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ESSAY

**Sexual Assault as a Law of War Violation
and U.S. Service Members' Duty to Report**

Chris Jenks & Jay Morse*

Introduction

This Essay considers when U.S. service members deployed to Afghanistan are obligated to report allegations of sexual assault by Afghan security forces (ASF) against Afghan nationals to the U.S. military.¹ The answer requires applying a longstanding Department of Defense (DOD) policy for reporting law of war (LOW) violations and hinges on when sexual assault can be considered such a violation. Although recent attention on this topic has brought much-needed visibility to sexual assault in conflict zones, the overbroad assertions of the media and the military have unfortunately fostered more confusion than clarity. Specifically, the *New York Times* has incorrectly implied that U.S. service members are *always* required to report alleged ASF sexual assaults,² while the U.S. military has wrongfully counterclaimed that the offenses “would be a matter of domestic Afghan criminal law.”³

This Essay does not attempt to resolve the debate about whether there is a reporting obligation, but rather suggests the framework by which the issue should be considered. To do so, this Essay first details the 2015 news reports of ASF sexual assaults and the conflicting claims by the U.S. media and military on

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1. Readers may wonder why reporting would even be needed to ensure that higher levels of the U.S. military are aware of the alleged sexual assaults. One reason is because U.S. military units in Afghanistan are widely dispersed across twenty-five of Afghanistan's thirty-four provinces.
2. Editorial, *Ignoring Sexual Abuse in Afghanistan*, N.Y. TIMES (Sept. 21, 2015), <http://nyti.ms/1Kvs0QO> (claiming that both the Geneva Conventions and U.S. federal law impose an obligation not simply to report but also to investigate and prosecute law of war violations, including any sexual abuse of people taken into custody).
3. *Id.* (quoting Col. Brian Tribus, spokesperson for the U.S. military in Afghanistan).

whether U.S. service members were required to report them. It then highlights the issues raised by sexual assaults that occur outside U.S. territory, involve neither American perpetrators nor victims, and do not constitute violations of U.S. law. Next, this Essay considers when the DOD's reporting policy is triggered and, finally, demarcates when sexual assault is properly characterized as a violation of the LOW as opposed to Afghan criminal law.

I. News Reports and Conflicting Responses

On September 20, 2015, the *New York Times* reported that the U.S. military had directed U.S. service members to ignore ASF sexual abuse of young boys.⁴ An additional article corroborated that throughout the U.S. military's presence in Afghanistan, U.S. service members were aware of the sexual abuse of boys ranging from six to ten years old.⁵ The alleged perpetrators of the abuse are all Afghan nationals and include members of various ASF components, the police, army, militias, and even a provincial governor.⁶ The assaults allegedly occurred at private residences,⁷ police stations, and army bases, including some installations shared with U.S. military personnel.⁸

In response to these stories, a U.S. military spokesperson clarified that “[g]enerally, allegations of child sexual abuse by Afghan military or police personnel would be a matter of domestic Afghan criminal law” and that “there [is] no express requirement that U.S. military personnel in Afghanistan report” such abuse unless sexual assault is used as a weapon of war.⁹ The *New York Times* editorial board found this response “laughable” and asserted that U.S. service members did, in fact, have an affirmative duty to report the alleged assaults.¹⁰

4. Joseph Goldstein, *U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies*, N.Y. TIMES (Sept. 20, 2015), <http://nyti.ms/1KrOuSM>. The allegations of ASF sexual assault appear to only involve young boys as victims. See *id.* (connecting the sexual abuse to a practice called “bacha bazi” that translates to “boy play”). The law and associated analysis, as well as this Essay’s perspective, would be the same were the ASF sexual assaults committed against young girls.

5. Matthew Rosenberg, *Ashraf Ghani, Afghan President, Vows to Crack Down on Abuse of Boys*, N.Y. TIMES (Sept. 23, 2015), <http://nyti.ms/1VaZM2F>.

6. *Id.*

7. See Kyle Jahner, *One of the Best: Defenders Show Support for Ousted Green Beret*, ARMY TIMES (Sept. 30, 2015, 9:07 PM EDT), <http://militari.ly/1KN07Gn> (describing how one Afghan police commander purportedly tied an Afghan boy to a post at the commander’s house and repeatedly sexually assaulted him over the course of two weeks).

8. Rosenberg, *supra* note 5.

9. Goldstein, *supra* note 4.

10. Editorial, *supra* note 2. As previously mentioned, the *New York Times* also claimed that the United States was obligated to prosecute the offending members of the Afghan security forces in areas “under its jurisdiction”. *Id.* This claim is beyond the scope of this Essay, but the United States would only be obligated to prosecute the Afghan offenders,

Two days after the initial story, the commander of U.S. Forces Afghanistan issued a statement outlining his expectation “that any suspicions of sexual abuse will be immediately reported to the chain of command, regardless of who the alleged perpetrators or victims are.”¹¹ In February 2016, the DOD Inspector General announced that it was “launching a ‘full assessment’ into multiple reports that the U.S. military [had] encouraged troops to ignore their Afghan allies’ sexual abuse of children.”¹² And in March 2016, a U.S. congressman introduced a bill that would require the DOD to develop and implement “a policy against sexual abuse on all United States military installations, whether located in the United States or overseas.”¹³ Despite this multiparty discussion, almost none of the discourse has addressed the basic sovereignty issues implicated by where the sexual assaults occur and the nationalities of the perpetrators and victims.

II. Sexual Assaults Outside U.S. Jurisdiction

It is important to remember that, however abhorrent, allegations of Afghans assaulting other Afghan citizens in Afghanistan do not constitute

or ensure that Afghanistan did so, if the United States were in “control” of the ASF members who committed the assaults. See Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L. SECURITY J. 31, 40-41 (2011).

11. Press Release, Statement from Commander, Resolute Support and United States Forces – Afghanistan (Sept. 22, 2015), <https://www.facebook.com/GENJohnCampbell/photos/a.162268200596849.1073741828.162243273932675/513810892109243>.
12. Rebecca Kheel, *DOD Watchdog Launches Full Probe into Afghan Sexual Abuse Claims*, THE HILL (Feb. 22, 2016, 10:59 AM EST), <http://thehill.com/policy/defense/270255-watchdog-deepens-investigation-into-afghan-sexual-abuse-claims>.
13. Martland Act, H.R. 4717, 114th Cong. (2016). The bill is named after a U.S. Army sergeant who at the time of the bill’s introduction was facing involuntary administrative separation for a reprimand received for his physical assault of an Afghan police commander who had purportedly sexually abused an Afghan boy. Kyle Jahner, *‘Martland Act’ Would Empower U.S. Troops to Block Sexual Abuse on Foreign Soil*, ARMY TIMES (Mar. 2, 2016, 4:54 PM EST), <http://www.armytimes.com/story/military/capitol-hill/2016/03/02/bill-would-empower-us-troops-block-sexual-abuse-foreign-soil/81211348>. However, the bill is not limited to sexual assault or Afghanistan, but rather applies to unspecified “human rights violations” occurring on any U.S. military installation in or outside the United States. H.R. 4717 § 2(b). And in April 2016, the U.S. Army’s Board for Correction of Military Records removed the U.S. Army sergeant from the list of service members facing involuntary separation. See Kyle Jahner, *Green Beret Who Beat Up Accused Child Rapist Can Stay in the Army*, ARMY TIMES, (Apr. 28, 2016, 10:07 PM EDT), <http://www.armytimes.com/story/military/2016/04/28/green-beret-who-beat-up-accused-child-rapist-can-stay-army/83679604>.

violations of U.S. law.¹⁴ Simply put, under international law in general,¹⁵ and under the Afghanistan-U.S. Security Agreement specifically,¹⁶ Afghanistan has exclusive jurisdiction to enforce its own criminal law within its territory. As such, U.S. service members may not arrest Afghans for violations of Afghan domestic law nor conduct any criminal investigation within Afghanistan without that government's consent. Nevertheless, while there is no general legal obligation to report crimes, U.S. military services do impose certain reporting requirements even where the crimes being reported fall outside the scope of its criminal jurisdiction.

In particular, the U.S. Navy requires its personnel to report "all offenses under the Uniform Code of Military Justice [(UCMJ)] which come under their observation."¹⁷ The U.S. Air Force imposes a broader responsibility to report any "violation of law."¹⁸ The U.S. Army, however, does not impose a general duty to report.¹⁹ Even so, all members of the DOD are held to a qualified duty to report any sexual assault that constitutes a UCMJ violation.²⁰ However, Afghan sexual assaults of Afghans do not qualify as UCMJ violations because the ASF are not subject to U.S. court-martial jurisdiction.²¹ But where sexual assaults do

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14. See CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2012) ("Criminal law is usually territorial. It is a matter of the law of the place where it occurs.").
 15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 & cmt. b (AM. LAW INST. 1987).
 16. In 2014 the United States and the Government of Afghanistan signed a Security and Defense Cooperation Agreement. Security and Defense Cooperation Agreement, Afg.-U.S., Preamble, Sept. 30, 2014, <http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf>. As part of that agreement, "United States forces shall not arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan." *Id.* at art. 3(3).
 17. See SEC'Y OF THE NAVY, U.S. DEP'T OF THE NAVY, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. VERSUS SERIANNE, ¶ 1 (2010), <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/ALNAVS/ALN2010/ALN10049.txt> (changing U.S. Navy Regulation article 1137). This requirement excludes having to report one's own criminal misconduct.
 18. U.S. DEP'T OF THE AIR FORCE, INSTRUCTION 1-1, AIR FORCE CULTURE 11 (2012) (amended 2014), http://static.e-publishing.af.mil/production/1/af_cc/publication/afi1-1/afi1-1.pdf.
 19. The U.S. Army does require both commissioned and noncommissioned officers to self-report their own criminal convictions. See U.S. DEPT OF THE ARMY, ARMY REGULATION 600-20 ARMY COMMAND POLICY ¶ 4-23, http://www.apd.army.mil/jw2/xmldemo/r600_20/main.asp.
 20. See generally U.S. DEP'T OF DEF., INSTRUCTION NO. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (2013) (amended 2015), <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.
 21. See 10 U.S.C. 47 § 802 Art. 2 (enumerating the categories of individuals subject to U.S. court-martial jurisdiction).

constitute LOW violations, all U.S. service members have—and have had—an affirmative duty to report.²²

III. DOD Policy on LOW Violation Reporting

In 2006, the DOD issued a policy directive outlining when U.S. service members are required to report LOW violations. The policy defines a reportable incident as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.”²³ Under this policy, “[a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”²⁴ The policy qualifies the investigation requirement by adding that “[o]nce it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander.”²⁵

The DOD reporting policy is broad in scope and has a low threshold; where there is credible information that sexual assault *might* constitute a LOW violation, regardless of the identity of the perpetrator or the victim, U.S. service members are obligated to report. But when is sexual assault a LOW violation?

IV. Sexual Assault as a LOW Violation

Sexual assault *can* constitute a war crime, but not all sexual assaults do.²⁶ Sexual assault can also constitute a violation of Common Article Three of the Geneva Conventions (CA3), which applies as a matter of law to the U.S. military in Afghanistan.²⁷ “While [CA3] does not specify rape or other types of sexual violence, these acts are implicitly covered by the listed prohibitions,” including “violence to life and person,” “cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁸

22. See U.S. Dep’t of Def., Dir 2311.01E, DOD Law of War Program, ¶ 3.2 (May 9, 2006).

23. *Id.* ¶ 3.2.

24. *Id.* ¶ 4.4 (emphasis added).

25. *Id.* ¶ 4.5.

26. See Rome Statute of the International Criminal Court art. 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 38544.

27. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006).

28. THE 1949 GENEVA CONVENTIONS: A COMMENTARY 360 (Andrew Clapham et. al. eds., 2015); see also 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW R. 93 (INT’L COMM. OF THE RED CROSS 2005) (summarizing customary international prohibitions on rape and other forms of sexual violence).

For sexual assault to qualify as either a war crime or a violation of CA3, it must be shaped by or dependent on an ongoing armed conflict. The necessary link between the criminal conduct and an armed conflict is referred to as the nexus.²⁹ Thus, the presence (or absence) of a nexus between alleged ASF sexual assaults and the armed conflict in Afghanistan dictates whether the assaults qualify as (a) LOW violations which U.S. service members would already have been obligated to report, or (b) solely Afghan domestic criminal law violations, which, prior to the newly announced policy, U.S. service members would not have been obligated to report.³⁰

Determining the existence of a nexus between a criminal offense and armed conflict can be challenging. International criminal tribunal decisions have developed a number of factors to aid in this analysis. To start, the armed conflict must have “played a substantial part in the perpetrator’s ability to commit [the offense], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”³¹ The nexus is established where the accused “acted in furtherance of or under the guise of the armed conflict.”³² It is *not* established where all that is proven is that the crime was committed “at the same time as an armed conflict” or “in any circumstances created in part by the armed conflict.”³³

Additional factors to consider in determining whether a nexus exists include: the status of the perpetrator; the status of the victim; whether the act advanced a military purpose; whether the act was committed in the context of the perpetrator’s official duties; and whether the crime was committed under the guise of military authority.³⁴ Tribunals have also indicated that establishing the nexus does not require evaluating whether the conduct took place during actual combat or hostilities, was part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or was in furtherance of a policy associated with the conduct of war or in the interest of a party to the conflict.³⁵

29. See Antonio Cassese & Paola Gaeta, *INTERNATIONAL CRIMINAL LAW* 75 (3d ed. 2013).

30. Cf. Press Release, Statement from Commander, Resolute Support and U.S. Forces Afghanistan, *supra* note 11.

31. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 58 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

32. *Id.*

33. Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Appeals Chamber Judgment, ¶ 570 (May 26, 2003), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-3/appeals-chamber-judgements/en/030526.pdf>.

34. *Id.* at ¶¶ 569-70 (quoting *Kunarac*, at ¶¶ 58-59).

35. Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Chamber Judgment, ¶¶ 193-97 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf; Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 573 (Int’l Crim. Trib. for the Former

Based on the limited information available, it is unclear whether there is a nexus between the ASF sexual assaults and the armed conflict in Afghanistan. On the one hand, there is the status of the alleged perpetrators as members of the ASF and the commission of crimes seemingly in the context of their duties or under the guise of their authority. Some of the assaults have even occurred on security force installations. On the other hand, the victims are not members of an opposing party or force, and many of the sexual assaults occurred in private residences.³⁶ And while a prosecutor at a war crimes trial would have to prove a nexus between the crime and an armed conflict beyond a reasonable doubt, the burden governing when U.S. service members are obligated to report ASF sexual assault flows from DOD Directive 2311.01E's far lower threshold of "possible, suspected, or alleged violation of the law of war."³⁷

Conclusion

While there is insufficient information to definitively answer the crucial "nexus" question, it is clear that if ASF, in the context of their duties, sexually assaulted civilians on ASF bases with the assistance or acquiescence of other security force members and in close proximity temporally and geographically to an armed conflict, their crimes would amount to at least possible or suspected LOW violations. In that case, the 2006 DOD policy would already have required U.S. service members to report the assaults, meaning that the U.S. military's recent statements that there had been no reporting requirement were erroneous, and the new reporting requirement is superfluous. If, however, the sexual assaults do not constitute possible or suspected LOW violations, then the new policy effectively creates a reporting requirement only for U.S. service members stationed in Afghanistan and only for sexual abuse and trafficking of persons.³⁸ If Afghan security forces were to commit any other crimes, the new policy would not require U.S. service member reporting.

While the new policy clarifies that there is a reporting requirement—at least in Afghanistan and for sexual assault—it could be interpreted as reflecting a

Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>; Prosecutor v. Akayesu, Case No. ICTR-96-4 Appeals Chamber Judgment, ¶¶ 430-46 (June 1, 2001), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict96-4/appeals-chamber-judgements/en/010601.pdf>.

36. But as the recently updated Commentaries to the Geneva Conventions stresses, CA 3 applies to *all* civilians and to a Party's own armed forces. See COMMENTARY OF 2016 ARTICLE 3: CONFLICTS OF A NON INTERNATIONAL CHARACTER, ¶¶ 194-199, <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

37. See U.S. Dep't of Def., Dir 2311.01E, *supra* note 22.

38. Cf. Press Release, Resolute Support and U.S. Forces Afghanistan, *supra* note 11. The new policy applies to sexual abuse, trafficking of persons, and "similar matters." The policy does not explain what constitutes a similar matter.

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categorical view that ASF sexual assaults do not constitute even *possible* LOW violations. Rather than answering the question with a new policy, what the longstanding DOD reporting policy means and when it is triggered should be explored and explained within (and to) the U.S. military, media, and general public. More broadly, additional discussion of when sexual assault constitutes a LOW violation appears warranted.