soldiers. His study of the Napoleonic campaigns, and his concern with the conduct of U.S. volunteers, meant that G.O. 20’s “primary focus,” as one leading scholar has put it, “was disciplining the American forces” in Mexico.¹¹¹ Accordingly, over the course of the next year, American forces convened military commissions to try several hundred U.S. soldiers. Counting only the last month of the war, Major General William O. Butler of the U.S. volunteers, commanding American forces in Mexico City, tried 74 U.S. soldiers and 12 more American nationals for crimes listed in G.O. 20, convicting 70 of the 86 U.S. individuals charged.¹¹² In all, the American military tried 303 Americans in military commissions during the war, more than half of whom were convicted.¹¹³

Such military commissions hold the seeds of an answer to the puzzling history of the modern war crime. They were produced by jurisdictional crisis. Absent apparent jurisdiction under the Articles of War, Scott was required to innovate. And innovate he did, pioneering the modern military commission. Yet in other respects the commissions convened to try U.S. soldiers were quite conventional. No one doubted the authority of an army to punish its own soldiers for violating the orders of their commanders. Scott’s difficulty stemmed from an omission by Congress, or at most a reluctance by Congress, which posed a simple separation of powers question about whether the executive branch acting through the army had the authority to punish crimes that Congress had left unaddressed.

3. Councils of War and International Law Offenses in Mexico

An importantly different question, one of international law rather than domestic constitutional law, arose with respect to trials of Mexican nationals by the occupying U.S. army. G.O. 20 swept in Mexican nationals as well as U.S. soldiers. The authority to do so was not the military law of the United States but rather the international laws of armed conflict and the inherent law of war power of an occupier in enemy territory to serve as a provisional government and enforce the laws of the occupied space—what Scott called the “unwritten code” that armies adopted “for the protection of the unoffending inhabitants and their property.”¹¹⁴ By leading military commission scholar David Glazier’s count, the U.S. military exercised this power to try 88 Mexican nationals in military commissions during the war.¹¹⁵

110. *Id.* § 7.

111. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 33 (2005).

112. See Glazier, *supra* note 105; see also David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 Rutgers L. Rev. 121, 139-41 (2005).

113. Glazier, *supra* note 111, at 37.

114. MEMOIRS, *supra* note 86, at 542.

115. Glazier, *supra* note 111, at 37. Gary Solis estimates that these 88 Mexican nationals were tried by 28 separately convened commissions. See Gary Solis, *Military Commissions and Terrorists*, in

Slightly more than half of the Mexican nationals charged were ultimately convicted, a lower conviction rate than that faced by U.S. nationals in military commissions.¹¹⁶

What these commissions trying Mexican nationals did not do, however, was try Mexican soldiers. This further category of cases was still more legally complicated, in ways that G.O. 20 did not contemplate. As soldiers of an enemy State, commissioned Mexican combatants arguably carried with them one or both of two immunities from punishment by U.S. officials. On the one hand, as Quincy Wright would later put it, nineteenth-century international law witnessed the development of “a positivist doctrine that only states are subject to international law and that individuals are bound only by the municipal law of states with jurisdiction over them.”¹¹⁷ At the same time, other authorities held that soldiers acting under authority of a State acted as States and were thus immune because no one State possessed the authority to punish another.¹¹⁸ Nor could the U.S. army, as an occupying army, purport to prosecute Mexican soldiers in its role as a provisional or temporary sovereign engaged in criminal justice. After all, the laws of war actually authorized attacks on U.S. forces, unlike the ordinary criminal assaults of noncombatant Mexican nationals. Such violence was thus privileged by the laws of war, so long as it remained within the permissions granted to combatants.

G.O. 20 contained a further and closely-related omission that also proved problematic. The Articles of War, Scott wrote in the order, “is absolutely silent as to all injuries which may be inflicted upon individuals of the army, or their property, against the laws of war, by individuals of a hostile country.”¹¹⁹ And so G.O. 20 aimed to address such injury-causing violations of the laws of armed conflict. Not all violations of the laws of war, however, caused injuries, at least not “upon individuals” as the General Order contemplated. Violating a truce flag, for example, might not produce any injury to a particular person, even while still being a gross violation of the law. Moreover, G.O. 20 by its terms only established authority for commissions to try those offenses specifically enumerated in its second paragraph, most of which were ordinary criminal offenses rather than breaches of the laws of war. At the very least, the second paragraph was no complete catalog of the law of war violations Scott and his fellow commanders might have wanted to prosecute. As Colonel William

EVOLVING MILITARY JUSTICE (Eugene Fidell ed., 2002).

116. See Glazier, *supra* note 105, at 2031-32.

117. Elbridge Colby, *War Crimes*, 23 MICH. L. REV. 606, 607 (1925) (describing the international principle that individual combatants will not be punished for the offenses committed under the “orders or sanction of their government or commander”); Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 56 (1947); Jean Jacques Rousseau, *The Social Contract*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 47 (Victor Gourevitch ed., 1997).

118. 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 252 (1912) (“If members of the armed forces commit violations by order of their Government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals.”).

119. General Orders No. 20, *supra* note 102, § 4.

Winthrop, the leading judge advocate of the Civil War-era, later put it, the acts “made punishable by military commissions” in the second paragraph of G.O. 20 “were mainly criminal offences of the class cognizable by the civil courts in time of peace.”¹²⁰ Winthrop spelled out the implication: a “further description of offences . . . against the laws of war” still “remained to be provided for.”¹²¹

And so, beginning in June 1847, the U.S. army in Mexico convened a new military tribunal called the Council of War named after a special seventeenth-century English court martial tribunal.¹²² The army designed the U.S. Council of War for cases charging violations of the laws of armed conflict. Winthrop put it this way: “The principal charges referred to and passed upon these courts were guerilla warfare” in “violation of the laws of war” and “enticing or attempting to entice soldiers to desert the U.S. service.” These latter offences also constituted violations of the laws of war.¹²³

The Councils of War seem to have grown out of preexisting practices among anti-guerrilla detachments in U.S. forces. One anti-guerrilla brigade reported taking a prisoner one day, trying him informally the next, and shooting him the day after in such a way so that “as many Mexicans [could] witness the execution as possible.”¹²⁴ In another episode early in the fall of 1847, U.S. forces summarily executed six Mexican nationals for murdering an American officer in New Mexico.¹²⁵ As scholar Erika Myers reports, “no official records of transcripts of such councils seem to be extant.”¹²⁶ And for good reason. Such early informal executions were hybrids. Not yet fully prosecutions, they closely resembled the kinds of retaliatory force that European armies had long sanctioned for violation of the laws of war.

Scott formalized retaliation and the informal Councils of War in a new order on December 12, 1847, after taking Mexico City.¹²⁷ Scott’s General Orders No. 372 (G.O. 372) expressly addressed enemy violations of the laws of armed conflict and in particular the problem of “atrocious bands” of guerrilla fighters operating under Mexican commissions. “No quarter will be given to known murderers or robbers,” announced G.O. 372.¹²⁸ Offenders “falling into the hands of American troops,” the order explained,

120. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* pt. II, ch. VI, art. 1299 (2d ed. 1920).

121. *Id.*

122. G. NORMAN LIEBER, *OBSERVATIONS ON THE ORIGIN OF THE TRIAL BY COUNCIL OF WAR* 6-7 (1876).

123. *See* WILLIAM WINTHROP, *2 MILITARY LAW AND PRECEDENTS* 1298-99 (Little, Brown, & Co. 1896).

124. Erika Myers, *Conquering Peace: Military Commissions as a Warfare Strategy in the Mexican War*, 35 *AM. J. CRIM. L.* 201, 232 (2008) (citing LANE, *infra* note 137, at 54).

125. *Id.* at 233.

126. *Id.*

127. *Id.* at 231-32.

128. General Orders No. 372, Headquarters of the Army (Mexico), Dec. 12, 1847, in *AFFAIRS IN THE PHILIPPINE ISLANDS: HEARINGS BEFORE THE COMMITTEE ON THE PHILIPPINES OF THE UNITED STATES SENATE*, 57th Cong., 1st Sess., S. DOC. NO. 331, pt. 3 (1902).

“will be momentarily held as prisoners” and then “promptly reported to commanding officers, who will, without delay, order a council of war for the summary trial of the offenders under the known laws of war applicable to such cases.”¹²⁹ G.O. 372 authorized the punishment of death for “any flagrant violation of the laws of war.”¹³⁰

As Myers observes, the Councils of War are “little studied and much misunderstood.”¹³¹ We know little more than the fact that they were conducted. Officer Winslow Filler Sanderson wrote home to his wife, early in 1848 or late in 1847, that he was “in a council of war at this time,” trying “Mexicans for encouraging our men to desert the service.”¹³² Sanderson reported at least one death sentence.¹³³ We know, too, that at least one officer “was arrested for executing two prisoners ‘without the sanction of a council of war’ when a ‘council of war could easily have been assembled.’”¹³⁴ Glazier reports three councils held in 1848 trying 11 Mexicans, six of whom were convicted and sentenced to death for encouraging desertion among U.S. troops.¹³⁵ In all, Glazier counts 21 persons tried by Councils of War (18 Mexicans and 1 U.S. citizen) of whom 11 were convicted.¹³⁶

Not every U.S. commander in Mexico took the technical letter of the law as seriously as Scott. Texas Ranger General Walter Lane reported one late 1847 trial and execution of a guerrilla leader as a “court martial.”¹³⁷ Lawfully speaking, the tribunal could not have been a court martial, since Congress created courts martial for trials under the Articles of War.¹³⁸ But Lane can be forgiven for his error. The differences were so modest that only a technically-minded lawyer like Scott could care. Still, Scott’s attention to detail had produced something new. Scott’s councils of war necessarily entailed a striking idea about the character of offenses by the Mexican guerrilla forces. Such offenses were not mere ordinary crimes that had fallen outside the privileged acts of combatants. Offenses in this category would have been triable by military commission under G.O. 20. Instead the councils of war conceived of such offenses as special violations for which a distinctive tribunal was required. Scott, it seems, had found his way through the jurisdictional thicket of the customary international laws of war, Congress’s Articles of War, and the U.S. Constitution to a distinctive and novel, if still not quite fully understood, species of wartime justice: a special tribunal held under the laws of armed conflict to try a very particular kind of charge, namely the charge of violations of the international laws of war.

129. *Id.*

130. *Id.*

131. Myers, *supra* note 104, at 228.

132. Winslow Filler Sanderson Papers (on file with Beinecke Library, Yale University).

133. *Id.*

134. *Id.*

135. Glazier, *supra* note 105, at 2033.

136. Glazier, *supra* note 111, at 36.

137. WALTER P. LANE, THE ADVENTURES AND RECOLLECTIONS OF GENERAL WALTER P. LANE, A SAN JACINTO VETERAN 47-48 (1887).

138. See Edwin O. Saunders & Edwin A. Meserve Jr., *Courts-Martial of the U.S. Army*, 30 *Calif. L. Rev.* 46, 48 (1941).

Scott's legal actions during the Mexican-American War present at least one more puzzle. Why did he not fall back upon simple retaliation? As Glazier observes, "Scott could have had the outlaws shot on the spot."¹³⁹ Yet he did not, and therein lies one further historical clue. Officers like Lane may not have cared whether their tribunals were styled as courts martial or military commissions or councils of war. They may not have scrupled the technical details. But at least some American officers seem to have thought that there was value in a legitimating trial and execution. When Lane executed a leader of the Mexican guerrilla forces, he gathered together as many people as he could to witness the proceedings. Lane wished "as many Mexicans to witness the execution as possible, so as to strike his confederates with terror."¹⁴⁰ Scott used his councils to the same effect, sometimes carrying out a highly public execution,¹⁴¹ and sometimes making a notorious show of granting clemency to Mexicans convicted of recruiting American soldiers or encouraging desertion in American ranks.¹⁴² Either way—execution or clemency—it seems, legitimation was available for militaries that would switch from the short and sharp work of retaliation to the longer and more labored project of punishment.

4. *A Mexican Coda: The Case of Foster and Goff*

The Mexican jurisdictional saga played out in one last case after the war's end. In the midst of the war, after G.O. 20, a Captain Foster of the Georgia infantry murdered an American lieutenant named Goff at the U.S. camp at Perote, Mexico.¹⁴³ A military commission was convened to try Foster for murder. But Foster escaped the commission's clutches and made his way back to Georgia, where he was apprehended by authorities after the close of the war.¹⁴⁴

The question that arose in Foster's case was whether the authority to try Foster persisted after the war had ended. The Army reached out to the Governor of Pennsylvania (Goff's home state), who disclaimed jurisdiction and passed the question on to Isaac Toucey, Attorney General of the United States.¹⁴⁵ Toucey concluded that the United States could not try Foster in its courts because the special offense of which he stood accused was not a crime against the laws of the United States at all.¹⁴⁶ Foster's crime was "against the temporary government established under the law of nations by

139. Glazier, *supra* note 135, at 36.

140. LANE, *supra* note 137, at 54.

141. See RAMON ALCARAZ & ALBERT C. RAMSEY, *THE OTHER SIDE: OR, NOTES FOR THE HISTORY OF THE WAR BETWEEN MEXICO AND THE UNITED STATES, WRITTEN IN MEXICO* 422 (Albert C. Ramsay ed. & trans., 1850).

142. *Id.*

143. Letter from Isaac Toucey, Attorney General to James K. Polk, President (Nov. 15, 1848), in 5 *OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES* 55 (Robert Farnham ed., 1852).

144. *Id.* at 55-59.

145. 8 JOHN BASSETT MOORE, *THE WORKS OF JAMES BUCHANAN* 253 (1909).

146. Letter from Isaac Toucey, *supra* note 143, at 58-59.

rights of war.”¹⁴⁷ With the restoration of the peace, however, “all the laws which existed by reason” of that war had “ceased to exist.”¹⁴⁸ The “restoration of the Mexican authorities” meant that “neither the offence nor any prosecution for it can any longer, in contemplation of law, have any existence.”¹⁴⁹

The Foster case was a curiosity—a long-forgotten footnote in the history of the Mexican-American War. But embedded in its logic was a strange new concept: a peculiar kind of crime, one produced by the jurisdictional imperatives of war that disappeared after war’s end. It was a novel legal creature. Winthrop would later remark that by the end of the war, “this branch of jurisdiction” was still not yet “fully developed.”¹⁵⁰ The next terrible American conflict would give it new life.

B. *The American Civil War*

The literature on the history of the war crime regularly makes an error about the Civil War, or at least implies one. Time and again, scholars refer to the postwar trial of Confederate Colonel Henry Wirz, the commandant of the prison camp at Andersonville, Georgia, as the Civil War’s principal contribution to the trial of war crimes. Some scholars refer to Wirz as the only person punished for a war crime during the conflict.¹⁵¹ As the Beall case described at the outset of this Article makes clear, however, the Wirz trial was not alone. The two cases were part of a much larger phenomenon. For the first time in the history of Euro-American warfare, prosecuting individuals and charging them with violating the laws of armed conflict became a standard practice. A complicated set of constitutional and jurisdictional dilemmas, however, produced an outpouring of prosecutions

147. *Id.* at 58-59.

148. *Id.*

149. *Id.* The Supreme Court later ruled that civil process under the authority of the provisional occupation government arising out of private disputes in the part of occupied Mexico that later became the U.S. Territory of New Mexico transferred seamlessly to the territorial courts. *See Leitensdorfer v. Webb*, 61 U.S. 176, 178 (1857) (“But it has been contended that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and reestablished. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty, and this too under the settled purpose of the United States never to relinquish the possession acquired by arms.”).

150. WINTHROP, *supra* note 120.

151. *E.g.*, Louis Fisher, *Military Tribunals: A Sorry History*, 33 PRESIDENTIAL STUDIES Q. 484, 487 (2003) (describing Wirz as “the only American tried and executed as a war criminal”); David Turns, *At the Vanishing Point of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflicts*, 45 GERMAN Y.B. OF INT’L L. 115, 117 (2002); *see also Myth: Henry Wirz Was the Only Person Tried for War Crimes in the Civil War*, NATIONAL PARK SERVICE (Apr. 14, 2015), <https://www.nps.gov/ande/learn/historyculture/wirztribunal.htm> (describing how the belief that Wirz was the only violator prosecuted spread). Jens Iverson’s recent chapter does slightly better, listing three war crimes trials, but even that is an undercount. *See* Jens Iverson, *The Trials of Charles I, Henry Wirz, and Pol Pot: Why Historic Cases are Often Forgotten*, in 3 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 93, 103 (Morten Bergsmo, Cheah Wui Ling, Song Tianying, & Yi Ping eds., 2015).

in need of a legal theory. The result was the establishment of a war crimes concept specifically rooted in international law. And shortly before the war's conclusion the term "war crime" itself would be coined.¹⁵²

1. *The Commissions and a Looming Constitutional Dilemma*

The Civil War military commission arose out of a jurisdictional difficulty like the one that produced the military commission in the Mexican War. The Articles of War in 1861 substantially resembled the Articles of War fifteen years before in 1846 at the start of the Mexican conflict.¹⁵³ They set forth rules binding principally on men enrolled in the U.S. military and contemplated courts martial—the military tribunal designed for members of the U.S. armed forces.¹⁵⁴ The constitutional authority of the court martial, in turn, rested on the firm footing of the Fifth Amendment's provision that "[n]o person shall be held to answer for a capital, or otherwise infamous crime," except by grand jury indictment, "except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."¹⁵⁵

But what to do with individuals who committed acts against the Union army or the Union war effort but who were not in "actual service" in the land or naval forces? The Civil War presented thousands of men and women acting against the authority of the United States. They were not eligible for trial by court martial. And many of them could not be charged in a state or federal court and tried by a jury as the federal constitution (and its state analogs) contemplated. Some had engaged in the relevant conduct in rebel-occupied territory where no trial could be held without flying in the face of the Fifth Amendment's guarantee of a trial in the "State and district" in which the alleged crime had been committed.¹⁵⁶ Others were charged where the courts were open, but where the civilian attitudes were such that convictions would be exceedingly difficult to obtain. And so, beginning principally in Missouri, where guerrilla fighting broke out early in the war, the military commission came to the rescue.

Read closely, in the Articles of War, Congress had purported to authorize a narrow band of military jurisdiction over individuals not in the land or naval forces as far back as before the ratification of the Constitution.¹⁵⁷ The old Articles of War dating from the War of

152. See *infra* text accompanying notes 234-37.

153. RULES AND ARTICLES OF WAR, H. REP. NO. 84 (2d Sess. 1861); see also WINTHROP, *supra* note 120, at 23.

154. U.S. CONST. amend. V; see also U.S. GOV'T PUB. OFF., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS, AND INTERPRETATION – CENTENNIAL EDITION – INTERIM, FIFTH AMENDMENT: RIGHTS OF PERSONS, S-DOC. 112-9, at 1468-69 (July 1, 2014).

155. See LIEUT.-COLONEL S. V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 405 (6th ed. 1868) (relating the text of Article 54 of the Articles of War).

156. U.S. CONST. amend. VI.

157. See WINTHROP, *supra* note 120, at 21-24; Edward Morgan, *Court-Martial Jurisdiction over Persons Under the Articles of War*, 4 MINN. L. REV. 79, 83 (1919) (describing the limited jurisdiction of military tribunals).

Independence had provided that “whosoever [relieved] the enemy with money, victuals, or ammunition,” or who knowingly harbored, protected, corresponded with, or gave “intelligence to the enemy,” was subject to punishment by military tribunal outside the courts.¹⁵⁸ In 1863, Congress enacted, and President Lincoln signed, further legislation extending the Articles of War to prohibit spying not only by aliens but by “all persons” in “time of war or rebellion.”¹⁵⁹

Was Congress duly authorized to establish military jurisdiction outside the grand jury requirement of the Fifth Amendment, at least when it involved individuals who were not enrolled in the land or naval forces of the United States? On what authority could Congress take criminal punishment out of the courts? Even more challenging, what of the many hundreds of men and women whose conduct seemed to warrant punishment but whose conduct did not seem to fall into one or another of the new provisions of the Articles of War governing assisting the enemy and spying? On what basis could the United States assert the authority to punish such individuals for crimes without going into the federal courts?

Crucially, the federal courts during much of the war seemed like nonstarters. At the war’s outset, the Lincoln administration had tried to use the federal courts to punish the so-called Confederate privateers: men whom the Confederacy had commissioned to harass and attack Union shipping. Initial trials in Philadelphia produced convictions, to be sure.¹⁶⁰ But trials in New York City proved more complex; a jury there deadlocked and produced an embarrassing mistrial. A sufficient number of war critics—known as “copperheads”—lived in northern cities as to make the jury pool suspect in such prosecutions.¹⁶¹ In the midst of a vast war effort, the Union could ill afford bad losses in the courts. But jury trials made such losses inevitable.

Critics of the use of military tribunals objected that the mere difficulty of getting convictions in the federal courts was no excuse to circumvent them; such difficulty was a feature rather than a bug of the constitutional guarantee of a jury trial. Creating impediments to federal prosecution was the whole point of the constitutional provisions, after all. When Congress took up the expansion of the spying provisions in the Articles in the fall of 1862, for example, critics in the Congress protested vigorously. Nevertheless, the bill passed, and Lincoln signed it into law on March 3, 1863.¹⁶²

The expansion of military jurisdiction, however, was far greater than the Act of March 3 suggested. In the war’s first two years a few hundred military

158. See JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 120-21 (June 30, 1775); see also Morgan, *supra* note 157, at 97-101.

159. Act of Mar. 3, 1863, 12 Stat. 339-40, 600, 602 (1863); Morgan, *supra* note 157, at 107-08.

160. WITT, *supra* note 44, at 161-62.

161. JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH (2006).

162. 12 Stat. at 736.

commissions tried civilians and Confederate guerrillas.¹⁶³ Half of those commissions took place in Missouri, where General Henry Halleck was in command.¹⁶⁴ Halleck was a close observer of Winfield Scott's Mexican War commissions; he was also a lawyer by training and author of an influential treatise on international law.¹⁶⁵ In late 1862 Lincoln promoted Halleck, bringing him back to Washington, where he served as General-in-Chief of the Union armies.¹⁶⁶ And with Halleck's promotion the use of military commissions grew into a widespread practice throughout the entire theater of the war. Beginning in the spring of 1863, the number of military commissions trying civilians and Confederates increased radically.¹⁶⁷ By the end of the war, Union officials had held approximately 4,000 military commission trials. Somewhere around 1,000 of those trials involved charges of violating the laws of war.¹⁶⁸

Nearly every one of these military commissions produced the basic constitutional problems that the military commission critics rehearsed in Congress in the winter of 1862-1863. The Bill of Rights and Article III of the Constitution seemed to guarantee protections such as jury trials in the "trial of all crimes" (Article III),¹⁶⁹ in the punishment of "capital, or otherwise infamous crime" (the Fifth Amendment),¹⁷⁰ and "all criminal prosecutions" (the Sixth Amendment).¹⁷¹ The federal government faced a further obstacle in punishing crimes that would not ordinarily have come within federal jurisdiction. Nineteenth-century constitutional law held that there was no federal common law of crimes.¹⁷² Congress had not enacted a criminal code to cover the myriad offenses with which civilian sympathizers and guerrillas were charged during the war. Nor was it clear that constitutional bases for Congress's authority would permit it to enact such a code.

The constitutional dilemmas of the Civil War tested the precise legal-conceptual character of violations of the laws of armed conflict. Constitutional guarantees made it difficult and sometimes impossible to

163. 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, 9-14 (2010).

164. *Id.* at 4 n.18 & 14.

165. See JOHN F. MARSZALEK, *COMMANDER OF ALL LINCOLN'S ARMIES: A LIFE OF GENERAL HENRY W. HALLECK* 19 (2004).

166. President Lincoln, Order Making Henry W. Halleck General-in-Chief (AGO General Orders No. 101), July 11, 1862, in 5 COLLECTED WORKS OF ABRAHAM LINCOLN, 1809-1865, at 313 (Roy P. Basler ed., 1953).

167. See Hart, *supra* note 163, at 3-4 & n.18.

168. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 176-77* (1991). The laws of war supplied Congress power over the former rebel states and these defendants were largely tried in military commissions during Reconstruction. See WITT, *supra* note 44, at 314-16.

169. U.S. CONST. art. III, § 2.

170. *Id.* amend. IV.

171. *Id.* amend. VI.

172. See *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812) ("[O]ur Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.").

treat such violations as crimes in the domestic sense. If violation of the laws of armed conflict caused behavior to lose the privilege created by international laws of war and fall back into the domestic criminal law, then the Union's legal efforts to prosecute Confederates and their sympathizers in military commissions would be in real jeopardy. The Union would have needed to rely on either the state courts or the federal courts, and neither could be counted on in the crisis to deliver the sort of decisions the Lincoln Administration needed.

In this moment of domestic constitutional crisis, the laws of war came to the rescue. When General John A. Dix, commanding the Department of the East, inquired as to whether he could employ a military commission to prosecute a blockade runner who was a U.S. citizen, Francis Lieber, a key Lincoln administration legal advisor, replied in the affirmative. "Undoubtedly a citizen under these conditions can, or rather must, be tried by military courts," he answered, "because there is no other way to try him and repress the crime which may endanger the whole country."¹⁷³ The laws of war authorized what was necessary in wartime. And as Lieber put it, relying on the international laws of war, "it must never be forgotten that the whole country is always at war with the enemy."¹⁷⁴ One leading Civil War judge advocate, William Winthrop, explained that the military commission "derive[d] its authority from the unwritten or common law of war."¹⁷⁵ The use of military commissions, in turn, expanded the jurisdiction of the common law of war. Winthrop recounted how the military commission swept in offenses like "using disloyal language" and kidnapping a "contraband negro" in Kentucky, even though the state had not seceded and even though the state's civil courts were open.¹⁷⁶ Military commissions tried charges like forging false discharge papers, assisting desertion, and making false claims on the armed forces, even where the claims were not made by a soldier and even though the conduct took place in the nation's capital, where once again the courts were open. Other charges before military commissions during the war included corruptly facilitating the release of convicts and prisoners who had been enlisted by brokers as substitutes in the Union Army draft, as well as neglect of duty by military contractors and the forging of medical certificates and furlough extensions.¹⁷⁷

Some military commissions took up charges that would not have been crimes outside of the state of war. Trading with the enemy, for example, was a crime that could only be committed in wartime. So too were crimes like recruiting within Union lines, violating an oath of allegiance, violating a truce

173. FRANCIS LIEBER, *THE LIFE AND LETTERS OF FRANCIS LIEBER* 347-48 (Thomas Sergeant Perry ed., James R. Osgood & Co. 1882); *see also* Hart, *supra* note 163, at 40.

174. Hart, *supra* note 163, at 40.

175. WILLIAM WINTHROP, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY* 225 (3d ed. 1868).

176. *Id.* at 225-26.

177. *Id.* at 225-27.

flag, and providing weapons to the enemy. Union military commissions repeatedly punished such war-specific behavior during the conflict. And for specialized crimes distinctive to the state of war such as trading with the enemy or the abuse of truce flags, the military commission seemed indispensable. No state's criminal code contained such crimes, and the federal Congress's peacetime powers did not reach them. The laws of war delivered the power necessary to criminalize such acts.

Most military commission trials, however, charged civilians with acts that would have been crimes in peacetime, and it was in these instances when the utility of a distinctively international-law-based conception of law of war offenses emerged most clearly. Consider a guerrilla fighter in Missouri named Stephen Bontwell who was charged with robbery and violating the laws of war for seizing a "civilian hostage and violently robbing him in August, 1861."¹⁷⁸ Bontwell's actions violated the laws of armed conflict.¹⁷⁹ But because his violent conduct also undoubtedly violated the law of Missouri in peacetime, such behavior might have been thought to fall out of the privileges of the laws of war and to become mere crime. Bontwell's conduct would thus have been subject to the criminal law of Missouri and of the United States. But such prosecutions before juries in jurisdictions with split allegiances between North and South were precisely what Union officials felt the need to avoid. And so the military commission charging Bontwell with violating the law of war surged to the fore to solve the procedural obstacles in the state and federal courts. Military commission prosecutions such as the Bontwell case ensued by the hundreds upon hundreds over the subsequent four years.¹⁸⁰

For our purposes here, the critical feature of military commission prosecutions is not whether the Lincoln Administration's legal theory was constitutional or not. The important point for us is that the legal theory of the military commissions during the American Civil War relied on and necessarily entailed a distinctively international legal theory of the status of the violation of the laws of war. The Administration's assertion of the federal government's war power purported to solve the problem of federal authority to prosecute crimes in the first place. And the assertion that violating the law of war was just that—a breach of the international laws of war, and not an ordinary crime—purported to solve the Article III and Bill of Rights problems.

Or at least so it seemed to Union-side lawyers.

178. Hart, *supra* note 163, at 25 n.157.

179. An attack on a civilian not participating in hostilities is prohibited under the laws of war. Moreover, we can probably assume that Bontwell did not wear a uniform or other distinguishing insignia when carrying out the violent act, further delegitimizing his conduct as a combatant and pointing to its unlawfulness. See FRANCIS LIEBER, LIEBER ON GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAW AND USAGES OF WAR 16-17, 22 (D. Van Nostrand 1862); PRESIDENT ABRAHAM LINCOLN, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDER NO. 100, at art. 44 (Apr. 24, 1863).

180. See Hart, *supra* note 163, at 29, 41-42.

2. *Vallandigham and the “Common Law of War” Solution*

In the early morning hours of May 5, 1863, a detachment of Union soldiers burst into the Ohio home of Clement Vallandigham, a former member of Congress, and arrested him in his bedroom.¹⁸¹ Vallandigham had distinguished himself as perhaps the most vocal critic of the war effort in the North, decrying the war as a battle “for the freedom of the blacks and the enslavement of the whites.”¹⁸² General Ambrose Burnside, Union commander of the Department of the Ohio, had issued an order prohibiting “all persons found within our lines” from committing “acts for the benefit of the enemies of our country.”¹⁸³ Burnside concluded that Vallandigham was trying to obstruct the recruitment of new Union volunteers. And so, after an especially intemperate speech, Burnside ordered Vallandigham’s arrest and charged him with attempting to obstruct the United States’ efforts to put down the rebellion.¹⁸⁴

At trial before a military commission of seven officers, Vallandigham refused even to enter a plea. The accused disputed the jurisdiction of the tribunal, citing the Constitution’s jury trial guarantee. But when Vallandigham initiated habeas corpus proceedings, lawyers for the United States offered a striking answer. Burnside had arrested the former congressman under “the laws of war, or martial law.” Specifically, the government identified “the common law of nations” as the source of Burnside’s authority to arrest and try men like Vallandigham.¹⁸⁵ Halleck had used the phrase “common law of nations” in his edits to a code for the laws of war drawn up by Lieber and issued by Lincoln around the same time as Vallandigham’s arrest.¹⁸⁶ And when District Judge Humphrey Leavitt ruled in the government’s favor, the military commission sentenced Vallandigham to spend the remainder of the war in prison.¹⁸⁷

Vallandigham’s case has long been a touchstone in the history of civil liberties in the Civil War. In a short opinion, the Supreme Court let the conviction stand, citing the President’s authority under “the common law of war.”¹⁸⁸ Less clear has been the distinctive position that the Vallandigham prosecution took on the question of the legal status of war crimes. For the Vallandigham episode exposed the implications of U.S. constitutional law for the war crimes debate. In order to justify military jurisdiction over men like Vallandigham, constitutional limits on the trial of ordinary crime compelled the government to contend that its authority stemmed from the laws of war, and that the accused’s offense was a breach of those laws, as

181. WITT, *supra* note 44, at 271.

182. *Id.*

183. Mary Bernard Allen & Joseph Holt, A Study in the Treatment of Political Prisoners by the United States Government during the Civil War 112 (1927) (Ph.D. dissertation, University of Chicago) (on file with the Virginia Journal of Int’l Law).

184. WITT, *supra* note 44, at 272.

185. *Ex Parte Vallandigham*, 28 F. Cas. 874, 903 (C.C.S.D. Ohio 1863).

186. WITT, *supra* note 44, at 272.

187. *Ex Parte Vallandigham*, 68 U.S. at 273.

188. *Id.*

opposed to the background criminal law.

3. *The Lincoln Conspirators: Offenses, Not Crimes*

The same distinction served as the foundation of an even more high-profile military commission convened soon after Lee's surrender at Appomattox. In the prosecution of the seven men and one woman charged with conspiring to assassinate President Lincoln, the defense repeated Vallandigham's objection to the jurisdiction of the military tribunal.¹⁸⁹ Senator Reverdy Johnson of Maryland, who had represented Sandford in *Dred Scott v. Sandford* only a few years earlier, objected that military tribunals could try no one except soldiers in the U.S. armed forces, and even then only for violations of the Articles of War.¹⁹⁰ But Judge Advocate General Joseph Holt and Attorney General James Speed had an answer at the ready. The source of the government's authority, Holt replied, was very same "common law of war" that the Supreme Court had recognized in the Vallandigham case and that Lieber and Halleck had cited in Lieber's code for the laws of war.¹⁹¹

In a long opinion, Attorney General Speed contended that the solutions to the government's constitutional and jurisdictional dilemmas lay in styling the assassination as a violation of the international laws of armed conflict. For one thing, he insisted, this approach supplied an explanation of the federal government's authority to punish the assassination. "That the law of nations constitutes a part of the laws of the land," he argued, "must be admitted."¹⁹² Moreover, Speed continued, the Constitution's guarantees of a jury trial and indictment by grand jury for alleged crimes did not apply because violations of the law of nations were not breaches of the background criminal law. Technically speaking, violations of international law were not crimes at all, they were "offences." The Constitution itself said so: Article I gave Congress the "power to define and punish . . . *Offences* against the Law of Nations," not crimes.¹⁹³ Surely, Speed contended, "offences" against the law of nations differed from the "crimes" referred to in Article III of the Constitution and its Fifth and Sixth Amendments. "Infractions of the laws of nations," he said, "are not denominated *crimes*, but *offences*."¹⁹⁴ Indeed, he continued, on close examination it was clear that the category of offenses against the law of nations was distinct from the category of crime: "Many of the *offences* against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes*." Speed offered examples. Blockade running, violating truce flags, and joining an unlawful guerrilla band were all punishable by the laws of

189. WITT, *supra* note 44, at 292.

190. BENJAMIN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 257 (1865).

191. *Id.* at 404-08.

192. Military Commissions, 11 Op. Att'y Gen. 297, 299 (1865).

193. *Id.* (quoting U.S. CONST. art I, § 8).

194. *Id.* at 312.

war, but they were not crimes in the civilian courts.¹⁹⁵

Here then was Speed's gambit. Like Vallandigham, the lawyers for the conspirators contended that the military tribunal was impermissible because of the Fifth Amendment's reference to "capital, or otherwise infamous crime," the Sixth Amendment's guarantees of speedy trials for "all criminal prosecutions," and Article III's promise that "the Trial of all Crimes . . . shall be by Jury."¹⁹⁶ But, citing the laws of war, Speed replied that

There is, then, an apparent but no real conflict in the constitutional provisions. *Offences* against the laws of war must be dealt with and punished under the Constitution as the laws of war, they being a part of the law of nations, direct; *crimes* must be dealt with and punished as the Constitution, and laws made in pursuance thereof, may direct.¹⁹⁷

The international law status of the war crime had rescued the Union's military commission system. Four Lincoln assassination conspirators were hanged on July 7, 1865.

4. *The Wirz Trial Was Not a Special Case*

A month and a half after hanging the Lincoln assassination conspirators, U.S. officials commenced another Washington, D.C. military commission when Union judge advocates brought Captain Henry Wirz before a military tribunal on charges arising out of his command of the prison camp at Andersonville, Georgia.¹⁹⁸ Nearly 13,000 Union soldiers died at Andersonville thanks to miserable conditions, malnutrition, brutal

195. Speed's argument here is worth quoting in full because it captures the logic, impelled by U.S. constitutional constraints, of the law of war as an independent body of law enforceable by criminal punishment:

Many of the *offences* against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes*. It is an offence against the law of nations to break a lawful blockade, and for which a forfeiture of the property is the penalty, and yet the running a blockade has never been regarded a crime; to hold communication or intercourse with the enemy is a high offence against the laws of war, and for which those laws prescribe punishment, and yet it is not a *crime*; to act as spy is an offence against the laws of war, and the punishment for which in all ages has been death, and yet it is not a crime; to violate a flag of truce is an offence against the laws of war, and yet not a crime of which a civil court can take cognizance; to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war. Some of the offences against the laws of war are crimes, and some not. Because they are crimes they do not cease to be offences against those laws; nor because they are not crimes or misdemeanors do they fail to be offences against the laws of war. Murder is a crime, and the murderer, as such, must be proceeded against in the form and manner prescribed in the Constitution; in committing the murder an offence may also have been committed against the laws of war; for that offence he must answer to the laws of war, and the tribunals legalized by that law.

Id. at 312-13.

196. U.S. CONST. art. III, § 2.

197. *Military Commissions*, 11 Op. Att'y Gen. 297, at 313.

198. WITT, *supra* note 44, at 298.

treatment, and unconscionable overcrowding.¹⁹⁹ Wirz had limited control over the crowding and the food supplies. But his angry temperament and occasional arbitrary violence made things worse, not better. In October the commission convicted Wirz on charges of murder and conspiracy against Union prisoners, both in violation of the international laws of war. The Union hanged Wirz a few weeks thereafter.²⁰⁰

Ever since the World War II-era effort to search for precedents to the Nuremberg and Tokyo tribunals, the Wirz trial has presented a paradigmatic case for jurists and historians. Wirz's crimes against the laws of armed conflict are recognizable to twentieth- and twenty-first-century eyes. The humanitarian crisis of Andersonville looked like some of the crises of the Second World War, featuring emaciated prisoners held in small and overcrowded camps. For twentieth-century American observers, it did not hurt that Wirz (a Swiss immigrant) spoke with a German accent. The Lincoln conspirators, by contrast, were more hapless than sinister. Their guilt was not certain and the proceedings by which their guilt had been determined were an embarrassment. The controversial and unprecedented hanging of Mary Surratt, too, cast a shadow over the entire proceedings. And so the Wirz case became the paradigmatic war crime case of the American Civil War. His prosecution did not represent an especially egregious overreach of the military tribunal power; the acts he was convicted of were safely ensconced in the past.

And yet casual observers and scholars have wrongly treated him as the only man punished for violating the laws of war in the American Civil War. This suggestion is not even close, given the numerous law of war commissions convened during the conflict, not to mention the prominent Lincoln conspiracy commission that had completed its work only a short time earlier. All of them, Wirz's case included, rested on the idea that violations of the international laws of war were punishable by virtue of norms rooted in international law.

C. Lieber Coins the Phrase

Francis Lieber began the war uncertain about whether the laws of war supplied their own criminal law norms. In the winter of 1861-62, when he delivered a series of lectures at Columbia on the laws of war, serialized in the *New York Times*, his treatment made virtually no mention of criminal sanctions for violations. Even as late as 1863, Lieber wrote to Halleck that "the Law of War is not a Penal or Criminal Law." Lieber explained further: "You don't punish a spy; you kill him to suppress his trade."²⁰¹

And yet few people have had as much influence over the rise of the

199. *Id.*

200. *Id.* at 301.

201. Letter from Francis Lieber to Henry Halleck (Oct. 3, 1863) (on file with Virginia Journal of Int'l Law); see generally Patryk I. Labuda, *The Lieber Code, Retaliation, and the Origins of International Criminal Law*, in 3 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW, *supra* note 151, at 299, 304-13.

modern concept of the war crime as Lieber did. In 1862, at Halleck's request, Lieber published a pamphlet on the law of guerrilla fighters, which quickly found its way into use in military commissions in Missouri and elsewhere. In 1863 he finished the code of the laws of war for which he is probably best known, published under Lincoln's signature as General Orders, No. 100, of the Union Army. The orders quickly became a blueprint for judge advocates in dozens and perhaps hundreds of military commissions.²⁰² By the middle of 1863 judge advocates were writing Lieber on a regular basis seeking advice about military commission trials. And at the war's end, Lieber took on the job of sifting through the remains of the Confederate archives in a futile search for evidence of complicity by the Confederate leadership in violations of the laws of war.

It was in the midst of this work that Lieber made the first extant use of the phrase "war crime."²⁰³ Scholars have alternately attributed the phrase war crime to Lassa Oppenheim's classic 1906 treatise, or to the German jurist Johann Caspar Bluntschli's writings in the 1870s.²⁰⁴ But Lieber is the first person to have used the phrase in correspondence, though he never published it. Writing to Secretary of War Edwin Stanton in July 1865, Lieber urged that Jefferson Davis face trial for treason in the federal courts rather than a military commission for violating the laws of war. His memorandum offered "[r]easons why Jefferson Davis ought not to be tried by military commission for complicity in the unlawful raiding, burning, etc." of civilian property and towns.²⁰⁵ Among such reasons, Lieber explained that there should be no military commission prosecution of Davis because some leaders of the Confederacy had probably not committed any violations of the laws of war. Men such as Alexander Stephens, the Vice President of the Confederacy, would have to be tried for treason in the federal courts, which would make the military commission prosecution of Davis look like a transparent effort "to get at his life." The difficulty, Lieber explained, was that men like Stephens had "probably committed no particular war-crime."²⁰⁶

There it was, in an unpublished letter from Lieber to the Secretary of War: the earliest known use of the phrase "war crime." The novelty of the phrase alone need not indicate a moment of much significance, of course. The mere fact of a neologism does not necessarily indicate the presence of a new idea. But in this instance, it signaled the consolidation of a conceptual

202. WITT, *supra* note 51, at 270.

203. Our search of academic and popular materials revealed fewer than three instances prior to 1865 in which the term "war-crime" was used. Unlike Lieber's use, these references were made in the context of discussion about war itself being a crime—often in religious or artistic expressions. "War-crime," therefore, operated as shorthand for that concept. We were unable to identify any usage of the term that conveyed a discrete violation of the law of war by an individual, as Lieber employs it.

204. See Daniel Marc Segesser, *The International Debate on the Punishment of War Crimes During the Balkan Wars and the First World War*, 31 PEACE & CHANGE 533, 545 n.1 (2006).

205. Memorandum from Francis Lieber to Edwin Stanton, Sec'y of War (July 1865) (on file with the Virginia Journal Int'l Law).

206. *Id.*

transformation in international law. The phrase “war crime” arrived at the end of nearly two decades of debate in the United States over the status of violations of the laws of war. The new phrase described a new species of offense. From the Mexican War to the end of the Civil War, American soldiers and jurists had recrafted the meaning of violations of the laws of war. What had been acts forfeiting the privileges of the laws of war and thus susceptible to prosecution under the authority of the default criminal law became acts punishable by virtue of the breach of the international law of war itself. In the abstract, the distinction might have seemed purely theoretical. But in the context of the U.S. Constitution, it was decisively important. The distinctive pressures of U.S. constitutionalism—the protections of the Bill of Rights and Article III in particular—had brought into being a particular conception of the legal structure of a violation of the laws of war.

III. PROLIFERATION AND INVERSION: THE CAREER OF A CONCEPT

A. The Persistence of Older Models: Conceptual Confusion and Pluralism

Even as Lieber was coining the new term, older alternatives for thinking about enforcement of the international laws of armed conflict persisted in the literature. Prominent legal scholars were still advancing the old domestic crime idea, among others. The German jurist August Wilhelm Heffter, for instance, argued that the enemy who uses illicit methods places himself outside the laws of war: “L’ennemi qui, pendant le combat, fait usage d’armes illicites, se place en dehors des lois de la guerre.”²⁰⁷ Late-nineteenth-century editions of James Kent’s best-selling *Commentaries on American Law* continued to parrot Vattel’s idea that a combatant “should be independent of the ordinary criminal jurisdiction of the country, unless he violates the law of nations by the commission of some enormous crime; and that if guilty of any crime, he should be sent home to be punished.”²⁰⁸

Popular conventions continued to blur the distinction between retaliatory and domestic criminal law models, drawing on early formulations of the laws of war. When referring to a singular raid on Canada by Confederate soldiers during the Civil War, for example, one British journalist in 1865 summoned a hybrid vision between retaliation and punishment. At the same time that war “annihilates all legal rights between the two belligerents,” wrote Charles Mackay, a *civilized* war “sanctions the punishing of an excess by instant penalties.”²⁰⁹ If an enemy soldier commits

207. AUGUST WILHELM HEFFTER, *LE DROIT INTERNATIONAL PUBLIC DE L’EUROPE* 245 (1857) (“The enemy who, during combat, uses unlawful tactics, places himself outside the laws of war.”) (translated by the author).

208. KENT, *supra* note 54, at 44. On the success of the Kent volume and its many editions, see Daniel Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 *ALA. L. REV.* 377 (2009).

209. Charles Mackay, *The St. Alban’s Raiders and Extradition Treaties*, *N.Y. TIMES*, Nov. 11, 1864, at 4 (discussing Canadian extradition of Confederate raiders).

a “criminal offense,” his opponents may grant him a trial, but Mackay insisted that they need not, for they already have a right to imprison or kill him in the state of war.²¹⁰ It was well established, Mackay concluded, that an opponent may “exercise these rights without form of trial, if [they] think them proper penalties for the offence [they] assume him to be guilty of.”²¹¹

Disparate threads lingered in legal and political responses to wartime atrocities, too. The Franco-Prussian War of 1870-1871 produced widely publicized controversies over the so-called *francs-tireurs*, the guerrilla-style fighters who acted as snipers in the countryside, killing Prussian soldiers after the battlefield successes of the Prussian armies.²¹² Prussia denounced such killings as lawless and engaged in reprisals against the French communities suspected of harboring and sheltering the *francs-tireurs*.²¹³ French partisans, in turn, denounced the Prussian reprisals.²¹⁴ And in the war’s aftermath, the *francs-tireurs* controversy led jurists to debate the question of who was privileged to use force in wartime. German observers complained that allowing shadowy *francs-tireur*-type actors to function as legitimate combatants with the privilege of using force in wartime would make it impossible for armies to distinguish between soldiers and civilians.²¹⁵ Critics castigated the German position as seeking to legitimize the brutal Prussian reprisals and to outlaw an effective enemy tactic.²¹⁶ The important point for us here is that the *franc-tireurs* debate took place with the default domestic criminal law as the implicit backdrop. The question put by the debate was whether *francs-tireurs* qualified for the privileges of the laws of war at all, or whether they remained outside the special privilege to use force afforded by the state of war. The famous Brussels Declaration ultimately put off the question, resolving that a “population spontaneously tak[ing] up arms” to resist invading troops “shall be regarded as belligerents if they respect the laws and customs of war.”²¹⁷ The last clause deferred the issue, since the contending sides disagreed about whether disorganized and ununiformed *francs-tireurs* complied with the laws of war or not by their very existence.²¹⁸ In any case, the dispute was over whether unorganized fighters were soldiers or criminals; the Brussels Declaration did not formally contemplate the possibility of the hybrid soldier-criminal.²¹⁹

210. *Id.*

211. *Id.*

212. ALEX J. BELLAMY, MASSACRES AND MORALITY: MASS ATROCITIES IN AN AGE OF CIVILIAN IMMUNITY 74 (2012); JOHN HORNE & ALAN KRAMER, GERMAN ATROCITIES, 1914: A HISTORY OF DENIAL 18-19, 23, 49-53 (2001).

213. *See* HORNE & KRAMER, *supra* note 211.

214. *Id.*

215. *See generally* GEOFFREY BEST, HUMANITY IN WAR (1978).

216. *See generally* John Horne & Alan Kramer, *German “Atrocities” and Franco-German Opinion*, 66 J. MODERN HIST. 1 (1994).

217. Project of an International Declaration Concerning the Laws and Customs of War art. 10, Aug. 27, 1874 [hereinafter Brussels Declaration].

218. *See* HORNE & KRAMER, *supra* note 211.

219. *See* Brussels Declaration, *supra* note 217. Art. 33 came as close as any other piece of the Declaration to identifying the war crime idea when it states that prisoners of war “liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour” could be

A contemporaneous meeting of the International Committee of the Red Cross proposed to do precisely what the Brussels Declaration avoided. In January 1872, the Swiss humanitarian and lawyer Gustave Moynier proposed a treaty that would have established an international tribunal with jurisdiction to try violations of the laws of war. Moynier's proposal, however, shared the fate of previous attempts to establish international tribunals with customary jurisdiction.²²⁰ Neither belligerent from the Franco-Prussian conflict was willing to submit to Moynier's idea. Indeed, not a single government was willing to sign on to the proposal.²²¹

Eight years later, Moynier led an effort by the Institut de Droit International to draft a manual on the laws of war. The so-called Oxford Manual firmly committed itself to the view that criminal punishment was the preferred mechanism for enforcing the laws of armed conflict. But the Manual was ambiguous in its conception of the war crime. On one hand, Article 84 of the Manual set out a body of rules for the state of war and announced a "penal sanction" for violations of the rules. "If any of the foregoing rules be violated," the article continued, "the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are."²²² The Manual further explained that punishment of such violations performed a function in international armed conflict. Should an offender be unavailable for punishment, the Manual contemplated that a belligerent might have "no other recourse than a resort to reprisals" in its effort "to recall the enemy to a respect for law."²²³ Yet the Manual could hardly avoid the awkward fact that, as Lieber had noted at the outset of the American Civil War, the laws of war did not seem to be a penal law. Its crimes were ill-specified, and it completely failed to indicate the penalties attaching to its violations. As a result, the Manual incorporated domestic criminal law norms to establish appropriate sanctions for violations of its rules. "Offenders against the laws of war," the article stated, "are liable to the punishments specified in the penal law."²²⁴

B. Diffusion of the International Conception

Despite continuing confusion about the laws of war, the war crimes concept arising out of the American experience spread as international lawyers and jurists adopted Lieber's formulation.²²⁵ Notably, the first person to put the phrase into print, the German jurist Johann Caspar Bluntschli,

stripped of the "rights accorded to prisoners of war and brought before the courts." *Id.* art. 33.

220. Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, INT'L REV. OF THE RED CROSS 1, 8-17 (1998).

221. *Id.* at 13.

222. INSTITUTE OF INT'L LAW, THE LAW OF WARS ON LAND art. 84 (1880).

223. *Id.*

224. *Id.*

225. See, e.g., Daniel Marc Segesser, "Unlawful Warfare is Uncivilised": *The International Debate on the Punishment of War Crimes, 1872-1918*, 14 EUR. REV. OF HIST. 215, 217 & n.2 (2007) (describing how Swiss jurist Johann Caspar Bluntschli first used the term "Kriegsverbrechen," or war crime, to refer to the issue of *franc-tireurs* in the Franco-Prussian War).

was Lieber's friend and correspondent. Writing shortly after the close of the Franco Prussian War, Bluntschli adopted Lieber's phrase in translation to characterize the legal significance of the behavior of French civilians during the conflict. Bluntschli was especially concerned with the *franc-tireurs*.²²⁶ And so, in the second edition of his treatise *Das Moderne Völkerrecht*, published in 1872, Bluntschli asserted that "communities and home owners who abet such war crimes [*Kriegsverbrechen*], or who do not prevent them through their vigilance, can depending on the size of the danger be threatened with punishment and asked for compensation."²²⁷ As in the American cases from the 1840s and the 1860s, the juridical context was crucial. The *franc-tireurs* and those who harbored them were not violating French law; they were acting in the defense of France's sovereignty against the foreign occupier. Their acts were therefore not illegal under the background default law of crimes. Their acts were unlawful according to the international laws of war. Lieber's distinctive formulation, of course, was designed precisely to distinguish crimes under international law from domestic crimes. Lieber and the American jurists of the Mexican-American War and the Civil War had designed the concept for the distinctive imperatives of the U.S. Constitution. But for the new setting of the Franco-Prussian War it proved valuable, too. And so the German jurist Bluntschli picked up the American-born concept and adapted it to European circumstances.²²⁸

The German-trained international law jurist Lassa Oppenheim also adopted the concept, becoming decisively important in specifying the logic of the war crime as a new creature of international law. The distinguished professor at the London School of Economics and then at Cambridge introduced the war crime concept in the midst of debates over the 1899 and 1907 Hague Peace Conferences.²²⁹ In his important treatise *International Law*, first published in 1906, Oppenheim developed the concept in much the same sense in which Lieber and Bluntschli had used the term several decades earlier.²³⁰ "Writers on the Law of Nations," Oppenheim observed at the outset of his discussion, "have hitherto not systematically treated of the question of war crimes and their punishment."²³¹

226. Daniel Marc Segesser, *The International Debate on the Punishment of War Crimes During the Balkan Wars and the First World War*, 31 PEACE & CHANGE 533, n.1 (2006).

227. JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT [MODERN INTERNATIONAL LAW OF CIVILIZED STATES AS A LEGAL CODE] § 643a (2d ed. 1872).

228. Hathaway and her co-authors contend that because Bluntschli was focused on nonprivileged civilians rather than privileged combatants his use of the term is properly thought of as adopting what we have called the ordinary criminal law approach to crimes during war, rather than the approach that views war crimes as violations of a body of international law as such. See Hathaway et al., *supra* note 11, at 60-61. Of course, for jurisdictional reasons relating to military commission jurisdiction, treating wartime attacks by nonprivileged combatants as war crimes has been U.S. practice since at least as long ago as the Mexican-American War and continuing right up to the Guantanamo commissions.

229. See Daniel Marc Segesser, *On the Road to Total Retribution? The International Debate on the Punishment of War Crimes 1872-1945*, in A WORLD AT TOTAL WAR (Roger Chickering et al. eds., 2005).

230. Oppenheim defines war crimes as "such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders." Oppenheim, *supra* note 118, § 251.

231. *Id.* at 263 & n.2.

On first glance, Oppenheim's assertion about the absence of a war crimes literature might seem puzzling. How could it be that after a millennium of development in the law of nations in Europe, nearly four centuries after Grotius's *The Rights of War and Peace*, there was still no systematic treatment of the question of the war crime? You, fair reader, having gotten this far, are in a position to understand why Oppenheim could have said as much in 1906. The legal structure of the modern war crime had been suppressed until the distinctive jurisprudential characteristics of modern war emerged in the nineteenth-century world—characteristics first salient in the U.S. and then spreading to Europe in the Franco-Prussian conflict.

Be that as it may, the modern structure of the war crime concept emerged in Oppenheim's writing. War crimes, he explained, stood "in contradistinction to hostile acts" for which soldiers "do not lose their privilege of being treated as members of armed forces." The war crime was an act by which "soldiers or other individuals . . . may be punished by the enemy."²³² Oppenheim then clarified that the war crime, as he meant it, arose under a special body of international law principles, not under the ordinary principles of the default criminal law:

It must be emphasized that the term war crime is used not in the moral sense of the term crime, but only in the technical legal sense, on account of the fact that perpetrators of these acts may be punished by the enemy.

As Oppenheim saw the problem, the international structure of the concept followed from the fact that although some war crimes were "crimes in the moral sense of the term," others were morally praiseworthy acts without any reference in the ordinary law of right and wrong. Because States must punish these acts "whatever may be the motive, the purpose, and the moral character," Oppenheim concluded, "they are termed war crimes."²³³

For Oppenheim, in other words, war crimes were a special kind of crime, rooted not in the basic distinctions of right and wrong characteristic of the ordinary criminal law systems of States, but founded instead in the peculiar logics and imperatives of international law. Oppenheim's concept thus closely resembled that of Lieber and Bluntschli before him. The law of war crimes, he insisted, existed as a body of rules contingent on the laws of war and independent of the ordinary law of crimes. For Lieber (and perhaps for Bluntschli) the independence of the war crime from domestic criminal law had followed from imperatives of jurisdiction and procedure. Oppenheim's account, too, followed from internal obstacles to locating the concept of the war crime in the domestic criminal law of an occupied territory. The obstacles differed, to be sure. For the generation of the American Civil War the obstacles arose out of domestic constitutional imperatives. For Oppenheim the hurdles to domestic criminal law treatment

232. *Id.* § 251.

233. *Id.*

were conceptual. But either way, challenges within the legal regimes of crime and war had the same effect of pressing jurists to adopt a conception of the war crime as a creature of international law.²³⁴

And still, the domestic model of the war crime had not been banished from the laws of armed conflict. Certainly it was alive and well in some circles in the early twentieth century. Writing in the *American Journal of International Law* in 1920, for example, the distinguished American criminologist James W. Garner adopted the domestic law approach with special clarity. Garner contended that soldiers were liable to criminal prosecution when they violated the laws of war not because they had thereby triggered a penal dimension of international law, but because any act outside the authorization of the laws of war was stripped of the special soldier's privilege and fell back into the ordinary law of crime. "[T]he killing by a soldier . . . or the taking of private property in occupied territory, are lawful acts of war only when they are done in the manner and subject to the conditions prescribed by international law; otherwise they are murder or theft, as the case may be."²³⁵ Garner clarified: soldiers were immune from prosecution for acts "authorized by the generally accepted laws of war."²³⁶ But acts that are "forbidden by the generally recognized laws and usages of war" presented a different question altogether.²³⁷ These were "not legitimate acts and they may be crimes under the common law."²³⁸ Violations of the laws of war, in other words, fell out of the immunity offered by the combatant's privilege and were subject to the ordinary law of crime.

Perhaps Garner's view ought to have been a clue. But the striking thing about the debates over punishing wartime atrocities in the immediate aftermath of the First World War was the new success among European jurists of the international war crime model—and its sudden disrepute on the other side of the Atlantic, where it had been invented a half-century before.

C. Inversions: Paris, Versailles, and Leipzig

The end of the First World War seemed to propel forward the new modern notion of the war crime as a creature of international law. But then circumstance—and the American delegation at Versailles—dealt it a blow.

In the peace negotiations in Paris that followed the Armistice in November 1918, the question of post-war trials for atrocities committed

234. Hathaway and her co-authors assert that Oppenheim shared the default or ordinary criminal law conception of the war crime. See Hathaway et al., *supra* note 11, at 61-62. For the reasons given here we think that's not quite right, though to be sure Oppenheim's passages on the war crime proceed cautiously and even hesitantly given (as he remarks) how little material he had on which to base his view.

235. James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 73 (1920).

236. *Id.*

237. *Id.*

238. *Id.*

during the war arose as an important issue. The Preliminary Peace Conference constituted a Committee on the Responsibility of the Authors of the War and on Enforcement of Penalties, charged with inquiring into, among other things, “breaches of the laws and customs of war committed by the forces of the German Empire and their Allies.”²³⁹ Two distinguished Americans served on the Committee: Secretary of State Robert Lansing and leading international lawyer James Brown Scott, along with respected jurists from the British Empire, France, Italy, Japan, and Belgium. In March, the Committee presented a report to the Conference recommending prosecution of German soldiers accused of atrocities for war crimes. The Committee set out a non-exhaustive list of thirty-two separate charges it recommended investigating, ranging from “murders and massacres” to “imposition of collective penalties,” to “poisoning of wells.”²⁴⁰ And it did so employing the modern international-law-violation sense of the term.

Innovations from the previous half-century of development were readily apparent in the Commission’s work. A mere thirteen years after Oppenheim had written about the unsystematic treatment of the new war crime idea, the Commission treated the war crime idea almost as second nature. “Every belligerent,” the Commission report asserted, “has, according to international law, the power and authority to try the individuals alleged to be guilty of . . . Violations of the Laws and Customs of War.”²⁴¹ The Commission continued by invoking the domestic model of the war crime: “Each belligerent has . . . pursuant to its own legislation, an appropriate tribunal, military or civil, or the trial of such cases.”²⁴² But then the Commission observed that the ordinary domestic model of the war crime might not suffice in all cases. Some persons in enemy countries may have committed atrocities against more than one Allied nation or in more than one area of the battle front and against more than one Allied army.²⁴³ Some accused persons might be high officials from an enemy country charged not with an ordinary crime of commission but with a special crime not appearing in the ordinary domestic criminal law, such as a command-responsibility crime of having failed to prevent violations of the laws of armed conflict.²⁴⁴ And sometimes, as the Commission’s report observed, “the character of the offence or the law of any belligerent country” might make it for one reason or another “advisable not to proceed before a court” of any one belligerent country.²⁴⁵ For all these reasons, the Commission recommended an international forum to take up the distinctively international offense of the war crime: a “high tribunal” made up of judges

239. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919*, 10 AM. J. INT’L L. 95, 95 (1920) [hereinafter *1919 Report*].

240. *Id.* at 114-15.

241. *Id.* at 121.

242. *Id.*

243. *Id.*

244. *Id.*

245. *1919 Report*, *supra* note 239, at 121-22.

appointed by the wartime allies.²⁴⁶

Here was essentially the same move that U.S. statesmen, soldiers, and jurists had made in the Mexican-American and Civil Wars. Complications with ordinary criminal prosecution in conflict settings had pressed Americans to generate a new concept that would allow an end-run around domestic legal impediments. And now, in Paris, the leading European law of war jurists proposed much the same move for much the same reason. A distinctly international conception of the war crime, along with an international tribunal to match, would allow post-war tribunals to get around awkward mismatches between domestic criminal law, on the one hand, and the peculiar imperatives of prosecuting wartime atrocities, on the other.

But then a surprising thing happened. The American delegation, led by Secretary of State Lansing, refused to go along with what had essentially been an American innovation, albeit a half-century earlier and in a very different context.²⁴⁷ The U.S. representatives agreed that “every belligerent has . . . the power and authority to try the individuals alleged to be guilty of the crimes.”²⁴⁸ Ordinary criminal prosecution of those who committed atrocities was fine. But the U.S. dissented from the further steps of (1) styling the crimes with which such persons would be prosecuted as international law violations and (2) constituting an international tribunal in which such charges would be tried.

Suddenly constitutional scruples constrained the U.S. from taking a position it had previously staked out to make an end-run around the same kinds of constitutional obstacles. Lansing and Scott reasoned that,

[An act] could not be a crime in the legal sense of the word unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted.²⁴⁹

The Americans cited *United States v. Hudson*, a classic 1812 case in the U.S. Supreme Court, for the proposition that “the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction over the offense.”²⁵⁰ If that were true for the United States, they continued, it must also “be true of this looser union which we call the Society of Nations.”²⁵¹ And yet Lansing and Scott knew “of no international statute or convention making a violation of the laws and customs of war . . . an international crime, affixing a punishment

246. *Id.* at 122.

247. The American delegation was also unwilling to endorse (1) the Commission’s recommendation that the post-war trials include trials for crimes against humanity, see *id.* at 133-34, and (2) the Commission’s recommendation that the post-war trials include command-responsibility charges against enemy heads of state and others, “however high their position may have been.” *Id.* at 135.

248. *Id.* at 140.

249. *Id.* at 145.

250. *Hudson & Goodwin*, 11 U.S. at 34.

251. *1919 Report*, *supra* note 239, at 146.

to it, and declaring the court which has jurisdiction over the offence.”²⁵²

All was not lost, however. The absence of any such statute or convention making the international laws of armed conflict into a penal code did not, as Lansing and Scott saw it, pose an insuperable obstacle to prosecutions of those who had committed atrocities. Domestic courts and ordinary criminal law concepts could do the necessary work,

inasmuch as the various states have declared certain acts violating the laws and customs of war to be crimes, affixing punishments to their commission, and providing military courts or commissions within the respective sates possessing jurisdiction over such offence.²⁵³

The ordinary law of States, in other words, would suffice. And so, the American representatives to the Commission insisted, “the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences” ought to take place in “military tribunals.”²⁵⁴ In the U.S., the American representatives observed, such crimes had been prosecuted in military tribunals since the Mexican-American War and then again in the American Civil War. Consider, they offered, the military commission prosecution of Henry Wirz, who as they recounted, had been “tried by a military commission . . . for crimes contrary to the laws and customs of war” and executed in 1865.²⁵⁵

Ironically, Secretary Lansing and James Brown Scott neglected to observe that the Wirz commission, like the Beall commission on Governor’s Island earlier that same year, like the Lincoln assassination tribunal, and like the one thousand other law of war commissions during the Civil War, had rested on precisely the same move now proposed by the Paris Commission. American military commissions in the Civil War era had relied on a distinction between ordinary crime and international law offenses in order to manage constitutional requirements for criminal prosecutions in the United States. They had relied on that distinction so heavily that they had invented the new phrase “war crime” to describe such offenses. But now, in 1919, the U.S. delegation felt very differently. In one instance, the move from the domestic model to the international model had allowed American statesmen to prosecute offenders in American conflicts. Now, in the aftermath of the First World War, the gains for the U.S. were more remote and the possible future risks to American soldiers and statesmen too apparent. And so Lansing and Scott rejected the model of the war crime that their predecessors had invented only two or three generations before.

American objections meant that the Treaty of Versailles omitted the Paris Commission’s recommendations for a high international tribunal to try offenses against the laws of war. To be sure, Article 227 authorized a “special tribunal” to take up the charge against the German Kaiser of “a

252. *Id.*

253. *Id.*

254. *Id.* at 141.

255. *Id.* at 142.

supreme offence against international morality and the sanctity of treaties.”²⁵⁶ But famously, The Netherlands refused to extradite Kaiser Wilhelm; no Article 227 tribunal ever came into existence. In turn, Article 228 of the Treaty conceded the American position. Rather than create an international “high tribunal,” Article 228 authorized the Allies to use their existing systems of military tribunals to try persons charged with “acts in violation of the laws and customs of war” and to sentence convicted defendants according to “punishments laid down by law.”²⁵⁷

Lansing’s and Scott’s domestic model for crimes during wartime had emerged triumphant in the Treaty of Versailles. It emerged again in the year thereafter, too. When the German government refused to turn over defendants to face charges in Allies’ military tribunals, officials from the Allies relented and permitted German authorities to try their own nationals for atrocities in their own courts and under their own laws. The trials that followed in Leipzig before the German Supreme Court failed to satisfy anyone. German authorities brought only a fraction of the Germans accused of atrocities. The court in Leipzig convicted only a fraction of those and handed out lenient sentences to those it did convict. Courts in Turkey proceeded in something of the same fashion, collapsing into nationalist recriminations and ultimately letting those accused of war crimes go free.²⁵⁸ In both places, the trials after the First World War took place in state-based courts applying the ordinary criminal laws.

D. Nuremberg and the Ironies of the Internal View

The failure of the Leipzig trials helped to shape the outlook of the generation of jurists who took up the question of war crimes after the Second World War. Nearly a century after the early experiments in Mexico, European and Anglo-American jurists readily recognized war crimes in the modern international sense of the term. The old retaliation model (advocated at different times by Stalin, by Churchill, and by U.S. Treasury Secretary Henry Morgenthau) gave way not to a domestic criminal law alternative, but to a fully internationalized model of the war crime. The struggles of Leipzig’s domestic tribunals significantly increased the appeal of the modern international law conception of the war crime by making international tribunals themselves substantially more appealing.²⁵⁹ And the list of war crimes prepared by the 1919 Paris Commission (“murders and massacres,” the “imposition of collective penalties,” and the “poisoning of wells” among them) served to solve any ex post facto problem. International law, since at least the First World War, had criminalized such acts.²⁶⁰

256. Treaty of Versailles, U.S.-Fr., art. 227, June 28, 1919, 3 U.S.T.I.A. 3329.

257. *Id.* art. 228.

258. CROWE, *supra* note 5, at 101-14.

259. See Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig*, 14 EUROPEAN REV. 441, 449-51 (2006); M. W. Mouton, *War Crimes and International Law*, GROTIUS INT’L Y.B. 38, 40-43 (1948).

260. ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE

The Second World War, however, also presented a new challenge to the international law of war crimes. War crimes such as the execution of prisoners or the targeting of civilians were only a modest part of the horrors of the Nazi war effort; indeed, Allied strategic aerial bombardment of cities like Dresden in the West and Tokyo in the East, not to mention the atomic bombs at Hiroshima and Nagasaki, threatened to bring uncomfortable scrutiny to Allied war efforts. The heart of Allied efforts to do justice after World War II centered not on ordinary war crimes but on the claim that the Axis Powers had engaged in an unlawful form of aggressive war. To prosecute mere ordinary war crimes and to leave unaddressed the vast destruction of the Axis's aggressive use of force seemed to miss the moral heart of the matter entirely. But here lay a new problem: there was no well-specified crime of aggressive war in international law. The Paris Commission and jurists running back to Oppenheim, Bluntschli, and Lieber had helped establish that violations of the laws and customs of armed conflict counted as war crimes. But no similar tradition treated aggressive war as an international law crime. The Kellogg-Briand Pact of 1928 purported to outlaw the use of force. But the Pact did not resemble a criminal or penal law at all. It carried no penal sanction. Prosecuting aggressive war seemed to have the same *ex post facto* problem that Lansing and Scott had identified in bringing international law charges against German officials and soldiers after the First World War.

The jurists of the Second World War solved their *ex post facto* problem by making the same move Lansing and Scott had offered at Paris in 1919. The Czech lawyer Bohuslav Ečer seems to have been the first to identify the solution. Writing in 1942, Ečer conceded that the Kellogg-Briand Pact was no criminal code.²⁶¹ It did not by its own force create crimes of international law. But Ečer realized that the Pact had dismantled the entire apparatus of wartime immunity for combatants.²⁶² Combatants in aggressive wars were no longer entitled to an international law privilege to use force. They were no longer immunized against the effects of the ordinary background criminal law principles. The Pact, as Hathaway and Shapiro put it, “did not convert aggressive war into a separate crime. It merely removed the legal protections that aggressors enjoyed when war was a legitimate method for resolving disputes.”²⁶³

An extension of the same logic allowed the Allies to charge Nazis with crimes against humanity in the Holocaust. Secretary of War Henry Stimson had objected to charging Germans with crimes for the wartime atrocities against the Jews. Foreign or international courts, he believed, were “without

QUESTION OF PUNISHMENT 96 (1998).

261. Confidential memorandum by Bohuslav Ečer entitled “Punishment of War Criminals” (Oct. 10, 1942), *in* REPORTS OF COMMISSION I (FORMERLY COMMISSION III) ON THE TRIAL AND PUNISHMENT OF WAR CRIMINALS 56 (London Int’l Assembly 1943). This discussion comes from HATHAWAY & SHAPIRO, *supra* note 8, at 252-54.

262. *Id.*

263. HATHAWAY & SHAPIRO, *supra* note 8, at 253.

jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our country.”²⁶⁴ But Associate Justice Robert Jackson of the U.S. Supreme Court, the United States’ representative to the International Conference on Military Trials in 1945 saw that Ečer’s move could answer Stimson’s objection just as it had solved the problem of prosecuting aggressive war. The “extermination of Jews and destruction of rights of minorities becomes an international concern,” he explained, because “it was part of a plan for making an illegal war.”²⁶⁵ Stripped of the immunities that war offered, the acts of the Germans against Jews and other minorities became crimes once more.

The war crime had come full circle. A century earlier, American jurists had begun to craft the international conception of the war crime to get around legal impediments to wartime prosecutions. Now the jurists of the Nuremberg trials performed an inverse operation in order to navigate a new set of legal obstacles.

IV. CONCLUSION: THE WAR CRIME IN THE INTERSTICES OF THE INTERNATIONAL SYSTEM

Nuremberg was a long way from Governor’s Island in New York Harbor. But the prosecution of the Nazis and the prosecution of John Yates Beall are part of the same story. Lawyers and statesmen developed new legal concepts in order to manage features of the legal order in which they found themselves. Law produced internal imperatives for innovation.

To be sure, internal developments in the law were not the entire story. Atrocity reports in the late nineteenth and early twentieth centuries from such episodes as the Armenian massacre and the Boer War produced powerful momentum for war crimes tribunals.²⁶⁶ War propaganda and new communications technologies helped push the concept forward in the First World War.²⁶⁷ The horrors of the Second World War seemed to demand some kind of forum for doing justice in its aftermath.

Still, the story of the modern concept of the war crime only makes sense by reference to the internal developments of the doctrine, as statesmen and soldiers and jurists encountered obstacles of the law’s own making.

And yet the invention of the war crime also presents a paradox for legal history from an internal point of view. On the one hand, internal histories imply a certain view of the autonomy of the law and its processes. The English jurist Sir Henry Sumner Maine famously observed of the common law that its substantive rules were “secreted in the interstices of

264. KOCHAVI, *supra* note 260, at 157.

265. HATHAWAY & SHAPIRO, *supra* note 8, at 266; *see also* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 331 (1949).

266. *See* Lemnitzer, *supra* note 4, at 132-34.

267. *Id.* at 123-24.

procedure.”²⁶⁸ The substantive law of the war crime, too, was pressed from the fissures of jurisdiction, emerging from the chasms between States like Athena rising in full armor from the skull of Zeus.

On the other hand, the story we have presented here is also a story about how actors in wartime strategically adapted the categories and the doctrines of the law to political ends. The Union prosecuted Beall in the Civil War to pursue the projects of Union and Emancipation. The Allies prosecuted Nazis at Nuremberg to bring a just close to the Second World War. And to vindicate their respective goals, Union officials and the Allies each made end-runs around legal obstacles, creating new legal doctrines in the process. How, then, says the externalist, can any internal theory of the law account for the law’s history?

The history of the war crime illuminates the virtues of internal stories. The history of the law—even in the politically contested terrain of warfare—is the story of how doctrinal landscapes shape the paths by which political projects work themselves out.

It is one thing to tell internal stories for such legal phenomena such as the invention of the jury trial,²⁶⁹ or the advent of self-incrimination law,²⁷⁰ or the use of torture in some legal systems and not others,²⁷¹ or the evolution of constitutional law in the New Deal.²⁷² Important features inside the legal system help explain legal phenomena in each of these areas and in countless others. The relative autonomy of the law makes such historical mechanisms inevitable.

Our account, however, turns on tectonic shifts in the basic legal structures of the State system. Our claim is that the altered legal relations among States in the modern era made possible the law of the war crime, as we now conceive it. Such shifts produced a conception of the war crime that emerged first in the Mexican-American conflict of the 1840s, matured in the American Civil War of the 1860s, and spread to European jurists between the 1870s and the first decade of the twentieth century.

In a sense, at the level of international law, internal and external accounts merge into one. For our account turns on a State system that is a juridical artifact—and an irreducibly political one, too. The story of States is both legal *and* political, and could hardly be otherwise. The war crime as we know it today, in turn, is a product of the modern world’s distinctive political-legal configuration.

268. SIR HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM (John Murray ed., 1883).

269. RENEE LERNER, JOHN LANGBEIN & BRUCE SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN INSTITUTIONS (2009).

270. John Fabian Witt, *Making the Fifth*, 77 TEX. L. REV. 825 (1999).

271. JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (2006).

272. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998).