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## **Self-Interest or Self-Inflicted? How the United States Charges Its Service Members for Violating the Laws of War**

**Christopher Jenks\***

### **12.1. Introduction**

In the early morning of 11 March 2012, a US service member, Staff Sergeant Robert Bales, slipped undetected from Village Stability Platform ('VSP') Belambai about 30 kilometres from Kandahar, Afghanistan. Bales was one of approximately 40 US military personnel deployed to VSP Belambai. Their mission was "to assist the Afghan government in maintaining security, reconstructing the country, training the national police and army, and providing a lawful environment for free and fair elections".<sup>1</sup> Sergeant Bales, however, was on a very different mission.

Bales, alone and on foot, hiked to two separate Afghan villages where he murdered 16 women and children, attempted to murder six more

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<sup>1</sup> United States Mission to NATO, "U.S. Policy Toward Afghanistan and Pakistan: A Dossier (2014)", available at <http://nato.usmission.gov/afghanistan.html>, last accessed on 27 March 2015.

and assaulted others.<sup>2</sup> The victims ranged in age from small children to an elderly grandmother. Bales murdered 11 members of one family, shooting most of them in front of each other, stomped to death at least one victim, and set 10 victims' bodies on fire. The US Army apprehended Bales as he attempted to return to VSB Belambai. The Army transferred Bales to the United States and prosecuted him under US military's criminal law and procedure, the Uniform Code of Military Justice ('UCMJ'). At an Army court martial held in June 2013 in the US, Bales plead guilty to 16 counts of premeditated murder, six counts of attempted murder and six counts of aggravated assault inflicting grievous bodily injury. A military panel, or jury, sentenced Bales to be dishonourably discharged and to be confined for the duration of his natural life without the possibility of parole.

In so doing, the US Army continued its long-standing policy and practice of asserting jurisdiction over its service members who commit crimes during armed conflict, and charging them with enumerated offences of the UCMJ rather than violations of the laws of war or war crimes. Yet, while not prosecuting its own service members with such crimes, the US continues to conduct military commissions at Guantanamo Bay, Cuba and to prosecute members of al-Qa'ida and the Taliban for just such offences, that is, violations of the laws of war.<sup>3</sup>

This chapter explores the aspects of self-interest implicated by the US military prosecuting its own service members who violate the laws of war under different criminal charges than it prosecutes enemy belligerents who commit substantially similar offences. The chapter briefly explains how the US asserts criminal jurisdiction over its service members before turning to how the US military reports violations of the laws of war. It then sets out the US methodology for charging such violations as applied to its service members, and compares this methodology to that applied to those tried by military commissions. The chapter then discusses the varied meanings of the term 'war crimes' and the way in which the 1949 Geneva Conventions can provide a benchmark against which the elements of offences, and their punishments, can be compared. While the US practice fares adequately in this comparison, the argument for a pragmatic ap-

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<sup>2</sup> *United States v. Robert Bales*, Charge Sheet, 23 March 2012 (redacted). A copy of Bales's charge sheet is appended to this chapter as Appendix 1.

<sup>3</sup> A copy of charge sheet from the US military commissions is appended to this chapter as Appendix 2.

proach to charging over the expressive value of a war crime charge is rendered untenable as a result of the disparate manner in which the US charges detainees when compared to its own service members. Ultimately, this chapter recommends adding armed conflict-related punitive articles to the UCMJ and increasing transparency in how the US holds its service members accountable for violations of the law of war.

## 12.2. United States Practice

### 12.2.1. A History of the UCMJ

The UCMJ came from the US Congress's desire, following the Second World War, to establish "a code that would apply to all branches of the military and create greater uniformity in the substantive and procedural law governing the administration of military justice".<sup>4</sup> While the UCMJ dates from 1951, its origins are in and with the founding of the US during the American Revolutionary War with Britain. In June 1775, the fledgling (and rebellious) Second Continental Congress enacted the Articles of War, which, somewhat ironically, were "generally a copy of the then-existing code governing England's Army".<sup>5</sup> Following the Revolutionary War, the US Constitution granted the US Congress the power "(1) to make Rules for the Government and Regulation of land and naval Forces"; and "(2) the power to define and punish [...] offenses against the Law of Nations".<sup>6</sup> Thus, beginning with the 1806 revisions to the Articles of War, US "military personnel were subject to a code that required them to obey certain laws and customs of war or face trial by court-martial or military tribunal".<sup>7</sup> In the century that followed, the US Congress updated

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<sup>4</sup> Mynda G. Ohman, "Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice", in *Air Force Law Review*, 2005, vol. 57, p. 4.

<sup>5</sup> Judge Advocate General's Corps, US Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, Government Printing Office, Washington, DC, 1975. The following month the Congress elected William Tudor as the first Judge Advocate General of the Army.

<sup>6</sup> United States Constitution, Art. I, § 8, Cl. 14. See also Tara Lee, "American Courts-Martial for Enemy War Crimes", in *University of Baltimore Law Review*, 2003, vol. 33, pp. 52-53.

<sup>7</sup> Eric Talbot Jensen and James J. Teixeira Jr., "Prosecuting Members of the U.S. Military for Wartime Environmental Crimes", in *Georgetown International Environmental Law Review*, 2005, vol. 17, no. 4, p. 658.



the Articles of War in 1874 and 1916.<sup>8</sup> The articles were again amended in 1920, with lessons learned from the First World War, and in 1949 following the Second World War.<sup>9</sup> The 1951 UCMJ replaced the Articles of War and established “a single codified system of military law, separate from the criminal justice systems of the various states and of the Article III [federal] courts”.<sup>10</sup> The features of the UCMJ have been described as follows:

The UCMJ permanently transformed the nature of military law. The UCMJ was more than a structural change to ensure uniformity across all branches of service. It added articles, defined new crimes, and established rules designed to protect the substantive and procedural rights of military personnel. New provisions designed to ensure a fair trial included the right against self-incrimination; equal process for the defense and prosecution to obtain witnesses and depositions; the prohibition on receiving guilty pleas in capital cases; the requirement that both prosecution and defense counsel be legally trained; the right for an enlisted accused to be tried by a panel [military jury] that included enlisted members; the requirement that the law officer (now the military judge) instruct the panel members on the record regarding the elements of the offense, presumption of innocence, and burden of proof; the provision mandating that voting on findings and sentencing be conducted by secret ballot; and an automatic review of the trial record.<sup>11</sup>

One of the advantages of the UCMJ is its broad jurisdictional scope:

The UCMJ applies to all [US] service members regardless of whether the offense can be tied to military discipline and effectiveness. The UCMJ is applicable both in the United States and in foreign countries. Because the UCMJ applies worldwide, a court-martial convened under the UCMJ may be held anywhere in the world. This flexibility allows for the prosecution to take place near the situs of the crime, presumably near the location of any relevant witnesses. This makes the prosecution of a crime that occurs during the con-

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<sup>8</sup> Ohman, 2005, p. 4, see *supra* note 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> Lee, 2003, pp. 52-53, see *supra* note 6.

<sup>11</sup> Ohman, 2005, pp. 9-10, see *supra* note 4.

duct of military operations, such as in Iraq [or Afghanistan], easier than it would be if the case had to be heard in a Federal District Court or before an international body convened at the Hague or some other site distant from the court's location.<sup>12</sup>

For the UCMJ to exercise personal jurisdiction over US service members regardless of where in the world the service member is or whether they were on or off duty is one of the strengths of the system. But the manner in which the system charges US service members for crimes blunts the efficacy, either real or perceived, of the UCMJ as an accountability mechanism. More confusing still is that the link between jurisdiction and charging, the reporting of alleged violations by US service members is conducted using law of war terms.

#### 12.2.2. Reporting US Service Member Violations of the Laws of War

The US Department of Defense ('DoD') issued a directive on its law of war programme in 2006.<sup>13</sup> The directive's stated purpose is to "update the policies and responsibilities ensuring DoD compliance with the law of war obligations of the United States".<sup>14</sup> The directive also clarifies investigation and reporting of "reportable incidents".<sup>15</sup> The directive defines the law of war as:

That part of international law that regulates the conduct of armed hostilities. It is often called the "law of armed conflict". The law of war encompasses all international law for the conduct of hostilities binding on the United States of its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.<sup>16</sup>

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<sup>12</sup> Jensen and Teixeira, 2005, p. 658, see *supra* note 7. Although one of the advantages of the UCMJ is the ability to hold courts martial in a combat theatre such as Iraq or Afghanistan, it is noteworthy that often the US military does not choose this course of action. As discussed in the introduction, Staff Sergeant Bales committed his crimes in Afghanistan and against Afghan civilians, but Bales's court martial was held in the US.

<sup>13</sup> US Department of Defense ('DoD') Directive 2311.01E, DoD Law of War Program, 9 May 2006.

<sup>14</sup> *Ibid.*, para. 1.1.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para. 3.1.

The directive then states that “[i]t is DoD policy that: [...] Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations”.<sup>17</sup> The combination of how the US defines the law of war and the policy decision to broadly apply it is, or could be, significant. It is significant because the US is claiming that its service members comply with the law governing international armed conflict, non-international armed conflict and even “applicable” customary international law in all armed conflicts, and even all other military operations, including for example, peacekeeping.

This could be the bridge over what is otherwise a significant gap stemming from the problematic inverse relationship between frequency of the type of armed conflict (international and non-international) and the applicable governing law. The vast majority of the law of armed conflict, including all four of the 1949 Geneva Conventions and their Additional Protocol I, is only triggered as a matter of law by international armed conflict. Yet there are few international armed conflicts. In contrast, non-international armed conflicts are far more prevalent,<sup>18</sup> but for which there is far less law. The US policy directive would avoid that problem, but only if it were clear what portions of the law of armed conflict the US is applying, which it is not. Indeed, an unprivileged belligerent the US is detaining at the time of writing at Naval Station Guantanamo Bay, Cuba has filed a legal challenge complaining of, among other things, the specific portions of the 1949 Geneva Conventions the US is not following.<sup>19</sup>

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<sup>17</sup> *Ibid.*, para. 4.1.

<sup>18</sup> For example, according to the North Atlantic Treaty Organisation (‘NATO’), in 2000 there were 25 armed conflicts around the world. NATO, “Statistics on armed conflicts around the world”, available at <http://nato.gov.si/eng/topic/threats-to-security/statistics/>, last accessed on 29 March 2015. Of those, only one, the conflict between India and Pakistan, was of an international nature. See also Armed Conflict Database, available at <http://acd.iiss.org>, last accessed on 29 March 2015.

<sup>19</sup> See United States Court of Appeals, District of Columbia Circuit, *Abdullah v. Obama*, 753 F.3d 193, 4 April 2014. Abdullah claimed that his conditions of confinement violated the Third Geneva Convention governing prisoners of war because “he is not permitted to purchase personal items, family and friends are not allowed to send him food or clothing, detainees cannot choose representatives to air their grievances and copies of the Geneva Convention are not posted in prominent places” (p. 196). The United States Court of Appeals for the District of Columbia denied Abdullah’s appeal on the grounds his claim was “only a bare and conclusory assertion that” the US government was in violation of certain sections of the Third Geneva Convention. Indeed, this footnote is considerably longer than

Similarly, the policy claims that US service members will follow “applicable” customary international law, without specifying which or what law that is. As discussed later in the chapter, the US has objected to the International Committee of the Red Cross’ (‘ICRC’) customary international humanitarian law study. It would be helpful if the US, indeed all States, were to acknowledge what they consider customary international law. In the absence of such specification, claiming to follow “applicable” customary international law is close to, if not fully, a meaningless claim.

Implementing and applying law as a matter of policy when that law would not otherwise apply should be a positive development. And it was the US practice during the Vietnam War. There, the Americans confronted a similar challenge as today, fighting one or more organised armed groups, including the Viet Cong, who, like al-Qa’ida today, do not qualify as prisoners of war under the Third Geneva Convention.<sup>20</sup> In con-

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Abdullah’s claim, which, in toto, was “Respondents are now, and have been for a decade, violating sections 3, 25, 70–72, and 78–79”.

<sup>20</sup> To qualify for prisoner of war status under Geneva Convention III, an individual must fall in one of the following categories:

- (1) Members of the armed forces of a party to the conflict as well as members of militia or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

trast, members of the North Vietnamese Army *did* qualify for prisoner of war status. The US Military Assistance Command in Vietnam's ('MACV') response was to issue an instruction, functionally the equivalent of the current directive. Through that instruction, the US still conducted the review process to determine if a captured belligerent qualified as a matter of law for prisoner of war status. For the Viet Cong, who did not qualify as a matter of law, the instruction stated that the US, as a matter of policy, would treat them as prisoners of war. The result was two identically run prison camps, separated by a road. In one camp were members of the North Vietnamese Army, who were entitled to prisoner of war treatment as a matter of law. In the other camp were the Viet Cong, who were not entitled to prisoner of war status as a matter of law but received the same treatment as a matter of policy. The ICRC was effusive in its praise of the US policy decision, claiming that

[t]he MACV instruction [...] is a brilliant expression of a liberal and realistic attitude. [...] This text could very well be a most important one in the history of the humanitarian law, for it is the first time [...] that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the rarities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty [...] will be a great one for man concerned about the protection of men who cannot protect themselves. [...] May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam.<sup>21</sup>

The difference between the application of the US military's policy decisions then and now is that in Vietnam, the US was transparent about the law it was applying and thus could be monitored and inspected. The

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- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, UST. 3316, Art. 4 ('Geneva Convention III').

<sup>21</sup> Laurie Blank and Gregory Noone, *International Law and Armed Conflict: Fundamental Principles and Customary Challenges in the Law of War*, Aspen Publishers, Aspen, 2013, p. 232, citing George S. Prugh, *Vietnam Studies: Law at War: Vietnam 1964–1973*, Department of the Army, Washington, DC, 1975.

current policy directive unfortunately falls far short of its Vietnam era predecessor.

Having established the vague policy footing on which the current directive rests, it is surprisingly expansive and specific in what qualifies as a reportable law of war violation. The directive defines reportable incident as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict”.<sup>22</sup> When the low threshold of a possible, suspected or alleged violation is reached, “[a]ll reportable incidents committed by or against US personnel, enemy persons, or any other individuals are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action”.<sup>23</sup>

The directive speaks in terms of violations of the law of war and requires their reporting and investigation. Yet if that investigation substantiates the violation, the US military takes the next step in its self-accountability process, charging the alleged wrongdoer, but not with a violation of the law of war.

### 12.2.3. Charging Violations of the Laws of War

As one US Army lawyer noted in a primer for the practitioner of charging war crimes: “The first step in analyzing how to charge the servicemember is to look for any offenses specifically enumerated in the UCMJ Articles 80 through 132”.<sup>24</sup> These articles address a wide range of criminal con-

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<sup>22</sup> DoD Directive 2311.01E, DoD Law of War Program, 9 May 2006, para. 3.2.

<sup>23</sup> *Ibid.*, para. 4.4.

<sup>24</sup> Martin N. White, “Charging War Crimes: A Primer for the Practitioner”, in *The Army Lawyer*, 2006, vol. 2, p. 2. As White explains, “[t]he [service lawyer prosecutor] should begin with this analysis due to the preemption doctrine. The preemption doctrine ‘prohibits application of Article 134 to conduct covered in Articles 80 through 132’” (p. 2). Article 134 is for misconduct not addressed in the enumerated punitive section of the UCMJ. Article 134 of the UCMJ, among other things, allows for the incorporation of federal offences as a military charge. But under the preemption doctrine, a prosecutor may not incorporate a federal charge to address conduct an enumerated article of the UCMJ covers. For example, Article 118 of the UCMJ criminalises murder. The US Code, in Title 18 § 1111 also criminalises murder. So a military prosecutor would need to charge the murder offence under Article 118; he or she could not incorporate the federal murder offence through Article 134. However, unlike the UCMJ, the US Code specifically criminalises war crimes as such, in Title 18 § 2441. This raises the question of whether a military prosecutor could in-

duct, and include both completed and inchoate offences. The crimes listed in the UCMJ include common offences such as larceny, assault, rape and murder, and arcane offences, such as abusing a public animal and jumping from a vessel to the water. There is no enumerated offence for violating the laws of war. Yet the UCMJ itself acknowledges that “[t]o the extent permitted by the [US] Constitution, courts-martial may try any offense under the code, and in the case of a general courts-martial, the law of war”.<sup>25</sup>

In explaining how to allege offences, the current US *Manual for Courts-Martial* provides that “[a] charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated”.<sup>26</sup> Not only does this indicate the possibility of a law of war charge, the accompanying discussion details that “[i]n the case of a person subject to trial by general court-martial for violations of the law of war, the charge should be: ‘Violation of the Law of War’”.<sup>27</sup> But that discussion concludes with the guidance that “[o]rdinarily persons subject to the code [a category which includes US service members] should be charged with a specific violation of the code rather than a violation of the law of war”.<sup>28</sup> Likewise, the Department of the Army’s field

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corporate the federal statute under Article 134 and thus charge a US service member with war crimes. The answer where the underlying conduct is reflected in a punitive article is unclear. For example, if a military prosecutor incorporated the federal war crimes statute and charged a grave breach of the Geneva Conventions, the unlawful killing of a protected person, the defense would challenge such a charge under the preemption doctrine, arguing that Article 118 of the UCMJ already addresses unlawful killing. But to the extent the underlying conduct is not reflected in a punitive article of the UCMJ, charging the conduct as a war crime through Article 134 and the federal statute appears a possibility. The challenge is to identify acts which constitute a grave breach of the Geneva Conventions or violate Common Article 3 and which are not already reflected in a punitive article of the UCMJ.

<sup>25</sup> United States Military, *Manual for Courts-Martial*, Rules for Courts-Martial r 202, 2012. See also Uniform Code of Military Justice, 10 USC § 818, Art. 18, 2010.

<sup>26</sup> United States Military, *Manual for Courts-Martial*, Rules for Courts-Martial r 307(c)(2), 2012.

<sup>27</sup> *Ibid.*, Discussion (D).

<sup>28</sup> *Ibid.* The analysis of that rule, also contained in the *Manual for Courts-Martial*, adds little clarity. The appendix to the 1969 *Manual for Courts-Martial* merely states that “[i]n the case of a person subject to trial by general court-martial by the law of war [...], the Charge should be: ‘Violation of the Law of War’”, *Manual for Courts-Martial* (1969), Appendix 6a at 12. That same manual lists as a source of military jurisdiction, international law, which it states includes the laws of war.

manual *The Law of Land Warfare*, in a section entitled “Persons Charged With War Crimes” states that:

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that law.<sup>29</sup>

That guidance, while not styled as an absolute requirement, has proved to be one in US practice. For example, the US charged Lieutenant William Calley with violating Article 118, murder, of the UCMJ, for his role in the My Lai massacre during the Vietnam War. There is considerable similarity between the charges against Calley and Bales. Calley was charged as follows:

In that First Lieutenant William L. Calley, Jr. [...] did, at My Lai 4, Quang Ngai Province, Republic of South Viet-Nam, on or about 16 March 1968, with premeditation, murder an unknown number, not less than seventy, Oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4, by means of shooting them with a rifle.<sup>30</sup>

Bales was charged as follows:

In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [redacted] by means of shooting her with a firearm.<sup>31</sup>

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<sup>29</sup> US Department of the Army, *Field Manual FM 27-10, The Law of Land Warfare*, 1956, 507.

<sup>30</sup> *United States v. First Lieutenant William L. Calley, Jr.*, Charge Sheet, 5 September 1969, Specification 1. A copy of Calley’s charge sheet is appended to this chapter as Appendix 3. Similar action was taken with respect to Calley’s Company commander, Captain Ernest Medina. “In keeping with United States policy, Captain Medina was not charged with violations of the law of war, but rather, was charged with violations of the UCMJ”. Michael L. Smidt, “Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations”, in *Military Law Review*, 2000, vol. 164, p. 194.

<sup>31</sup> *United States v. Robert Bales*, Charge Sheet, 23 March 2012 (redacted), Charge I, Specification 1.



The historian for the US Army Judge Advocate Generals' Corps claims that the US has never charged a US service member with a law of war violation as such.<sup>32</sup> But one commentator, Professor (and former Army lawyer) Jordan Paust, claims that the US charged a service member during the Vietnam War with "cutting off an ear from the body of an unknown dead Viet Cong soldier, which conduct was of a nature to bring discredit upon the Armed Forces of the United States as a violation of the Law of War".<sup>33</sup>

The legislative intent behind Rule for Court-Martial 307, or the commentary, provides no clarification.<sup>34</sup> Noted Army legal scholars and military justice practitioners claim that as stated in the *Manual for Courts-Martial* the US may court-martial a US service member for a violation of the law of war.<sup>35</sup> The US Congress has also failed to provide an answer, although it briefly discussed the issue in 1996. During the debate on the War Crimes Act, members of Congress discussed the potential for US service members to be court-martialled for violating the law of war and determined that it "was not a viable option".<sup>36</sup>

#### 12.2.4. Military Commissions

The US military's internal practice stands in stark contrast to that of the military commissions, the stated purpose of which is to "try alien unprivi-

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<sup>32</sup> E-mail message from Fred Borch to author, 6 November 2012.

<sup>33</sup> Jordan Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility", in *Military Law Review*, 1972, vol. 57, p. 118 (referring to *United States v Passantino*, Hq. 1st Inf. Div. Special Court-Martial Order no. 11, 11 February 1968).

<sup>34</sup> The analysis to the subsection of Rule for Court-Martial 307 references charges under the law of war and refers to the 1969 *Manual for Courts-Martial*. Yet that version of the manual does not contain the language that "ordinarily" US service members should be charged with a violation of an enumerated punitive article of the UCMJ. The 1969 *Manual* even helpfully provides how to word a charge, saying that "[i]n the case of person subject to trial by general court-martial by the law of war [...] the Charge should be: 'Violation of the Law of War'; or 'Violation of -----, -----,' referring to the law penal law of the occupied territory". Similarly, the very first US *Manual for Courts-Martial* in 1949 included that "[t]he technical charge should be appropriate to all specifications under it, and ordinary will be written: 'Violation of the \_\_\_\_\_ Article of War,' giving the number of the article".

<sup>35</sup> Jan E. Aldykiewicz with Geoffrey S. Corn, "Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed during Internal Armed Conflicts", in *Military Law Review*, 2001, vol. 167, p. 76.

<sup>36</sup> *Ibid.*

leged enemy belligerents for violations of the law of war”.<sup>37</sup> The Military Commissions Act of 2009 lists a host of law of war violations, including murder of a protected person, attacking civilian objects and property, pillaging and the denial of quarter.<sup>38</sup> In its zeal to charge law of war offences in the commissions, the US added the qualifier “in violation of the law of war” to other charges, such as murder and destruction of property, when no such crimes exist, at least in the traditional, international conception of the law of armed conflict.<sup>39</sup>

For an example of how this disparity in charging its own service members versus its enemies plays out, consider what the specific criminal charge would be for desecrating human remains. In 2011 a US Marine scout-sniper unit permissibly engaged and killed several members of the Taliban in Afghanistan. Following the engagement, members of the unit videotaped themselves urinating on and posing with the bodies of the dead Taliban. The video was uploaded to YouTube in early 2012, went viral and drew widespread condemnation.<sup>40</sup> The Marine Corps prosecuted those involved, but the closest punitive UCMJ article was dereliction of duty, Article 92. The maximum punishment for wilful dereliction in the performance of duties is confinement for six months, forfeiture of all pay and allowances, and a bad conduct discharge.

While US service members have mistreated enemy remains, there is no specific charge for that misconduct, yet there is as applied to al-Qa’ida and the Taliban, despite the absence, thus far anyway, of their committing such acts. Under the Military Commissions Act of 2009 it is a crime for

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<sup>37</sup> Military Commissions Act of 2009, 10 USC § 948b(a) (2009).

<sup>38</sup> Military Commissions Act of 2009, 10 USC § 950t(1) (2009). Given the US’s opposition to the International Criminal Court (‘ICC’), the similarities between criminal offences under the ICC Statute and the Military Commissions Act of 2009 are interesting. That a US citizen could not be subject to prosecution for such offences by military commission reinforces a common US stereotype: the US holds itself to a lower standard than that it claims others should meet under international law.

<sup>39</sup> See John C. Dehn, “The Hamdan Case and the Application of a Municipal Offence: The Common Law Origins of Murder in Violation of the Law of War”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, p. 63.

<sup>40</sup> “Marine Pleads Guilty to Urinating on Corpses”, in Fox News, 16 January 2013, available at [www.foxnews.com/us/2013/01/16/marine-faces-court-martial-for-urinating-on-corpses-taliban-fighters-in/](http://www.foxnews.com/us/2013/01/16/marine-faces-court-martial-for-urinating-on-corpses-taliban-fighters-in/), last accessed at 30 March 2015.

an unprivileged enemy belligerent to intentionally mistreat a dead body.<sup>41</sup> More significantly, the punishment for this offence is up to and including the death penalty. While there are stark differences in that example others are not as clear-cut. Before the US approach can be more fully evaluated and discussed, clarifications to the terminology are warranted.

### 12.3. Scope of War Crimes under US Law and International Law

A common misconception is that any violation of the Geneva Conventions is a war crime.<sup>42</sup> First, the Conventions do not utilise the term war crimes. Instead, each of the four Conventions details violations that constitute a “grave breach” of the particular Convention. For those violations, States Parties have agreed to enact legislation to provide “effective penal sanction”.<sup>43</sup> The Conventions refer to lesser violations as “other than grave breaches” for which States Parties agree to “take measures necessary for the suppression” of such acts.<sup>44</sup>

In its study of international humanitarian law, the ICRC attempted to identify the customary international law principles of international humanitarian law. Rule 156 of the study states that “serious violations of international humanitarian law constitute war crimes”.<sup>45</sup> In response, the legal advisers to the US Departments of Defense and State wrote a letter

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<sup>41</sup> US Military Commissions Act of 2009, § 950t(20). The crime of intentionally mistreating a dead body is defined as “any person subject to this chapter [meaning non-US citizen members of al-Qa’ida and the Taliban, but not US service members] who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct”.

<sup>42</sup> The US Army’s own field manual on *The Law of Land Warfare* is, at least in part, to blame. It states, that “[t]he term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime”; Department of the Army, *Field Manual 27-10, The Law of Land Warfare*, Washington, DC, 1956, p. 499.

<sup>43</sup> Articles 49, 50, 129, 146 respectively of the Geneva Conventions I–IV; for acts constituting grave breaches, see Articles 50, 51, 130, 147 respectively of the Geneva Conventions I–IV.

<sup>44</sup> *Ibid.*

<sup>45</sup> Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, in *International Review of the Red Cross: Customary Law*, 2005, vol. 87, no. 857, p. 211, Rule 156.

to the ICRC claiming that the term war crimes “is an amorphous term used in different contexts to mean different things”.<sup>46</sup> The US stated that:

The national legislation cited in the commentary to Rule 157 employs a variety of definitions of “war crimes,” only a few of which closely parallel the definition apparently employed by the Study, and none that matches it exactly. Much of the legislation cited does not precisely define “war crimes” [...]. Although the military manuals of Croatia, Hungary, and Switzerland, among others, appear to define “war crimes” as “grave breaches,” the lack of specificity leaves the intended meaning ambiguous. Even among the few States that employ a definition of “war crimes” similar to that in Rule 156, no State definition mirrors the Study’s definition precisely.<sup>47</sup>

Part of the difficulty stems from what constitutes ‘serious’. This is then compounded by the definition of international humanitarian law. US federal law and the Statute of the International Criminal Court (‘ICC’) provide similar definitions which serve as a starting point for a comparison to their counterpart under the UCMJ.

US federal law provides that

[w]hoever, whether inside or outside the United States, commits a war crime [...] shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.<sup>48</sup>

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<sup>46</sup> John B. Bellinger III and William J. Haynes II, “A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, in *International Review of the Red Cross*, 2007, vol. 89, no. 866, p. 467. Rule 157 provides that “States have the right to vest universal jurisdiction in their national courts over war crimes”.

<sup>47</sup> *Ibid.*

<sup>48</sup> War Crimes Act of 1996, 18 USC § 2441 (1996). Under the federal law, the term “war crime” means any conduct:

- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

Pursuant to this approach, war crimes include grave breaches of any of the 1949 Geneva Conventions, certain articles from the 1907 Hague Convention IV, grave breaches of Article 3 common to each of the 1949 Geneva Conventions, and certain violations of Protocol II of the Convention on Certain Convention Weapons, the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

The ICC Statute defines war crimes as grave breaches of the 1949 Geneva Conventions, “serious violations of the laws and customs” applicable to international and other than international armed conflict, and serious violations of Article 3 common to each of the 1949 Geneva Conventions.<sup>49</sup>

#### 12.4. Comparison of Elements of War Crimes and UCMJ Crimes

How then do the elements (and punishments) of ICC Statute war crimes compare to an analogous charge under the UCMJ? This section compares the following offences: wilful killing, committing outrages against personal dignity, wilfully causing great suffering or serious injury and extensive destruction of property.

The elements for each war crime under the ICC Statute include that the conduct took place “in the context of and was associated with” an armed conflict and that the accused was aware of that conflict. Yet the introduction to the elements explains that:

There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

There is only a requirement for the awareness of the factual circumstances that established the existence of an armed

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(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

<sup>49</sup> Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, 2187 UNTS 90, Art. 8 (‘ICC Statute’).

conflict that is implicit in the terms “took place in the context of and was associated with”.<sup>50</sup>

#### 12.4.1. Wilful Killing

Article 8(2)(a)(i) of the ICC Statute provides the following elements for the crime of wilful killing to be committed in an international armed conflict:

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>51</sup>

Article 118 of the UCMJ provides as follows:

1. That a certain named or described person is dead.
2. That the death resulted from the act or omission of the accused.
3. That the killing was unlawful.
4. That, at the time of the killing, the accused had a premeditated design to kill.<sup>52</sup>

The maximum punishment under the UCMJ is death. There is a mandatory minimum of imprisonment for life with eligibility for parole. For the ICC crimes, the maximum punishment for war crimes is “life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”.<sup>53</sup>

On the surface, the differences between the UCMJ and the ICC Statute are a higher *mens rea* in case of the UCMJ (premeditation) and the fact that wilful killing under the ICC requires proving both the protected

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<sup>50</sup> International Criminal Court, Elements of Crimes, Doc. no. ICC-ASP/1/3 (part II-B), 9 September 2002, Art. 8.

<sup>51</sup> *Ibid.*, Art. 8(2)(a)(i).

<sup>52</sup> Uniform Code of Military Justice, 10 USC § 918, Art. 118, 2010.

<sup>53</sup> ICC Statute, Art. 77(1), see *supra* note 49.

status of the victim and the underlying existence of an armed conflict. Qualitatively, wilful killing is a more circumspect offence, proscribing a rule not against any wilful killing, but the wilful killing of a certain class of victims – protected persons.

Could Staff Sergeant Bales be charged with wilful killing? Even with the expansion of protected person status to include ethnicity and not just nationality,<sup>54</sup> the alleged victims were not protected persons for the purposes of the Geneva Conventions. They were Afghan nationals, allegedly killed in Afghanistan by a member of the US military when the US military was neither fighting against nor occupying Afghanistan, but instead aiding the government of Afghanistan in its counter-insurgency efforts. Thus, while the offence of wilful killing is uniquely tailored to armed conflict, it proves less useful in certain conflict-based settings than the more general murder charge under the UCMJ.

#### 12.4.2. Maltreatment of Persons

Article 8(2)(c)(ii) of the Elements of Crimes outlines the elements of the crime “outrages upon personal dignity” as follows:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

In Article 93 of the UCMJ cruelty and maltreatment are defined as:

1. That a certain person was subject to the orders of the accused.
2. That the accused was cruel toward, or oppressed, or maltreated that person.

In the UCMJ the maximum punishment is dishonourable discharge, forfeiture of all pay and allowances, and confinement for one year. Once

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<sup>54</sup> International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-T, Appeals Chamber, 3 March 2000, p. 3.

more the ICC Statute provides for a maximum term of 30 years or life in particularly grave circumstances. Attention is immediately drawn to the brevity of the UCMJ charge (it contains only two elements) as well as the disparity between possible punishments: one year compared to 30 years. Arguably, the UCMJ charge is not analogous to the ICC offence, or certainly not a complete equivalent. The UCMJ charge requires that the victim be subject to the orders of the accused. While being subject to orders is broadly defined, it is nonetheless a significant limitation on the application of the charge. Finally, under the UCMJ offence the victim must be alive. By comparison, an outrage against personal dignity better lends itself to the misconduct that occurs during armed conflict, particularly towards corpses.<sup>55</sup> For outrages against personal dignity, the Elements of Crimes provides that “‘persons’ can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim”.<sup>56</sup>

#### **12.4.3. Wilfully Causing Great Suffering or Serious Injury**

ICC Article 8(2)(a)(iii) provides that the crime of wilfully causing great suffering or serious injury to body or health occurs when:

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.

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<sup>55</sup> For example, some of the actions US service members have taken in recent years in Iraq could fall within this crime, notably the Abu Ghraib abuses. As the detainees were subject to the orders of the US military guards, cruelty and maltreatment could (and did) apply. In such situations, the question becomes whether a maximum sentence of one-year confinement is adequate.

<sup>56</sup> International Criminal Court, 2002, Art. 8(2)(c)(ii), see *supra* note 50.



5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>57</sup>

According to Article 128 of the UCMJ aggravated assault occurs in the following circumstances:

1. That the accused attempted to do, offered to do, or did bodily harm to a certain person;
2. That the accused did so with a certain weapon, means, or force;
3. That the attempt, offer, or bodily harm was done with unlawful force or violence; and
4. That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.<sup>58</sup>

There are a number of subsets of this offence, including when a firearm is used and when it is committed against a child under the age of 16 years. Absent one of those qualifiers, the maximum punishment is a dishonourable discharge, forfeiture of all pay and allowances, and confinement for three years.

Of the offences being compared, these two (wilfully causing great suffering and aggravated assault) may be the most similar. Interestingly, the UCMJ version applies to attempts and completed acts, while the ICC offence only applies to the completed acts. The ICC offence encompasses mental pain or suffering while the UCMJ version is limited to bodily harm. Again disparity between the possible punishment arises: the ICC crime yields a sentence range up to 30 years while the UCMJ is generally limited to three years. Even when the qualifiers are considered, the UCMJ punishment only increases to five years for a child victim and eight years when a firearm is used.

#### **12.4.4. Destruction of Property**

The crime of extensive destruction and appropriation of property is defined in the ICC Statute as occurring when:

1. The perpetrator destroyed or appropriated certain property.

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<sup>57</sup> *Ibid.*, Article 8(2)(a)(iii).

<sup>58</sup> Uniform Code of Military Justice, 10 USC § 928, Art. 128, 2010.

2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>59</sup>

Article 103 of the UCMJ provides that the crime of looting or pillaging captured or abandoned property occurs in the following circumstances:

1. That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;
2. That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and
3. That this property was:
  - (i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or
  - (ii) part of the equipment of a seized or captured vessel; or
  - (iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.<sup>60</sup>

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<sup>59</sup> ICC Statute, Art. 8(2)(a)(iv), see *supra* note 49.

<sup>60</sup> Uniform Code of Military Justice, 10 USC § 903, Art. 103, 2010.

The maximum punishment is “any punishment, other than death, that a court-martial may direct”.<sup>61</sup>

The striking feature of the UCMJ charge is that it represents a rare US military offence – one that only applies to armed conflict or during times of military occupation. Although anachronistic, this offence nonetheless demonstrates the potential for broader offences unique to armed conflict to apply to US service members.

### 12.5. Assessment and Proposal

The above discussion demonstrates that in some ways the crimes in the UCMJ and the ICC Statute are analogous, but in other ways they are not. The enumerated UCMJ offences are more generalised, allowing for application during both peacetime garrison settings and during armed conflict. But in that generalisation, it can be claimed that something is lost. Is the same offence in a garrison setting really the same as when it is committed in an armed conflict? For intra-military offences, for example, one service member assaulting another, the answer may be yes. But where the victim of the offence is not American and the armed forces are deployed in an armed conflict environment, the answer would appear to be no. The question becomes whether the various intrinsic and extrinsic values the US military justice system – designed to promote, protect and defend – operate in a domestic setting in the same manner as they do in an armed conflict.

Part of the difficulty stems from the lack of awareness of the US approach, even among legislators tasked with developing US law. In the mid-1990s, the US Congress was debating what ultimately became the War Crimes Act of 1996, which criminalised law of war violations committed by or against US nationals.<sup>62</sup> A report accompanying the legislation stated that “[t]he Uniform Code of Military Justice grants court-martial jurisdiction to try individuals for violations of the laws of war”.<sup>63</sup> The report then claimed that “[t]he most famous example of a court martial for war crimes is probably that of William Calley, who was prose-

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<sup>61</sup> *Ibid.*

<sup>62</sup> War Crimes Act of 1996. While the Act was progress, it only lessened the jurisdictional loophole in the US. Law of war violations committed by other than US nationals against anyone who is not a US national and which occur outside the US are not criminalised.

<sup>63</sup> US House of Representatives, House Report 104-698, 24 July 1996, p. 5.

cuted for his part in the Mai Lai massacre during the Vietnam War”.<sup>64</sup> Yet as discussed, the US military did not charge Calley with war crimes, it charged him with murder. But the US charges were based on substantially the same misconduct as would a charge of a crime against humanity, and the possible punishment for murder under the UCMJ – death – exceeds that of the ICC Statute.

Ultimately, there are some crimes and offences which seem to be more fully and fairly represented by enumerated punitive articles of the UCMJ than others. And the US military practice at least adequately compares with the ICC. Where the US charging practice fares poorly is the comparison between how it charges with its own service members versus members of al-Qa’ida and the Taliban for similar conducts constituting similar violations of the law of armed conflict. The US most certainly endeavours to hold its service members accountable for their violations of the law of armed conflict. But that it does so differently compared to how it holds its enemies accountable is problematic.

Given the state of the United States’ long history, charging its service members with law of war violations or war crimes as such, while feasible, is not likely realistic. But surely the US military can adopt some new punitive articles that reflect the armed conflict-related misconduct committed by US service members since 2001. The US could also mitigate this criticism if it were more transparent about how it meets its obligations under international humanitarian law, which the US approach to charging its service members renders even more difficult.

The Geneva Conventions require that States “provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches”.<sup>65</sup> Yet the US approach to how it charges its service members hampers the ability to separate out examples of where the US has enforced its obligations (court-martial of a US service member under Article 118 for killing an Iraqi civilian, for example) from other actions under the UCMJ (court-martial of a US service member under Article 118 for killing another US service member). Until 2013, none of the US military services publicly reported their court-martial results. In 2013 the United States Navy became the first to do so, which is progress but which

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<sup>64</sup> *Ibid.*

<sup>65</sup> Articles 49, 50, 129 and 146 respectively of the Geneva Conventions I–IV.

at same time underscores the ripple effects of the US charging approach.<sup>66</sup> As part of a wider effort to be more transparent about prosecuting service members through the military justice system, the Navy published the results of 135 special and general courts martial which occurred between January and June 2013. For example, one entry reads as follows:

At a Special Court-Martial in Washington, D.C., an E-3 was tried for assault consummated by a battery. The panel of members returned a verdict of not guilty to assault consummated by a battery, but guilty to simple assault. The panel awarded a forfeiture of \$1,342 per month for 2 months, reduction in rank to E-1 and 40 days confinement.

This is a significant (albeit long overdue) step and which the entire US military services should emulate. Unfortunately, it is of minimal utility in terms of demonstrating US compliance with its obligations under the Geneva Conventions. The court-martial result listed above does not reveal whether that case involved a violation of the law of war or not. We know that a court-martial panel acquitted a sailor of assault consummated by a battery and found the sailor guilty of simple assault. It is possible, though extremely unlikely, that the sailor's actions took place in Afghanistan and that the victim of the assault was a civilian, thus potentially implicating the laws of war.

How the military charges its service members generally, combined with how the Navy is reporting results, amount to a missed opportunity to demonstrate not just transparency of the UCMJ process but how the US complies with its Geneva Convention obligations.

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<sup>66</sup> "Document: Navy Court-Martial Summaries from Jan. to June 2013", in USNI News, 24 July 2013, available at <http://news.usni.org/2013/07/24/document-navy-court-martial-summaries-from-jan-to-june-2013>, last accessed at 30 March 2015. See also "Navy Releases Six Months of Court-Martial Results", in *Navy Times*, 22 July 2013, available at <http://archive.navytimes.com/article/20130722/NEWS06/307220033/Navy-releases-six-months-court-martial-results>, last accessed at 30 March 2015. The US Army also now releases court-martial results and in a similar fashion to the US Navy. See "Army Releases Court-Martial Verdicts for December", in *Army Times*, 23 January 2015, available at <http://www.armytimes.com/story/military/crime/2015/01/23/-criminal-verdicts-discharge-results/22225147/>, last accessed at 30 March 2015.

## 12.6. Conclusion

One senior US military prosecutor has commented that charging decisions ultimately reflect the narrative the prosecutor wants to convey to a jury. It is difficult to envision a case where adding elements, including the existence of armed conflict or of a protected person, would render that endeavour easier. A pragmatic approach to prosecutions is not unique to the US.<sup>67</sup> The differences may be explained by degrees – a domestic military charge would apply to a lower-ranking individual, whereas a ‘war criminal’ must be an authority figure. Or, it could be argued that property destruction is appropriately addressed by the UCMJ, and that a war crime act of the same conduct would, or should, constitute a graver crime.

Yet the US approach rings hollow, maybe not in an absolute sense but certainly in a relative one. The US has been involved in armed conflict for over 10 years and is, accordingly to a commentator, in an era of “persistent conflict”<sup>68</sup> which will exist for “the next several decades”.<sup>69</sup> This negates an argument that armed conflicts are not long enough to warrant unique military charges.<sup>70</sup> Nor is the argument that specific offences should only exist when they occur with some degree of frequency particularly persuasive, given the offences in the UCMJ such as abusing a public animal and hazarding a vessel. But fatally problematic for the US pragmatism argument is that law of war offences are detailed and employed against detainees subject to US military commissions.<sup>71</sup> For either reason,

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<sup>67</sup> Interview with Beth Van Schaack, Deputy Chief of the US Office of Global Criminal Justice, describing actions by ICTY prosecutors to employ charges that obviate the need for conflict classification and the use of joint criminal enterprise as a more effective modality than traditional forms of command responsibility.

<sup>68</sup> Pete Geren and George W. Casey Jr, *A Statement on the Posture of the United States Army 2009*, Department of the Army, Washington, DC, 2009.

<sup>69</sup> See also Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences*, Oxford University Press, Oxford, 2012, arguing that war is not an exceptional state but the unfortunate status quo.

<sup>70</sup> Moreover, as discussed above, the US military manual for courts martial has for some time contained a few conflict specific offences.

<sup>71</sup> This inconsistent approach to the way in which the US charges its service members versus the enemy is not new. During the Second World War, the US Army court-martialled its own service members for killing enemy prisoners of war for murder, while prosecuting Germans who committed similar acts against US POWs for violations of the laws and customs of war. See General Military Government Court at Dachau, Germany, *U.S. v. Valentin Bersin et al.*, US011 Case no. 6-24, 1945–1948.

and certainly for both reasons, the US should modify the charges employed against its own service members.

Self-Interest or Self-Inflicted?

How the US Charges Its Service Members for Violating the Laws of War

**Appendix 1: Charge Sheet of Staff Sergeant Robert Bales**

CHARGE SHEET					
1. NAME OF ACCUSED (Last, First, MI) <b>BALES, ROBERT</b>			2. SSN [REDACTED]		3. GRADE OR RANK <b>SSG</b>
5. UNIT OR ORGANIZATION <b>Headquarters and Headquarters Company 2d Battalion, 3d Infantry Regiment (Rear) (Provisional) Joint Base Lewis-McChord, Washington 98433</b>			4. PAY GRADE <b>E-6</b>		
6. CURRENT SERVICE			7. TERM		
a. INITIAL DATE <b>14 Jan 09</b>			b. TERM <b>6 Years</b>		
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED	
a. BASIC <b>\$3243.30</b>	b. SEA/FOREIGN DUTY	c. TOTAL <b>\$3243.30</b>	<b>Pretrial Confinement</b>	<b>11 Mar 12 – present</b>	
II. CHARGES AND SPECIFICATIONS					
10. CHARGE: 1 VIOLATION OF THE UCMJ, ARTICLE 118					
<p><b>SPECIFICATION 1:</b> In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.</p> <p><b>SPECIFICATION 2:</b> In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.</p> <p><b>SPECIFICATION 3:</b> In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.</p> <p><b>SPECIFICATION 4:</b> In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent by means of shooting her with a firearm.</p> <p style="text-align: center;">(SEE CONTINUATION SHEET)</p>					
III. PREFERRAL					
11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]		b. GRADE <b>O-5</b>		c. ORGANIZATION OF ACCUSER <b>5th Battalion, 20th Infantry Regiment</b>	
d. SIGNATURE OF ACCUSER [REDACTED]			e. DATE <b>13 MAR 12</b>		
<p><b>AFFIDAVIT:</b> Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>22</u> day of <u>MARCH</u>, 2012, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <p style="text-align: center;">[REDACTED]</p> <p style="text-align: center;"><i>Typed Name of Officer</i></p> <p style="text-align: center;"><b>O-4</b></p> <p style="text-align: center;"><i>Grade</i></p> <p style="text-align: center;">[REDACTED]</p> <p style="text-align: center;"><i>Signature</i></p> </div> <div style="width: 45%;"> <p style="text-align: center;"><b>3d Brigade (SBCT), 2d Infantry Division</b></p> <p style="text-align: center;"><i>Organization of Officer</i></p> <p style="text-align: center;"><b>Judge Advocate</b></p> <p style="text-align: center;"><i>Official Capacity to Administer Oath</i> <small>(See R.O.M. 307(b) – must be a commissioned officer)</small></p> </div> </div>					

DD FORM 458, MAY 2000

PREVIOUS EDITION IS OBSOLETE.



Appendix 2: Charge Sheet of the US Military Commissions

CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: ABD AL HADI AL-IRAQI		
2. ALIASES OF ACCUSED: SEE ATTACHED APPENDIX A		
3. ISN NUMBER OF ACCUSED (LAST FOUR): 10026		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.		
SPECIFICATION:  SEE ATTACHED CONTINUATION SHEET OF BLOCK II. CHARGES AND SPECIFICATIONS		
III. SWEARING OF CHARGES		
8a. NAME OF ACCUSER (LAST, FIRST, MI) TAWIL, KHALIL, M.	8b. GRADE CPT / O-3	8c. ORGANIZATION OF ACCUSER Office of the Chief Prosecutor, OMC
8d. SIGNATURE OF ACCUSER 		8e. DATE (YYYYMMDD) 20130807
<p><small>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 7th day of June, 2013, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</small></p>		
<p>MARY K. KRIVDA <small>Typed Name of Officer</small></p>		<p>Office of Military Commissions <small>Organization of Officer</small></p>
<p>LTC / O-5 <small>Grade</small></p> <p> <small>Signature</small></p>		<p>Judge Advocate Article 135(a)(1) UCMJ <small>Official Capacity to Administer Oath (See R.M.C. 307(b) must be commissioned officer)</small></p>

MC FORM 458 JAN 2007

**CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI**

**CHARGE I: VIOLATION OF 10 U.S.C. § 950(6), DENYING QUARTER**

**SPECIFICATION:** In that Abd al Hadi al-Iraqi ("Abd al Hadi") (see Appendix A for list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, from in or about 2003 to in or about 2004, at multiple locations in and around Afghanistan and Pakistan, in the context of and associated with hostilities, while in a position of effective command and control over subordinate forces, declare, order, and otherwise indicate to those forces that there shall be no survivors, when it was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist, with the intent to conduct hostilities such that there would be no survivors.

**CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI**

**CHARGE II: VIOLATION OF 10 U.S.C. § 950(4), ATTACKING PROTECTED PROPERTY**

**SPECIFICATION:** In that Abd al Hadi al-Iraqi ("Abd al Hadi") (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 29 September 2003, at or near Shkin, Afghanistan, in the context of and associated with hostilities, intentionally attack a military medical helicopter, which was protected property under the laws of war as a military medical aircraft bearing the emblem and distinctive sign of the Medical Service of armed forces, to wit: the red cross on a white ground, by firing at said military medical helicopter as it attempted to evacuate a United States military casualty from the battlefield, which protected property was the object of the attack and Abd al Hadi knew and should have known of the factual circumstances that established the military medical helicopter's protected status.

The Accused is liable for the above alleged offense as a principal and a co-conspirator, and as a participant in a common plan, as set forth in the section entitled "Common Allegations" which is hereby re-alleged and incorporated by reference as if set forth fully herein.

**CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI**

**CHARGE III: VIOLATION OF 10 U.S.C. § 950(17), USING TREACHERY OR PERPIDY**

**SPECIFICATION 1:** In that Abd al Hadi al-Iraqi ("Abd al Hadi") (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 7 June 2003, at or near Kabul, Afghanistan, in the context of and associated with hostilities, invite the confidence and belief of at least one person that a vehicle appearing to be civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle alongside a bus carrying German military members, resulting in death and injury to at least one person.

**SPECIFICATION 2:** In that Abd al Hadi al-Iraqi ("Abd al Hadi") (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 28 January 2004, at or near Kabul, Afghanistan, in the context of and associated with hostilities, invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle alongside a coalition convoy carrying British and Estonian military members, resulting in death and injury to at least one person.

The Accused is liable for the above alleged offenses as a principal and a co-conspirator, and as a participant in a common plan, as set forth in the section entitled "Common Allegations" which is hereby re-alleged and incorporated by reference as if set forth fully herein.

**CONTINUATION SHEET – MC Form 458 (Jan 2007) – Continuation of the Charges and Specifications in the case of UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI**

**CHARGE IV: VIOLATION OF 10 U.S.C. § 950(28), ATTEMPTED USE OF TREACHERY OR PERFDY**

**SPECIFICATION:** In that Abd al Hadi al-Iraqi ("Abd al Hadi") (see Appendix A for a list of aliases), a person subject to trial by military commission as an alien unprivileged enemy belligerent, did, on or about 29 March 2004, at or near Jalalabad, Afghanistan, in the context of and associated with hostilities, with the specific intent to commit the offense of Using Treachery or Perfidy (10 U.S.C. § 950(17)), invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to attempt to detonate explosives in said vehicle alongside a convoy carrying United States military members with the intent to kill and injure at least one person.

The Accused is liable for the above alleged offense as a principal and a co-conspirator, and as a participant in a common plan, as set forth in the section entitled "Common Allegations" which is hereby re-alleged and incorporated by reference as if set forth fully herein.

### **Appendix 3: Charge Sheet of First Lieutenant William L. Calley**

Charge : Violation of the Uniform Code of Military Justice, Article 118

Specification 1: In that First Lieutenant William L. Calley, Jr., US Army, 40th Company, The Student Brigade, US Army Infantry School, Fort Benning, Georgia (then a member of Company C, 1st Battalion, 20th Infantry) did, at My Lai 4, Quang Ngai Province, Republic of South Vietnam, on or about 16 March 1968, with premeditation, murder four Oriental human beings, occupants of the village of My Lai 4, whose names and sexes are unknown, by means of shooting them with a rifle.

Specification 2: In that First Lieutenant William L. Calley, Jr., US Army, 40th Company, The Student Brigade, US Army Infantry School, Fort Benning, Georgia (then a member of Company C, 1st Battalion, 20th Infantry) did, at My Lai 4, Quang Ngai Province, Republic of South Vietnam, on or about 16 March 1968, with premeditation, murder an unknown number, not less than 30, Oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4, by means of shooting them with a rifle.

Specification 3: In that First Lieutenant William L. Calley, Jr., US Army, 40th Company, The Student Brigade, US Army Infantry School, Fort Benning, Georgia (then a member of Company C, 1st Battalion, 20th Infantry) did, at My Lai 4, Quang Ngai Province, Republic of South Vietnam, on or about 16 March 1968, with premeditation, murder three Oriental human beings whose names and sexes are unknown, occupants of the village of My Lai 4, by means of shooting them with a rifle.

Specification 4: In that First Lieutenant William L. Calley, Jr., US Army, 40th Company, The Student Brigade, US Army Infantry School, Fort Benning, Georgia (then a member of Company C, 1st Battalion, 20th Infantry) did, at My Lai 4, Quang Ngai Province, Republic of South Vietnam, on or about 16 March 1968, with premeditation, murder an unknown number of Oriental human beings, not less than seventy, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4, by means of shooting them with a rifle.