



9-1-2008

The Legal Regulation of War

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The Legal Regulation of War

As discussed in more detail in Chapter 1, the law of war has historically encompassed two main foci: *jus ad bellum* and *jus in bello*. The former addresses the legality of going to war and historically took the form of theological and then secular “just war” theories; the latter concedes the de facto existence of war and seeks to regulate belligerent conduct within it. Although some of the world’s greatest minds grappled with establishing standards for determining when states had the right to go to war, by the late nineteenth century, the right to wage war began to be viewed as an incident of state sovereignty. Further development of the *jus ad bellum* was all but eclipsed by prolific developments in *jus in bello*. Nonetheless, these two approaches to regulating warfare converged in the charters of the World War II international tribunals, which prosecuted violations of both bodies of law as crimes giving rise to individual criminal responsibility.

In the postwar period, violations of *jus ad bellum* (referred to as “crimes against the peace” at Nuremberg and Tokyo) all but disappeared from the pantheon of international criminal law (ICL). Instead, Article 2(4) of the UN Charter addressed states — rather than individuals — and prohibited the “threat

or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Under the Charter regime, breaches of this provision give rise to state responsibility, rather than individual criminal responsibility.

Contemporary international law now views the conceptual distinction between the *jus ad bellum* and the *jus in bello* as axiomatic: The legal evaluation of the conduct of hostilities is an inquiry entirely independent of the legal evaluation of the lawfulness of the resort to armed force. Accordingly, a just (or lawful) war may be fought unlawfully, and an unjust (or unlawful) war may be fought lawfully. Under the *jus in bello*, by consequence, all parties are treated equally, regardless of who initiated the armed conflict and their reasons for doing so. Indeed, the International Committee of the Red Cross (ICRC) remains strictly agnostic about the cause(s) of any armed conflicts in which it operates while strictly scrutinizing their consequences. That said, there is an intuitive appeal to the position, still advocated by some, that any act of armed force committed within the context of an unlawful war should *ipso facto* be treated as a war crime. In addition, many groups fighting against what they consider to be oppressive, racist, or occupier states have argued that any act committed in furtherance of a just war must itself also be deemed just and lawful.

Although crimes against the peace merit only a short chapter in the annals of ICL, the idea that the resort to war itself is a criminal act has proven to be more than mere history. The *jus ad bellum* and *jus in bello* have reunited in the Statute of the International Criminal Court (ICC), although the full scope of the crime of aggression—the modern lexicon for crimes against the peace—has yet to be determined. This chapter briefly traces some high points in the development of the penal components of these two bodies of law. It then presents the basic framework for understanding the contemporary law

of aggression and then war crimes, noting areas in the law that remain in flux. Underlying this chapter is a rich legacy of legal rules aimed at the regulation of hostilities that belies the claim by Cicero that *silent enim leges inter arma* — the laws are silent among those at war.

JUS AD BELLUM

The Original Crime of Aggression

The charters for both the Nuremberg and Tokyo Tribunals contained the charge of “crimes against the peace” alongside the charges of war crimes and crimes against humanity. The postwar architects of international justice defined crimes against the peace somewhat tautologically at Article 6(a) as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.”¹ In addition, the charters allowed for the prosecution of individuals for “participation in a common plan or conspiracy” to commit aggression. Count One of the Nuremberg Indictment charged all the defendants with conspiring to commit crimes against the peace. Count Two charged all but five defendants with committing crimes against the peace. All but four defendants were charged with war crimes in Count Three.

Although the World War II defendants did not submit to the equally novel crimes against humanity charge without objection, the crimes against the peace charge was the most controversial element of the charters at the time. Both sets of defendants argued that the concept of crimes against the peace violated the principle of legality, because war had never before been criminalized in international law, so the prohibition against crimes against the peace in the two charters was, in effect, *ex post facto* legislation. As is discussed more fully in

Chapter 5 on the defense of *nullum crimen sine lege*, the tribunals ruled that the proven acts of aggression were unlawful, and thus criminal, under extant treaties and customary norms, although none of these sources expressly provided for criminal penalties in the event of a breach.

The crime of aggression was the centerpiece of the Charter and the Nuremberg Trial, which was to be “the Trial to end all wars.” Indeed, a majority of the Nuremberg Tribunal’s judgment consists of describing the aggressive acts of Germany, including the invasions of (*inter alia*) Poland, Austria, Czechoslovakia, and Belgium in violation of the Kellogg–Briand Pact, various bilateral treaties and assurances of nonaggression, and declarations of neutrality. In its final judgment, the Nuremberg Tribunal reasoned that belligerency was the proximate cause of all the other crimes alleged: “[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”² Given the importance of this crime in the postwar period, it is noteworthy that none of the statutes of the contemporary ad hoc tribunals contains the crime of aggression, even though it would have arguably been relevant in the conflicts in the former Yugoslavia, East Timor, and Sierra Leone.

The tribunals laid the foundation for the recognition of the crime of aggression. As peace descended on the globe, states immediately turned to the creation of the United Nations, an institution primarily concerned with the maintenance of peace and security. Article 2(4) of the UN Charter, quoted earlier, sets forth a presumption against the use of force internationally. The UN Security Council bears the primary responsibility for maintaining international peace, through identifying threats to the peace and acts of aggression (Article 39) and deciding on measures, including the use of armed force, in response (Articles 41 and 42).³ The Charter recognizes only two scenarios in which the use of force by a state is potentially

lawful: in response to Security Council authorization and in self-defense (Article 51).^{*} In addition, the Responsibility to Protect initiative of the United Nations raises questions about the lawfulness of humanitarian intervention where such an intervention is not employed against the territorial integrity or political independence of a state but in defense of individuals in need.⁴ All these Charter provisions address potential state responsibility for acts of aggression, not individual criminal responsibility. Collectively, they significantly weaken von Clausewitz's claim that "war is a mere continuation of policy by other means"⁵ by largely invalidating it as a valid policy choice.

In the postwar period, the international community failed to draft a comprehensive treaty setting forth the elements of the crime of aggression as it did with genocide and war crimes. In taking up the proposal for establishing a permanent international criminal court, the International Law Commission (ILC) promulgated a Draft Code of Crimes Against the Peace and Security of Mankind that was to provide the substantive law to be adjudicated before the proposed court. Early versions of the Draft Code designated the crime of aggression as a crime against the peace and security at Article 2 and defined the crime as:

- (1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence

^{*} Article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The conditions under which states may claim preemptive or anticipatory self-defense remain contested under international law.

or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.⁶

In 1954, the Draft Code project went into quiescence, not to be fully revived until the 1990s.

In 1974, the UN General Assembly unanimously passed Resolution 3314 to “guide” the Security Council in determining the occurrence of aggression in the exercise of its Chapter VII power.⁷ Article 1 provides that aggression is the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The resolution contains in Article 3 a nonexhaustive list of acts comprising aggression, regardless of the existence of a declaration of war, that includes:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that

other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁸

The resolution at Article 5(2) states that a “war of aggression is a crime against international peace,” but the remainder of the resolution is geared toward state, rather than individual, responsibility. Notwithstanding this consensus definition of aggression, only a few states have incorporated the crime of aggression into their penal codes.⁹ Nonetheless, when the international community again turned to the drafting of a statute for a permanent international criminal court in the 1990s, many state delegates argued for the revival of the crime of aggression in keeping with the Nuremberg and Tokyo legacy.

The Modern Crime of Aggression

Article 5(1) of the ICC Statute lists the crime of aggression as a crime over which the ICC has jurisdiction. Delegates to the Rome Conference, however, were unable to agree on the crime’s definition or on any applicable jurisdictional preconditions. Accordingly, Article 5(2) promises that the Court “shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Resolution F of the Final Act of the Rome Conference requested that the Preparatory Commission prepare proposals for a provision on aggression to be presented to the Assembly of State Parties. The anticipated provision is to be considered at the first Review Conference, to be held in 2009 or 2010.¹⁰ Thus, the Court

cannot exercise jurisdiction over the crime of aggression until this Committee completes its work and a definition of aggression is approved by a two-thirds majority of the Assembly of State Parties and ratified by seven-eighths of the State Parties.

In 2002, the Assembly of State Parties adopted a resolution that established a Special Working Group on the Crime of Aggression, with Ambassador Christian Wenaweser of Liechtenstein now serving as chair, to continue to work on a proposed amendment to the ICC Statute.¹¹ The group is open to all states, including non-State Parties. Two main issues facing the Special Working Group are defining the crime in terms of individual conduct, which requires coordination with the General Principles set forth in Part 3 of the Rome Statute, and identifying any preconditions for the exercise of jurisdiction.

Defining the Crime of Aggression

The definition of the crime of aggression has several elements that have eluded drafters. These include elements addressing issues of personal jurisdiction, *actus reus*, *mens rea*, applicable forms of responsibility, and the necessity to show state action. Although much remains in flux, the crime of aggression is currently formulated in terms of state action: It must be shown that a state committed an act of aggression as defined by the statute. If such a showing is made, then individuals who knowingly and intentionally ordered or otherwise participated actively in the act of aggression can be prosecuted for their contributions thereto. The draft amendment to the ICC's Elements of Crimes for the crime of aggression has not been significantly amended since 2002. At that time, the proposed amendment included the following elements for the crime of aggression:

1. The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined by element 5.

2. The perpetrator was knowingly in that position.
3. The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.
4. The perpetrator committed element 3 with intent and knowledge.
5. An act of aggression, that is to say an act referred to in United Nations General Assembly resolution 3314, was committed by the State.
6. The perpetrator knew the actions of the State amounted to an act of aggression.
7. The act of aggression, by its character, gravity, and scale constituted a flagrant violation of the Charter of the United Nations.
8. The perpetrator had intent and knowledge with respect to element 7.

A preliminary challenge facing drafters has been to determine who in a military or civilian hierarchy may be charged with the crime of aggression. Early in the discussions, delegates proposed that the crime of aggression should be chargeable only against individuals in leadership positions rather than against the rank and file. According to current formulations of the “leadership clause,” the defendant must be in a “position effectively to exercise control over or to direct the political or military action of a State.”¹²

A second area of discussion has concerned the actions of the relevant state to which the defendant was connected. This has been framed as a circumstance element of the crime of aggression on the theory that aggression can only be committed through the collective act of a state by harnessing the state’s war-making machinery.* Delegates have debated whether this provision should include a generic definition of aggression or

* Most definitions of aggression do not consider the possibility of aggression being committed by non- or substate groups, and few argue that it should. *But see*

an enumerated list along the lines of, and perhaps identical to, Articles 1 and 3 in G.A. Resolution 3314. To date, the preferred approach has been the combination of a generic *chapeau* followed by a nonexhaustive list of specific acts mirroring the structure of the crimes against humanity article in the ICC Statute. In this regard, the terms of Resolution 3314 have exerted a strong pull, especially among the African and Arab states, with delegates resisting efforts to either amend its list of aggressive acts or exclude reference to the resolution altogether. In addition, delegates have debated whether to include language limiting the jurisdiction of the Court to “flagrant” or “manifest” acts of aggression in violation of the UN Charter. Some states have argued that such a threshold is inherent to Article 1 of the ICC Statute, which limits the Court to considering “the most serious crimes of international concern.”

A third open question concerns the nature of the defendant’s participation in the act of aggression. Delegates have adopted two approaches—the so-called differentiated approach applies all forms of responsibility in Article 25(3) to the crime of aggression except for subparagraph (f) addressing attempt. Article 25(3) sets forth various forms of responsibility applicable to all crimes within the jurisdiction of the ICC: committing a crime; ordering, soliciting, or inducing a crime; aiding or abetting a crime; or contributing to the commission of a crime through a group acting with a common

Antonio Cassese, *On Some Problematical Aspects of the Crime of Aggression*, 20 *Leiden J. Int’l L.* 841, 846 (2007) (“[t]here is . . . no logical or legal obstacle to rules on aggression also criminalizing aggressive acts by non-state entities (such as terrorist armed groups, organized insurgents, liberation movements, and the like) against a state. . . . If the purpose of the relevant international rules is to protect the world community from serious breaches of the peace, one fails to see why individuals operating for non-state entities should be immune from criminal liability for aggressive conduct.”).

purpose.* The “differentiated” draft text reads as follows (with contested and alternative language indicated by parentheses): “that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack.” Alternatively, the so-called monist approach considers the various forms of commission outlined in Article 25(3) to be inapplicable to the crime of aggression and allows for prosecution only where the defendant has “order[ed] or participate[d] actively in the planning, preparation, initiation or execution of an act of aggression/armed attack.” Some delegates also took the position that Article 28 addressing superior responsibility does not apply to the crime of aggression.

Preconditions for the Exercise of Jurisdiction

The placeholder text in Article 5(2) of the ICC Statute provides that any future definition of aggression in the ICC Statute “shall be consistent with the relevant provisions of the Charter of the United Nations.” This seemingly innocuous phrase pinpoints one of the most highly contentious issues of defining the crime of aggression: what role the Security Council or other UN bodies will play in determining the existence of a sovereign act of aggression as a prerequisite to the ICC’s jurisdiction over a case against a responsible individual. Many states have argued that a prior determination that an act of aggression by a state has occurred is crucial before the Court should proceed with an individual prosecution to prevent the politicization of the Court. They also point to limitations on the Court’s jurisdiction and its institutional competency, arguing that the Court is charged with determining individual criminal responsibility and not state responsibility.

* Incitement is relevant only for the crime of genocide pursuant to Article 23(e).

This raises the question of by whom such a prior determination should be made. Most states assume that any determination should be made by the Security Council given its singular role in the UN system in addressing breaches of the peace.* The ILC, for example, recommended in Article 23 of its Draft Code that the Security Council must first declare that an act of aggression occurred by a state before the ICC could exercise jurisdiction over the crime. Not surprisingly, this approach was strongly supported by the permanent members of the Security Council (China, France, Russia, the United Kingdom, and the United States). Although the UN Charter does not explicitly state that *only* the Security Council may make that determination, proponents of an exclusive role for the Security Council argue that UN practice, in light of the logic and structure of the Charter, dictates this result. Additionally, these states argue that an absence of a Security Council determination will make it difficult to find an individual liable, because the perpetrator can raise the lack of Security Council action as proof that his or her nation did not commit an act of aggression.

Other delegates have argued that Article 39 of the UN Charter gives only primary, but not exclusive, authority to the Security Council to determine the existence of an act of aggression. These delegates argue that the Court should be able to proceed where a prior determination by the General Assembly or even the International Court of Justice (ICJ) has been made. Advocates of a broader approach point to Articles 10, 12, and 14, which all allow the UN General Assembly to consider and make recommendations about any matters within

* Article 39 of the UN Charter provides that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

the scope of the Charter,^Ψ and Articles 36 and 65 of the Statute of the ICJ, which extend the Court's advisory* and contentious jurisdiction to disputes under international law or the Charter. There is precedent for General Assembly determinations that states have engaged in acts of aggression and for ICJ determinations that states have used force in violation of Article 2(4) of the Charter,¹³ although the latter is not necessarily the equivalent of a finding that such states committed acts of aggression. Proponents of a nonexclusive role for the Security Council argue that if the Security Council has exclusive power to determine whether a sovereign act of aggression occurred, it may paralyze the Court if the Council is unwilling or unable to make the predicate determination. Furthermore, they argue that the veto power may enable the agents of permanent members or their friends and allies to be shielded from prosecution. They also note that the Security

Ψ General Assembly Resolution 377, the so-called Uniting for Peace Resolution, purports to empower the General Assembly to implement "collective measures" (including the use of force) when the Security Council cannot reach consensus in the face of an apparent act of aggression, breach of the peace, or threat to the peace. See U.N. Doc. No. A/Res/377 (V) A (Nov. 3, 1950). The United States proposed Resolution 377 shortly after the commencement of the Korean War following the exercise of a Russian veto in the Security Council. The General Assembly has invoked the Resolution ten times since 1950 (for example, after Egypt nationalized the Suez Canal, provoking an English/French occupation). Because it allows for the exercise of military force, it seems that the resolution would *a fortiori* allow for a declaration that a state has engaged in an act of aggression.

* The ICJ's advisory opinions generally involve questions of law rather than fact, so it is not clear if the ICJ could contribute in the necessary way to an ICC prosecution in an advisory capacity. Utilizing the contentious jurisdiction of the Court would require the initiation of a case by a state (presumably the victim of the act of aggression) against the putative perpetrator state. In addition, at the moment, Article 119 of the Rome Statute only allows the ICJ to make determinations in disputes between State Parties as to the interpretation of the Rome Statute. Such intervention is allowed only after the dispute between State Parties has been referred to the ICJ by the Assembly of State Parties. This provision may need to be amended if some more active role of the ICJ is contemplated by the aggression provisions (for example, if the ICC could trigger the ICJ's advisory jurisdiction).

Council has no power to determine the existence of past acts of aggression, absent immediate threat, whereas the General Assembly and ICJ are bound by no temporal limitations. Finally, it is argued that a political determination could impede the development of precedent and customary international law.

Other states have argued that a prior determination of state aggression is not necessary at all, notwithstanding the language of Article 5(2). The concern is that any formal precondition might hinder the Court's ability to take cognizance of international crimes within its jurisdiction and lead to inconsistent outcomes. Requiring a determination about aggression before the Court can act may even go so far as to undermine the legitimacy of the Court by making its work dependent on determinations by the political, and potentially politicized, branches of the United Nations. To make the case that the ICC Statute is already adequately "consistent" with the Charter provisions, proponents of a more autonomous Court point to Article 13 of the ICC Statute, which allows the Security Council to refer situations to the Court even if none of the relevant states has ratified the treaty, and Article 16, which allows the Security Council to request (subject to indefinite renewal) the Court to defer an investigation for 12 months in a Chapter VII resolution.*

In any case, there is wide agreement that to protect the individual's due process rights, any prior determination by another legal or political entity that an act of aggression had occurred could not be binding on the Court. Thus, the Court would be empowered to reexamine the existence of an act of

* Article 16 provides that "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

aggression by the relevant state, and defendants would be able to refute the determination before the Court. This also ensures that the prosecution remains subject to the penal burden of proof, beyond a reasonable doubt, which is likely more rigorous than required by any other UN institution in determining state responsibility for acts of aggression.

Including the Crime of Aggression in the ICC Statute

Notwithstanding the ICC's placeholder provision and this intense work to reach a consensus definition of aggression, deep divisions remain among states and nongovernmental organizations as to whether the ICC should exercise jurisdiction over the crime of aggression at all. The primary objection to its inclusion is that the crime of aggression threatens to indelibly politicize the Court, even if—or especially if—other UN bodies contribute to the determination that a state has committed an act of aggression. Under certain proposals, for example, a Security Council decision not to make a determination of aggression on purely political grounds would effectively bar the ICC from considering the matter. The appearance of unequal justice could threaten the perceived legitimacy of the Court. As a judicial body, it is argued, the Court should not be dependent on any political determination involving crimes within its jurisdiction. Furthermore, aggression is a crime of state that is by definition committed against another state, rather than the crime of an individual that is committed against other individuals. Thus, only collective, rather than individual, culpability should be considered, and because the ICC only has jurisdiction over individuals, it is an inappropriate forum for apportioning such responsibility. Finally, it is argued that there is no modern precedent for the crime of aggression, as none of the ad hoc tribunals exercised jurisdiction over the crime.

The debate over the inclusion of the crime of aggression has also touched on the potential intersection between the crime and the prohibitions against war crimes. Opponents of including the crime of aggression in the ICC Statute argue that the harms experienced by victims of war are captured by the prohibitions against war crimes (and even potentially those provisions governing crimes against humanity and genocide). They note that the crime of aggression adds little to the subject matter jurisdiction of the Court given the Rome Statute's comprehensive *jus in bello* provisions. Conversely, it is argued that aggression remains the supreme international crime that often gives rise to all other international crimes, as was noted by the Nuremberg Tribunal. Proponents of fully implementing Article 5(2) contend that a "clean" but nonetheless criminal war — that is, an act of aggression in which no war crimes are committed — still harms victims in a way that should be cognizable by the Court. In the words of Ben Ferencz, a former prosecutor in the post-World War II trials and a staunch advocate for the inclusion of the crime of aggression in the ICC Statute:

Ever since the judgment at Nuremberg, it has been undeniable that aggressive war is not a national right but an international crime. War is the soil from which the worst human rights violations invariably grow. The U.N. Charter prescribes that only the Security Council can determine when aggression by a state has occurred but it makes no provision for criminal trials. No criminal statute can expand or diminish the Council's vested power. Only an independent court can decide justly whether any individual is innocent or guilty. Excluding aggression from international judicial scrutiny is to grant immunity to those responsible for "the supreme international crime"—omission [of the crime of aggression] encourages war rather than peace.¹⁴

In this way, it is argued that including the crime of aggression in the ICC Statute will deter political and military leaders from

resorting to armed force in their relations with each other, because they will be on notice that the resort to armed conflict without Security Council approval, or without credible claims to be acting in self-defense, might give rise to individual criminal liability. This debate continues. As you cover this material in your course of study, you might refer to the Web page of the Working Group, which keeps relatively up-to-date records of ongoing deliberations.

JUS IN BELLO

Whereas the *jus ad bellum* governs the decision to utilize armed force, the *jus in bello* takes hold once an armed conflict exists. Historically, the codification of the *jus in bello* proceeded along two tracks: one, referred to as *Geneva law*, is based on the four Geneva Conventions of 1949 and their two 1977 Protocols and originated under the auspices of the Geneva-based ICRC; the other, referred to as *Hague law*, derives from a series of conventions concluded in The Hague in 1899 and 1907. Together, these sets of treaties regulate many aspects of the conduct of hostilities, at times in great detail. Geneva law creates interlocking legal regimes to protect classes of persons, such as prisoners of war (POWs) and noncombatants, who are particularly vulnerable in armed conflicts. By contrast, Hague law governs the means and methods of warfare.

Until the promulgation of the 1949 Geneva Conventions, which now bear the distinction of being the first multilateral conventions to receive universal ratification, a notion that there were crimes of war that would give rise to individual criminal responsibility existed only in customary international law and domestic law, primarily within national military codes. The Geneva Conventions for the first time considered certain “grave breaches” of the *jus in bello* to be war crimes, giving rise to individual criminal responsibility. The law of war crimes

thus constitutes just one element of the *jus in bello*, as many applicable rules give rise only to state responsibility. The remainder of this chapter focuses on the penal provisions of the *jus in bello*, because only these aspects of international humanitarian law (IHL) fall under the rubric of ICL.

Given their long-standing pedigree, there was never any question that the ICC would exercise jurisdiction over violations of the *jus in bello* that give rise to individual criminal responsibility. The devil, as always, is in the details. This section sketches out the framework for understanding the current law of war crimes under ICL. It starts with the antecedent question of the applicability of IHL altogether, because the prohibitions against war crimes apply only where IHL applies. This section next touches on the choice of law question occasioned by the requirement of conflict classification. This is followed by a discussion of how ICL distinguishes between ordinary criminal acts committed in war and war crimes—the nexus problem. We then discuss the distinguishing features of Geneva and Hague law: protected persons and the principles of necessity, proportionality, and distinction, respectively. The section concludes with a brief tour of the ICC Statute’s war crimes provision, because it encompasses many—but not all—of the war crimes contained within IHL treaties and adjudicated by the ad hoc tribunals as crimes under customary international law. The next chapter continues this discussion by concluding with a discussion of the intersections between the international criminal prohibitions against war crimes and terrorism.

Triggering International Humanitarian Law

Not all disturbances, acts of violence, or even uses of military force trigger the applicability of IHL and thus the prohibitions against war crimes. The Geneva Conventions themselves provide little insight into the question of their field of application,

declaring at Article 2 only that the bulk of their provisions apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Common Article 3 of those Conventions creates a mini-regime governing armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties” without further definition. It is not until Protocol II, which elaborates on and expands common Article 3, that we find a clear statement that its provisions do not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

Determining when and where IHL applies in the absence of more express treaty guidance was a central conundrum of the work of the two ad hoc international tribunals. In both the former Yugoslavia and Rwanda, the prosecutor charged individuals with war crimes for acts of violence committed well beyond the vicinity of active hostilities. For example, as part of a general challenge to the jurisdiction of the tribunal, defendant Tadić asserted that the war crimes counts in his indictment had to be dismissed, because his actions were not committed in the context of an armed conflict. In upholding the charges, the ICTY announced a broad test for determining when IHL is triggered within a particular situation, touching both on the question of when an armed conflict exists and the territorial scope of the prohibitions that then apply. It ruled:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until

a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁵

The tribunal reached this conclusion by noting that although the Geneva Conventions are silent as to the geographical scope of international “armed conflicts,” they do imply that at least some of the provisions of the Conventions apply to the entire territory of the parties to the conflict, not just to the place of actual hostilities. In particular, provisions addressing the treatment of POWs and other individuals captured by opposing forces are not dependent on any proximity to actual hostilities. Likewise, the beneficiaries of common Article 3 and Protocol II governing noninternational armed conflicts are those taking no active part (or no longer taking active part) in the hostilities. Further, Article 6(2) of Geneva Convention IV indicates that “[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.” The Tribunal ruled that all these provisions make clear that IHL applies broadly within embattled territory, such that the charges against Tadić should stand.

Where IHL does not apply, other bodies of law may still penalize the conduct in question. For example, Tadić was concurrently charged with crimes against humanity, the prohibition of which pertains independent of any armed conflict (although that had not been definitively established until the Tribunal so ruled in *Tadić*). Acts of violence may also constitute acts of genocide (where protected groups are targeted with the intent to destroy the group) or acts of terrorism under international law. Where international law does not criminalize particular acts of violence, recourse can always be had to extant

domestic penal law. Many of the war crimes prohibitions find domestic analogs in the crimes of assault, kidnapping, murder, and mayhem.

Conflict Classification

Determining that IHL applies to a particular situation (because it has reached the level of an armed conflict) immediately triggers a second inquiry: whether the conflict in question is an international or noninternational conflict. The 1949 Geneva Conventions primarily apply to international armed conflicts, defined at common Article 2 as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” This definition thus requires the presence of two embattled High Contracting Parties. There is a difference, however, between an international conflict and a conflict that is internationalized or that involves multiple state parties. Thus, the conflict in Afghanistan initiated after the events of September 11, 2001, began as an international armed conflict when the United States and its coalition parties fought the Taliban and its supporters. This was a conflict between two or more nation states and was thus “international” within the meaning of Article 2. Once the government of Hamid Karzai was installed, the conflict no longer pitted two sovereigns against each other. At that point, the conflict ceased to be an international armed conflict within the meaning of the Geneva Conventions, even though it remained internationalized by the presence of troops from multiple nations. Most of the articles of the Geneva Conventions thus no longer apply to this conflict as a technical matter.

Although the majority of the Geneva Conventions’ provisions govern international armed conflicts (including situations of foreign occupation), the one exception is Article 3,

common to all four Conventions, which applies in cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” This article—called a “convention in miniature”—sets forth minimum protections that must be afforded to all individuals involved in noninternational armed conflicts. The latter terminology is employed in lieu of “civil war” or “internal war” to encompass the entire range of conflicts that do not meet the somewhat technical and unintuitive definition of international armed conflict contained in Article 2. The only textual requirement for the applicability of common Article 3 is the occurrence of an “armed conflict” within “the territory” of a High Contracting Party.

The international community adopted two protocols to the Geneva Conventions in 1977 in response to the changing nature of armed conflict, which involved the shift to predominantly noninternational armed conflicts, the movement of the battlefield to population centers, increased civilian involvement in armed conflicts, and the expansion of guerilla warfare. Most important, Protocol I expands the definition of international armed conflict to include “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” By elevating these conflicts to the status of international armed conflicts, and granting a political advantage to certain liberation movements, the protocol to a certain degree invokes the “just war” tradition of the *jus ad bellum*. Protocol I also provides a more detailed set of rules concerning the obligation to discriminate between military and civilian targets and to utilize proportionate force, and further defines and clarifies the rules with respect to mercenaries. It also expands the category of privileged combatants to include members of guerrilla movements or informal militias that adhere to certain rules to distinguish themselves from the civilian population. These rules are more relaxed than those

contained within the Third Geneva Convention addressed to POWs, which has led to criticism that the protocol puts civilians at greater risk and provides greater protections to combatants and guerillas. With these provisions, Protocol I reflects elements of both Geneva and Hague law.

Protocol II elaborates on the minimum rules in common Article 3. Historically, states were reluctant to create legal rules governing the conduct of noninternational armed conflicts, primarily out of fear of legitimizing dissident or insurrectionary groups and of submitting what had been viewed as internal matters to international rules and scrutiny. During the drafting of the four Geneva Conventions, the ICRC and some state delegates proposed more detailed rules for noninternational armed conflicts. In the face of steep resistance, all that was achieved was the laconic common Article 3. The passage of Protocol II reflects a trend toward a greater acceptance of the need to regulate conflicts that do not fall within the bailiwick of the 1949 Geneva Conventions.

Protocol II also established a more precise test for determining its field of application than exists in common Article 3. Article 1 states:

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

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and

sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, Protocol II does not apply until the armed conflict involves armed groups under responsible command, who have sufficient control over territory to launch “sustained and concerted” military operations and also to conduct their operations in accordance with the rules of war contained in the protocol. Moreover, Protocol II applies only to a conflict between a State’s armed forces and rebel or dissident movements. Common Article 3 is broader, and covers armed conflicts between such groups competing for power within a state when the central government is not involved or has ceased to exist. Common Article 3 also applies to those civil wars in which guerilla forces lack any fixed location from which to exercise territorial control or are not led by responsible command.

A further wrinkle in the exercise of conflict classification involves conflicts that appear to be noninternational armed conflicts, because they pit a state’s military against rebel or insurrectionary forces, but involve the significant intervention of another nation state. The situation in the former Yugoslavia is an example of such a conflict. The armed conflict there began as a classic civil war when ethnic groups within Yugoslavia took up arms against each other. Eventually, however, various republics declared independence, including Bosnia-Herzegovina. Within Bosnia, the Bosnian Serbs (who favored continued union with Yugoslavia) and the Bosnian Croats (who favored union with the nascent Republic of Croatia) came to blows with the Bosnian authorities. The two groups enjoyed significant financial, logistical, and strategic support from Belgrade and Zagreb, respectively. In situations in which this level of support rose to the level of “overall control” over the Bosnian Serb and Croat paramilitaries, the ICTY has determined that the war became an international armed conflict,

essentially pitting two nation states against each other, thus triggering the whole panoply of Geneva Convention rules.¹⁶

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

- (a) situations that do not trigger IHL at all (e.g., riots, sporadic acts of violence);
- (b) noninternational armed conflicts that trigger common Article 3's protections;
- (c) noninternational armed conflicts that meet the heightened requirements of Protocol II;
- (d) international armed conflicts within the meaning of Protocol I (e.g., situations in which an indigenous population is resisting colonial domination);
- (e) sufficiently internationalized armed conflicts that trigger the greater part of the protections of the 1949 Geneva Conventions; and
- (f) traditional international armed conflicts pitting two High Contracting Parties against each other that also trigger the bulk of the 1949 Geneva Conventions.

Choice of Law Implications of Conflict Classification

The question of conflict classification is more than academic in ICL. From the perspective of positive law, only the Geneva Conventions governing international (or sufficiently internationalized armed conflicts) create a penal regime of war crimes. Within those treaties, it is only certain "grave breaches" of the treaties that give rise to individual criminal responsibility. By their own terms, violations of other treaty provisions (including much of the four Geneva Conventions and common Article 3) and whole treaties (Protocol II and the Hague Conventions) only give rise to the civil liability of states and do not set forth any individual penal sanctions.

Nonetheless, the ad hoc tribunals have made quick work of dismantling distinctions between the norms applicable in international and noninternational armed conflicts that were so carefully crafted by states during the IHL treaty-drafting process. As a result, much conduct prohibited or criminalized in international armed conflicts now constitutes war crimes even if committed in internal or other noninternational conflicts. With respect to the ICTY, this process was enabled by the formulation of the war crimes provisions of the ICTY Statute. Article 2 of the ICTY Statute reproduced the grave breaches regime of the Geneva Conventions. Article 3 of the ICTY Statute extended the jurisdiction of the Tribunal to cover “violations of the laws and customs of war” including a non-exhaustive list of violations of the Fourth Hague Convention. The Tribunal interpreted this latter provision expansively to penalize violations of common Article 3 as well as other prohibitions within the Geneva Conventions and their Protocols, finding authority for this assertion in customary international law rather than treaty law.

In penalizing violations of common Article 3 and Protocol II, the ICTY has essentially merged the law governing international and noninternational armed conflicts, rendering conflict classification a virtually irrelevant exercise in its proceedings. The Appeals Chamber in *Tadić* was quite self-conscious about this, having found that national practice and the inroads made by the international human rights regime into areas traditionally shrouded by state sovereignty have “blur[red] the traditional dichotomy between international wars and civil strife.”¹⁷ In addition, as most global conflicts are internal in character, the distinction between the two bodies of law seemed increasingly arbitrary and outmoded to modern tribunals.¹⁸ This merger now finds positive expression in Article 8 of the ICC Statute, indicating that this expansive approach has been largely — although not entirely — ratified by the community of states. As a result, the ICC can prosecute

almost all war crimes committed in any type of conflict as can states that have harmonized their domestic penal codes with the ICC Statute.

Despite the modern trend toward conflating the rules governing international and internal armed conflicts, the question of conflict classification remains relevant to determine the particular rules that apply in any armed conflict. Indeed, the question of conflict classification has been central to the jurisprudence arising out of the global “war on terror” and in particular for legal efforts to challenge the policy of the United States to detain individuals captured in Afghanistan and elsewhere at Guantánamo Bay and prosecute them before military commissions. In a case contesting the legality of the military commission scheme as originally established by the Bush administration, the U.S. Supreme Court dodged the question of whether the full Geneva Conventions applied to the hostilities.¹⁹ It did rule, however, that at a minimum the protections of common Article 3 were applicable, and in particular found applicable the requirement that persons “taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘*hors de combat*’ by . . . detention” can only be tried by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The Court struck down the original military commission scheme in part because of its failure to adhere to the provisions of common Article 3. Expanding a penal regime to noninternational armed conflicts has also destabilized the conventional thinking about the intersection between war crimes and the crimes of terrorism, as will be discussed more fully in the next chapter.

Nexus to Armed Conflict

Establishing the applicability of IHL and of war crimes prohibitions does not end the inquiry of whether and how an

individual can be prosecuted for the commission of a violent act in the context of an armed conflict. In particular, it must still be determined whether the act in question — such as an act of murder or the theft of property — constitutes a war crime as opposed to a simple domestic crime or some other international crime. Only offenses that have some sort of a nexus to an armed conflict fall within the category of war crimes under IHL. If there is no link between the offense and the armed conflict, then the act must be charged under some other head of ICL or under domestic criminal law.

The ad hoc tribunals have struggled with how to define this link. The ICTY Trial Chamber in *Prosecutor v. Delalić* stated that “there must be an obvious link between the criminal act and the armed conflict.”²⁰ In *Tadić*, another Trial Chamber noted that “the offences [must be] closely related to the armed conflict as a whole.”²¹ Defining this link became particularly acute in the Rwandan context, because although the genocide occurred nationwide, the actual theater of war — which pitted the government armed forces against the Tutsi-led Rwandan Patriotic Front — only engulfed part of the country. This led to a number of acquittals on war crimes counts, although most defendants were convicted of genocide and crimes against humanity, which require no link to armed conflict.

In the *Akayesu* case, for example, the Trial Chamber acquitted the defendant of war crimes charges on the ground that “it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu . . . were committed in conjunction with the armed conflict.”²² Likewise, in *Kayishema*, the Trial Chamber ruled that it was insufficient to show a simple temporal concurrence between the crimes charged and the internal armed conflict ensuing elsewhere in the country. Rather, the Trial Chamber required a showing that “there was a direct link between crimes committed against these victims and the hostilities”²³ and that the defendants were

connected to one of the two embattled parties.²⁴ The Trial Chamber also noted that the armed conflict had been used as pretext to unleash an official policy of genocide, but that these two phenomena were distinct within the region in question.

The ICTY *sub silentio* disagreed with this approach. In the *Kunarac* case, it ruled that although the armed conflict must have “played a substantial part in the perpetrator’s ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed,” it was enough if, as in the present case, “the perpetrator acted in furtherance of or under the guise of the armed conflict.”²⁵ The Tribunal identified a nonexclusive series of factors that would help to guide this inquiry:

- the perpetrator is a combatant;
- the victim is a noncombatant;
- the victim is a member of the opposing party;
- the act may be said to serve the ultimate goal of a military campaign; and
- the crime is committed as part of or in the context of the perpetrator’s official duties.²⁶

In the ICC’s Elements of Crimes, drafters settled on the following formulation: It must be shown that the charged conduct “took place in the context of and was associated with” an international or noninternational armed conflict. This formulation eases up on the strict requirements established in *Kayishema* and seems to imply the necessity only of a geographical and temporal nexus.

Protected Persons

The collective goal of the Geneva treaty regime is to mitigate the effects of war by primarily protecting four classes of persons who do not, or who can no longer, participate in

hostilities. Thus, the four Geneva Conventions apply to (1) the sick and wounded on land (Geneva Convention I); (2) the sick and wounded at sea (Geneva Convention II); (3) POWs (Geneva Convention III); and (4) civilians, or more accurately, anyone who does not fall into one of the other treaties' protective regimes (Geneva Convention IV). Each treaty contains a provision defining the class of protected persons. The Fourth Geneva Convention acts as a catch-all for individuals who fall outside of the prior three regimes. For example, Article 4 of the Fourth Geneva Convention defines its protected persons as follows:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. . . . Persons protected by [one of the other three Conventions] shall not be considered as protected persons within the meaning of the present Convention.

Key elements of this definition are the fact that the individual is “in the hands of” a party “of which they are not nationals” — that is, a different nation state — and not protected by one of the other Conventions. This definition does, however, exclude from protection individuals who are nationals of a state that is aligned with their captors' state or that is neutral. Accordingly, although Geneva Convention IV's title indicates its aim is to protect “civilian persons in time of war,” it also provides protection to combatants who do not meet the definition of POWs

in Article 4 of Geneva Convention III. This includes so-called “unprivileged belligerents” — irregular combatants who are not part of a High Contracting Party’s military force or who are nationals of states not formally at war — although this point remains contentious.

In connection with the global “war on terror,” for example, the U.S. government has argued that none of the detainees held in Guantánamo or elsewhere is entitled to claim protection under the Geneva Conventions because, under the U.S. government’s reading, these individuals meet neither the definition of “prisoner of war” under Geneva Convention III nor the definition of “civilian” pursuant to Geneva Convention IV. Instead, the Bush administration has employed an alternative terminology, calling these individuals “enemy combatants” or “unlawful enemy combatants” — terms that are not employed within IHL or any of its treaties. Furthermore, the Fourth Geneva Convention’s definition of protected person set forth earlier does not turn on combatant or civilian status. That said, many of the individuals detained by the United States were captured within the context of a noninternational armed conflict, the regulation of which by international law does not contain a POW regime. In addition, many of these individuals are not nationals of a High Contracting Party with which the United States is at war. The U.S. courts have yet to rule definitively on how these individuals should be characterized under the well-established classificatory system of the Geneva Conventions and thus which protections should be accorded to them.²⁷

Under the conventional regime, only protected persons can be the victims of war crimes. This requirement has been relaxed in the recent jurisprudence. For example, in the former Yugoslavia, Bosnian Muslims often found themselves “in the hands of” Bosnian Serb paramilitary troops with whom they shared a nationality, but not an ethnicity or ultimate allegiance. The ICTY rejected arguments that no war crimes were

committed because the victim and the perpetrator shared a bond of citizenship when it held:

While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.²⁸

By adopting a functional and teleological approach to the treaties and to the concept of "protected persons," the ICTY significantly diminished the significance of nationality in determining protected person status. This ruling has implications for the "war on terror", suggesting that nationality alone should not be the basis for excluding individuals from the protections of the Geneva Conventions.

Means and Methods of Warfare

Hague law is not organized by protected group; rather, it sets forth rules concerning the methods and means of warfare that seek to regulate what kinds of weapons are allowed, what constitutes a legitimate military target, and what type and degree of force is permissible. Hague law traditionally, and by its terms, only applied to international conflicts. Modern developments before the international criminal tribunals and within the ICC Statute, however, have extended many of these principles to noninternational armed conflicts.

The Hague Conventions originally established both basic principles and more specific rules governing the means and methods of warfare and the use of force in pursuit of a military objective. Protocol I to the 1949 Geneva Conventions recodified many of these principles and rules, thus signaling the convergence of Hague and Geneva traditions. This body of law most importantly subjects the use of force within an armed conflict to the interlocking principles of necessity, distinction, and proportionality. Necessity requires that armed attacks be designed and intended to defeat the opponent militarily. Thus, Article 52(2) of Protocol I states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

The principle of distinction requires that parties to an armed conflict distinguish between legitimate military targets and illegitimate targets, such as civilians or civilian infrastructure. Article 48 of Protocol I provides that “[p]arties to the conflict shall at all times distinguish between the civilian population and combatants.” Not surprisingly, interpretive problems arise with respect to so-called dual-use facilities, such as bridges, power plants, or communication facilities. Indiscriminate attacks are also prohibited. Article 51 of Protocol I defines indiscriminate attacks to include “[t]hose [attacks] which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” This principle has also been interpreted to prohibit certain types of weapons (such as cluster bombs and landmines)

that, by their very nature, do not discriminate among lawful and unlawful targets. The international community has promulgated multilateral treaties to this effect, although many of the major suppliers and consumers of these weapons have yet to sign or ratify these treaties.

The principle of proportionality states that when military force is used for a proper military objective, only that force that is proportional to the military objective to be gained may be used. If a choice of weaponry or tactics is available, the commander should choose those that will cause the least incidental harm. Civilian casualties in and of themselves are not necessarily unlawful. Rather, only those attacks that cause damage to civilian objects that is excessive in relation to the anticipated military advantage of the attack are prohibited. The greater the degree of military advantage anticipated, the more so-called collateral damage is allowed. Thus, civilian casualties do not indicate a violation of the laws of war where they are the result of an attack that is proportional to the military objective sought.

Hague law thus approaches the question of legality from the point of view of lawful military objectives and related activity. Geneva law takes a more rights-based approach, defining categories of people and the protections to which they are entitled. As should be clear, however, although the focus of Hague and Geneva law is somewhat different, the rules serve to reinforce each other. Indeed, Geneva law's protection of vulnerable classes of individuals from the effects of armed conflict and the Hague rules governing the principle of distinction and the legitimate use of force during an armed conflict are in essence two sides of the same coin.

War Crimes Before the International Criminal Court

The ICC's list of war crimes contains a partial synthesis of Geneva and Hague law, the two major strands of *jus in*

bello. Rather than adopt an open-ended provision along the lines of the ICTY Statute's Article 3, the drafters chose to specifically list chargeable crimes (51 in total) to better adhere to the principle of legality. The entire section is preceded by a threshold provision at Article 8(1) that emphasizes that the ICC has jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

The remainder of the article itself is quite unwieldy by virtue of the fact that it separately enumerates the crimes applicable in international armed conflicts (Article 8(2)(a) and (b)) and noninternational armed conflicts (Article 8(2)(c)-(f)). The latter provisions are subject to two different triggering prerequisites. Common Article 3 crimes can be charged with respect to noninternational armed conflicts that are distinct from "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature" (Article 8(2)(d)). In this way, the drafters essentially applied some of the provisions contained in Protocol II's material field of application (Article 1(2)) to common Article 3. The other crimes can be charged with respect to "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" (Article 8(2)(f)). This limitation mirrors the *Tadić* test, as discussed previously.

Article 8 also contains separate subsections reproducing the grave breaches of the Geneva Conventions (Article 8(2)(a)) and the violations of common Article 3 (Article 8(2)(c)). The remainder of the article enumerates crimes according to the laws and customs of war, as drawn from the Hague Conventions, Protocol II, other IHL treaties (such as those protecting cultural property or prohibiting particular weapons of war), and other sources. In identifying these lists of customary crimes, the drafters were guided by two main

considerations: the gravity of the acts in question and whether they merited international prosecution, and whether the particular acts gave rise to individual criminal responsibility under either customary or treaty law. Although the drafters often claimed that they were merely codifying existing law, it is impossible not to conclude that some progressive development in the law occurred, especially with respect to the crimes that may be committed within noninternational armed conflicts.