

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

Contents

Overview — United States Penal Sanctions Against Its Service Members For Violations of International Humanitarian Law	1
Cases — United States Military Courts — United States Army	4
Cases — United States Military Courts — United States Marine Corps	7
Cases — United States Military Courts — United States Navy	10

UNITED STATES OF AMERICA¹

Overview — United States Penal Sanctions Against Its Service Members For Violations of International Humanitarian Law

In 2012 the United States military deployment as part and in support of Operation Enduring Freedom in Afghanistan reached the eleven-year mark. Over 100,000 US service members were deployed to Afghanistan at the start of 2012. Yet by July, the US withdrew over 20,000 troops in accordance with President Barack Obama's plan to drawdown US force levels in Afghanistan. This operation represented the vast majority of US military involvement in armed conflict in 2012, the remainder being exponentially smaller special operations missions in places other than Afghanistan, including US drone strikes in Pakistan, Somalia, and Yemen. 2012 saw several instances whereby the US publicly disclosed aspects of its drone strike program, including President Obama discussing the CIA's role during a town hall webcam chat in January,² a news story on US 'kill lists' in May,³ and the White House declassifying and releasing portions of a letter Obama sent to the US Congress on US military operations.⁴ Accordingly, combat operations in Afghanistan account for the overwhelming number of instances where US service members were applying, and in the cases described below, violating, international humanitarian law (IHL)/the law of armed conflict in 2012.

In terms of responding to service members violating IHL, US policy is that 'efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the [Uniform Code of Military Justice] to the extent possible.'⁵ As a result, with one

¹ This entry was prepared by Chris Jenks, Assistant Professor of Law and Criminal Justice Clinic Director, SMU Dedman School of Law. Prior to joining the faculty at SMU, Professor Jenks served in the US Army from 1992-2012, first as an infantry officer in Germany, Kuwait and Bosnia, and then as a Judge Advocate (military lawyer) in Korea and Iraq. In his last assignment he served in the Pentagon as the Chief of the International Law Branch for the US Army. Special thanks to Brandon Bellows and the SMU Dedman law library staff for their assistance.

² Chris Woods, 'Analysis: Obama outs CIA drone campaign – but do his words add up?' (1 February 2012) Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com/2012/02/01/analysis-obama-outs-secret-cia-drone-campaign-but-do-his-words-add-up/>>.

³ Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will', *The New York Times* (online), 29 May 2012 <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1&hp#>.

⁴ The White House 'Presidential Letter — 2012 War Powers Resolution 6-Month Report' (12 June 2012) The White House <<http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>>.

⁵ *Manual for Courts-Martial*, United States Rule for Court-Martial 201(d) (discussion) (2012) ['MCM'].

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

exception, the cases that follow are examples of the US military exercising court-martial jurisdiction over its service members as opposed to jurisdiction exercised by US Federal or State Courts. The cases are illustrative of how the US utilizes its military justice system during armed conflict in response to offenses by its service members against protected persons, most often Iraqi and Afghan nationals.

Authority for the US military justice system derives from the US Constitution, which allows the US Congress to ‘make rules for the government and regulation of the land and naval forces.’⁶ Prior to the Constitution, the Continental Congress issued Articles of War in 1776, which were almost exclusively based on the British Articles of War of 1774. Following the Revolutionary War with Great Britain that yielded the United States, the US Congress continued to revise and reissue the Articles of War until they were superseded by the Uniform Code of Military Justice (UCMJ) in 1951.⁷ The UCMJ is federal law and codified in Title 10 of the US Code, Chapter 47. The US military implements the UCMJ through the Manual for Courts-Martial (MCM), which is the product of an Executive Order issued and updated by the President of the United States.⁸

As the MCM explains: ‘The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.’⁹ The US military strives to achieve these goals by vesting various levels of military command with different types and levels of responsibility and authority within the military justice system. Lower level commanders address the vast majority of service member misconduct with administrative sanctions or non-judicial punishments. The ramifications of these sanctions and punishments should not be overlooked. Through these mechanisms service members lose rank, pay, perform extra duty, receive informal and formal reprimands, and are administratively separated from the US military. Often these separations result in a characterization of service besides ‘honorable’, which can mean the loss of some or even all veterans benefits.¹⁰

For more serious, criminal, misconduct, these commanders will initiate or prefer charges. The charges are forwarded through the chain of command, stopping where an intermediate commander elects to take action ranging from more severe non-judicial punishment up to and including lower levels of court-martial (summary and special), which can result in confinement for up to one year. The cases described below however are of charges forwarded to the highest level, a General Court-Martial Convening Authority, which, as the title suggests, has the authority to convene a general court-martial. This authority includes selecting the military members who will serve on the panel, the military equivalent of a jury. Per the UCMJ, the convening authority is required to detail, or select, service members under his or her command who, in the convening authority’s opinion, ‘are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.’ Additionally, a US service member is not eligible to serve as a panel member

⁶ *United States Constitution* art I § 8 C 14.

⁷ *Uniform Code of Military Justice*, 10 USC § 801 et seq <<http://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47>>.

⁸ The MCM is comprised of the Rules for Courts-Martial, the Military Rules of Evidence, the punitive articles of the UCMJ, and the non-judicial punishment procedures. The President of the United States revised the MCM in 2012 through Executive Order. See Executive Order 2012 Amendments to the Manual For Courts-Martial available at <http://www.dod.gov/dodgc/images/12mcm.pdf>

⁹ MCM, above n 5 pt. I-1(3).

¹⁰ Characterization of service following administrative separation range from the highest, honorable, to general under honorable conditions, to other than honorable.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

when 'he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case'. The most serious charges, carrying the most severe possible penalties (including the death penalty), are referred to a general court-martial. The referral process transfers the case from the military command to a separate, independent, military judge. Service members facing court-martial may elect to be tried by a military judge or by a panel. They are provided military defense counsel at no charge. Alternatively, or in addition to their military defense counsel, an accused service member may be represented by civilian defense counsel but at no cost to the US government.

Of course a US service member may elect to plead guilty or not guilty. One unique aspect of the US military justice system is that service members are able to enter into a pre-trial agreement with the convening authority through which the service member agrees to plead guilty and the convening authority agrees to limit or cap the possible punishment. The service member then pleads guilty in front of a military judge, who conducts a lengthy and rigorous providency inquiry to ensure the service member understands the ramifications of the plea and that he or she is in fact guilty of the offense to which he or she is pleading.¹¹ If the military judge accepts the plea, which is not a foregone conclusion, a sentencing hearing is held before either the military judge or a panel. They determine an appropriate sentence without knowing the terms of the pre-trial agreement between the accused and the convening authority. Once the sentence is announced, them and only then does the military prosecutor inform the military judge of the terms of the agreement. The accused then receives the lesser punishment of the sentence cap from the agreement or the sentence determined following the guilty plea. This is reflected in several of the cases below.

Following trial, the case is returned to the convening authority to approve the findings and sentence. The convening authority may alter findings and/or the sentence but only in a way beneficial to the accused service member, which is also reflected in the cases below. Service members who receive a punitive discharge (meaning the characterization of the military service is either a bad conduct or a dishonorable discharge) and/or are sentenced to a year or more of confinement are entitled to automatic appellate review of their court-martial by a service specific appellate court (Air Force Court of Criminal Appeals (AFCCA), Army Court of Criminal Appeals (ACCA), and Navy-Marine Corps Court of Criminal Appeals (NMCCA)). The judges on the service appellate courts are US military lawyers who serve on the court for a period of 2 to 3 years. Following action by a service appellate court, service members may petition for review by first the Court of Appeal for the Armed Forces (CAAF) and then by the United States Supreme Court, but both those levels of appeal are discretionary. To reinforce the civilian nature of the CAAF, the UCMJ provides that its judges 'shall be appointed from civilian life' by the President for a fifteen year term.¹² Justices on the US Supreme Court are not required to be civilians (though in practice all have been) and they are also appointed by the President, though for a lifetime term.

Pinpointing examples of US enforcement of its obligations under various IHL agreements and treaties is challenging, both legally and practically. Legally there are questions of how the conflicts are characterized and which agreements apply.¹³ Practically, the US military will

¹¹ Some criminal justice systems, including US Federal Court, allow an accused to plead guilty while not acknowledging their guilt. This option is not available in the US military justice system. And the providency inquiry referenced above is a colloquy between the military judge and, with a few exceptions, the accused service member, not his defense counsel.

¹² MCM, above n 5 at art 142.

¹³ The US answer is largely policy based. Pursuant to a directive, '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

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

ordinarily charge an individual subject to the UCMJ with a specific violation of that code rather than a violation of the law of war. Thus where a US service member is alleged to have wrongfully killed an Iraqi or Afghan, that service member is charged with murder in violation of Article 118, an enumerated punitive article of the UCMJ.

This charging decision hampers the ability to separate out examples of where the US has enforced its IHL 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]. But the US position remains that its efforts, however styled, 'provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the [Geneva Conventions]....'.¹⁴ The task of explaining US (or any State's) enforcement efforts is further complicated by the fact that the appropriate response to lower level IHL violations is through mechanisms other and less than criminal prosecution for which there are few if any publicly available records. These actions include having offending service members undergo corrective training, issuing informal or formal reprimands (with formal reprimands effectively ending a service member's career), non-judicial punishment (which as previously discussed can result in demotion in rank, loss of pay, extra duty and restriction) and/or administrative separation proceedings. The key to whether these lesser responses fulfill the US' IHL enforcement obligations is whether the action is considered 'measures necessary for the suppression of all acts contrary to the provisions of the [Geneva] Convention[s]'.¹⁵

Cases — United States Military Courts — United States Army

• *United States v Behenna* 71 MJ 228 (United States Court of Appeals for the Armed Forces, 2012)

The US Army court-martialed Behenna, a commissioned officer (Lieutenant) in 2009 for murdering a recently released Iraqi detainee, Ali Mansur. Two weeks after an improvised explosive device (IED) claimed the lives of two of his soldiers, Behenna's unit raided a suspected insurgent safe house, captured Mansur, and seized a machine gun and ammunition. After some 10 days of questioning US military intelligence personnel did not believe there was sufficient evidence to continue to detain Mansur and directed that he be released. Behenna was detailed to transport Mansur back to his village but, convinced that Mansur was responsible for the IED attack, Behenna pulled over, marched Mansur into a culvert at gunpoint and demanded he admit his involvement. When Mansur claimed to not have any additional information Behenna shot him twice, killing him. Behenna testified that Mansur threw a piece of concrete at him while Behenna was looking at the translator and that when

operations' Department of Defense Directive 2311.01E, 'DoD Law of War Program' [4.1] <<http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>>. Under this policy, the law of war is defined as 'encompass[ing] all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.' - [3.1]. This policy results in the application of international armed conflict standards of conduct to all conflicts 'no matter how characterized.' This approach also provides criminal sanctions for those actions that could be characterized as 'grave breaches' of the Geneva Conventions or Common Article 3 [accord the *US War Crimes Act* 18 USC 2441]; other violations of the law or armed conflict may result in criminal or administrative sanctions: see, eg, *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) art 146 ['Geneva Convention IV'].

¹⁴ Geneva Convention IV, art 146.

¹⁵ Ibid.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

he turned back Mansur was reaching for his gun, which caused Behenna to shoot Mansur in self-defense. Contrary to his pleas, a military panel found Behenna guilty of unpremeditated murder and assault, but found him not guilty of making a false official statement. Behenna was sentenced to dismissal from the Army (the officer equivalent of a dishonorable discharge), confinement for twenty-five years and total forfeiture of all pay and allowances. The convening authority subsequently reduced the period of confinement to twenty years. On appeal the ACCA affirmed the findings and the sentence.

In 2012, the CAAF reviewed two issues on appeal: whether the military judge improperly instructed the panel at trial on Behenna's ability to lose and regain the right to self-defense, and whether the government failed to disclose favorable and material information to Behenna's prejudice. As to the self-defense instruction, the CAAF concluded that 'because [Behenna] was the initial aggressor, and because there was no evidence to support a finding of escalation or withdrawal, a rational member could have come to no other conclusion than that [Behenna] lost the right to self-defense and did not regain it.'¹⁶ Although the CAAF found the military judge's instruction on escalation was erroneous, it was harmless beyond a reasonable doubt as escalation was not in issue. Behenna also argued that the government's failure to turn over the changed post-verdict opinion of one of its non-testifying expert witnesses warranted a mistrial. To this claim the CAAF held that 'even assuming that the information [Behenna] asserts the government failed to disclose was favorable, it was immaterial in regard to findings and sentencing because the evidence substantially overlapped with other evidence presented by [Behenna].' The CAAF dismissed Behenna's request, noting the changed opinion had 'little evidentiary value' due to its similarity with defense counsel's expert witnesses and because the government's witness would have been subject to impeachment for his inconsistency in opinion.

The CAAF affirmed the judgment of the ACCA.

☛ *United States v Girouard* [2012] Fort Campbell, Kentucky

The US Army court-martialed Girouard, a non-commissioned officer (Staff Sergeant), in 2007 for conspiracy to commit premeditated murder, and premeditated murder in connection with the shooting of three Iraqi detainees in 2006. Contrary to his pleas, a panel found Girouard guilty of conspiracy to obstruct justice, obstruction of justice, violating a lawful general order, and negligent homicide and not guilty of premeditated murder and conspiracy to commit premeditated murder. The panel sentenced Girouard to dishonorable discharge, confinement for ten years, total forfeiture of all pay and allowances, and reduction in rank to the lowest enlisted grade (E-1). In 2011, the CAAF overturned and dismissed the portion of his conviction pertaining to negligent homicide, and remanded his case to the ACCA for a reassessment of his sentence. The ACCA subsequently ordered a sentencing rehearing.

In February 2012, a military panel resentenced Girouard, this time to confinement for 180 days, reduction in rank, restricted him to post, and reprimanded him. The panel declined to discharge Girouard.¹⁷ After the sentencing hearing, Girouard requested and received a general discharge under honorable conditions.¹⁸

¹⁶ *United States v Behenna* 71 MJ 228, (United States Court of Appeal for the Armed Forces, 2012) 238.

¹⁷ 'Panel Decides Against Discharge in Cover-Up Case' *Associated Press* (online), 1 February 2012 <<http://www.whas11.com/news/local/Panel-decides-against-discharge-in-cover-up-case-138534639.html>>.

¹⁸ 'Former Soldier Ray Girouard Starts Life Over with Cleared Name' (12 April 2012) WBIR.com, <<http://www.wbir.com/news/article/215893/2/Former-Soldier-Ray-Girouard-starts-life-over-with-cleared-name>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

- *United States v Vela* 71 MJ 283 (United States Court of Appeals for the Armed Forces, 2012)

The US Army court-martialed Vela, a noncommissioned officer (Sergeant), in 2008 for murdering an unarmed Iraqi man and attempting to cover up the crime. In May 2007, Vela, one of three US Army snipers operating as a team, fell asleep while on watch in a sniper hide-site outside Jurf As-Sakhr, Iraq. An unarmed Iraqi man who owned the land on which the sniper team was located stumbled onto the hide-site, apparently on his way to turn on an irrigation pump. US Army Staff Sergeant Hensley, the sniper team leader, radioed to his higher headquarters falsely claiming the team had spotted an Iraqi man holding an AK-47 approaching the hide-site. After requesting permission to 'execute a close kill' on the fictional armed man, Hensley ordered Vela to shoot the Iraqi man. From less than a foot away, Vela fired one shot into the man's head with a 9mm pistol. Hensley then planted an AK-47 on the body. Contrary to his pleas, a panel found Vela guilty of unpremeditated murder, making a false official statement, and wrongfully placing a weapon with the remains of the Iraqi man. The panel sentenced Vela to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade (E-1). On appeal, the ACCA affirmed the findings and sentence with the exception of the forfeitures. Vela then appealed to the CAAF.¹⁹

In 2012, the CAAF reviewed two issues: whether the military judge erred in denying Vela's motion to dismiss the charges or, alternatively, to disqualify trial counsel on *United States v Kastigar* grounds (use of immunised testimony), and whether the evidence presented against Vela was legally sufficient to sustain his conviction for placing the AK-47 on the Iraqi man's body. On the *Kastigar* claim, the CAAF found that the military judge was not clearly erroneous in concluding that the prosecution did not directly or indirectly use immunised testimony against Vela.²⁰ As to the legal sufficiency of his conviction, Vela argued that he could not have aided and abetted Hensley because he did not actually take action in placing the weapon on the dead Iraqi's body. The CAAF rejected Vela's characterization of inaction, commenting that Vela 'participated in the offense by setting the stage for the offense and later participating in the cover-up of the incident.'²¹ The CAAF found that Vela's behavior before and after Hensley placed the weapon on the deceased body supported the required intent element.

The CAAF affirmed the ACCA decision.

- *United States v Wagon* [2012] Fort Lewis, Washington

In 2010, the US Army preferred court-martial charges against Wagon, an enlisted Soldier (Specialist), for his role on the 'kill team', an informal group of US Army Soldiers who murdered Afghan civilians for sport and attempted to portray the killings as legitimate. The 2011 entry more fully describes the kill team's actions and its other members. The Army charged Wagon with murder, conspiracy to commit murder, conspiracy to commit assault, assault with a dangerous weapon, possessing a portion of the skull of one of the murdered Afghan civilians, and obstructing justice. A 2010 pre-trial hearing recommended that there was insufficient evidence to prosecute Wagon. In 2011, the convening authority decided to

¹⁹ *United States v Vela* 71 MJ 283 (United States Court of Criminal Appeal, 2012), 284–85.

²⁰ *Ibid*, 290.

²¹ *Ibid*, 287

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

drop the charges of possessing a portion of the skull and obstructing justice, but referred the remaining charges to a general court-martial.²² In early 2012, the Army dismissed without prejudice the remaining charges against Wagon. The Army did not indicate why the charges were dismissed other than a statement that the action was taken 'in the interests of justice.' By dismissing the charges without prejudice, the Army left open the possibility of refile charges against Wagon in the future. Following the dismissal of charges, Wagon remains an active duty member of the US Army.²³

☛ *Afghanistan Quran Burning Incident* [2012] Fort Benning, Georgia

In February 2012, US service members removed over 1,500 books, including 500 copies of the Quran, from the Parwan Detention Facility at Bagram Airfield, Afghanistan. The service members removed the books because detainees had written extremist messages in them. The books, including the Quran, were initially boxed up but later were mistakenly sent to an incinerator.²⁴ Local Afghan garbage collectors reported finding several charred Qurans, which sparked several days of riots and protests. The protests claimed the lives of fourteen people, including two US service members and prompted US President Obama to apologize to then Afghan President Karzai for the burning of the Qurans.²⁵ The US Army investigated the burning and determined that service members had made unintentional but costly mistakes. Ultimately the Army imposed unspecified administrative non-judicial sanctions or punishments on six unidentified soldiers, including four officers.²⁶

Cases — United States Military Courts — United States Marine Corps

☛ *United States v Hutchins* 2012 WL 933067 (United States Navy–Marine Corps Court of Criminal Appeals, 2012)

The US Marine Corps court-martialed Hutchins, a noncommissioned officer (Sergeant), in 2007 for leading a squad of US Marines in kidnapping and murdering a retired policeman in 2006 in Hamdania, Iraq. Contrary to his pleas, a panel found Hutchins guilty of making a false official statement, unpremeditated murder, conspiracy and larceny. The panel sentenced Hutchins to a dishonorable discharge, confinement for 15 years and reduction to the lowest enlisted grade. On appeal, the NMCCA determined that the record of trial failed to adequately address 'the process by which one of [Hutchins'] three defense counsel terminated his participation in the case.'²⁷ Upon further review of the record, the NMCCA

²² 'Lewis-McChord Soldier Will Face Trial on Murder Charge', *Seattle Times* (online), 31 January 2011 <http://o.seattletimes.nwsources.com/html/localnews/2014093662_wagon1m.html>.

²³ 'Charges Dismissed Against Soldier in Afghan Sport Killing Case, Military Says' CNN (Atlanta, US), 4 February 2012 <<http://www.cnn.com/2012/02/03/world/asia/afghanistan-sport-killing/index.html?iref=allsearch>>.

²⁴ Craig Whitlock 'US troops tried to burn 500 Korans in blunder, investigative report says', *Washington Post* (Washington DC, US) 27 August 2012

<http://www.washingtonpost.com/world/national-security/military-disciplines-9-service-members-in-connection-with-afghan-incidents/2012/08/27/a25b6eaa-f065-11e1-8b5e-add8e2fb7c95_story.html>.

²⁵ 'Obama forced to apologise to Karzai for Koran burnings in Afghanistan', *The Australian* (online), 24 February 2012

<<http://www.theaustralian.com.au/news/world/obama-forced-to-apologise-to-karzai-for-koran-burnings-in-afghanistan/story-e6frg6so-1226280166800?nk=84d79343ea0f71ea3a0cab6cc4674abd>>.

²⁶ 'No Criminal Charges for Soldiers in Koran Burning' ABC News (online), 27 August 2012

<<http://abcnews.go.com/Blotter/criminal-charges-soldiers-koran-burning/story?id=17090174>>.

²⁷ *United States v Hutchins*, 69 MJ 282 (Navy-Marine Corps Court of Criminal Appeal, 2011) 283.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

found a procedural error that ‘warranted a presumption of prejudice’ and a setting aside of the trial court’s findings and sentence.²⁸ Specifically, the NMCCCA concluded that Hutchins’ attorney-client relationship was wrongfully severed without good cause when his counsel withdrew. The Judge Advocate of the Navy certified the decision for consideration to the CAAF, petitioning for review of the NMCCCA findings of severance and asserting that the NMCCCA erroneously set aside the trial findings and sentence.²⁹

On appeal to the CAAF, the government argued that the NMCCCA erred in finding severance of the attorney-client relationship and the presumption of prejudice attached to the finding. The CAAF held that the trial record lacked a basis for the NMCCCA’s severance conclusion because it lacked fully developed reasons for defense counsel’s absence and departure. In its assessment of prejudice, the CAAF determined that a ‘standard formula for assessing prejudice against the defense’ must apply, under which ‘the defense must establish that the error produced material prejudice to the substantial rights of the accused.’³⁰ Here the severance error did not ‘materially prejudice’ Hutchins’ substantial rights.³¹ The CAAF reversed and remanded the case to the NMCCCA.³²

On remand, the NMCCCA considered four additional assignments of error: whether the Secretary of the Navy engaged in unlawful command influence (UCI) concerning Hutchins’ case, whether Hutchins had ineffective assistance of counsel, whether Hutchins’ sentence was excessive and disproportionate in comparison to other members of his squad, and whether the military judge erred in denying instruction on the lesser included offense (LIO) of voluntary manslaughter.³³

The NMCCCA found Hutchins’ UCI claims without merit. The court concluded that the comments made by the Secretary of the Navy regarding Hutchins’ sentence, which were made public eighteen months after the convening authority approved the sentence, ‘could not reasonably be perceived by a disinterested member of the public as UCI or otherwise indicative of an unfair proceeding in this court-martial.’³⁴ The NMCCCA also disagreed with Hutchins’ sentence disproportionality and appropriateness claims. The court held that Hutchins’ sentence did not unlawfully differ from his co-conspirators’ sentences, and that any disparity was permissible because Hutchins was squad leader, he had initiated the conspiracy plan, and he was the only Marine in his squad convicted of murder. As to Hutchins’ LIO assertion, the court appropriately instructed the jury on voluntary manslaughter. In rejecting Hutchins’ ineffective assistance of counsel claims, the court noted that Hutchins’ error really took issue with aspects of defense counsel’s strategy and not the actual assistance he received at trial. Hutchins had complained that his defense team was unprepared to present mental health evidence both pre-trial and at trial. The court, however, refused to ‘second-guess’ defense counsel’s strategy, noting that counsel was experienced, and effective, in defending Hutchins.³⁵

The NMCCCA affirmed the findings and the sentence.

²⁸ *Ibid.*

²⁹ *Ibid.*, 283–84.

³⁰ *Ibid.*, 292.

³¹ *Ibid.*, 293.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*, 4.

³⁵ *Ibid.*, 5–7, 9–10.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

☛ *United States v Wuterich* [2012] Camp Pendleton, California

The US Marine Corps court-martialed Wuterich, a non-commissioned officer (Staff Sergeant) in connection with the killing of 24 unarmed civilians in Haditha, Iraq in 2005. Then-Staff Sergeant Wuterich ordered the storming of two houses after a roadside improvised explosive device killed a fellow Marine. By his own admission, Wuterich ordered the Marines under his command to 'shoot first, ask questions later,' resulting in the deaths of 24 Iraqis, including several children and a 76 year old man in a wheelchair. The Marine Corps charged Wuterich with multiple counts of involuntary manslaughter, assault with a dangerous weapon, and negligent dereliction of duty.

In January 2012, Wuterich pleaded and was found guilty by a military judge on one count of negligent dereliction of duty. Although the military judge sentenced Wuterich to 90 days confinement, the terms of Wuterich's pre-trial agreement with the convening authority did not allow for any confinement.³⁶ In February 2012, Wuterich received a general discharge under honorable conditions.³⁷

The civilian deaths at Haditha, also known as the Haditha massacre, represent one of the most controversial incidents of the US war in Iraq. The incident resulted in a Time Magazine article,³⁸ an angry diatribe at the US Congress,³⁹ 60 Minutes stories,⁴⁰ and news stories and outrage from around the world. How one views Haditha and its aftermath very much depends on one's perspective on a number of other issues. Among other things, the resulting process is a reminder of how the US criminal justice system 'prioritizes the rights of the accused over a desire to punish criminals.'⁴¹

☛ *United States v Chamblin* [2012] Camp Lejeune, North Carolina

The US Marine Corps court-martialed Chamblin, a non-commissioned officer (Staff Sergeant), for his role in urinating on and posing with the bodies of dead Taliban insurgents in Afghanistan. In July 2011, then-Staff Sergeant Chamblin's scout-sniper unit killed several Taliban insurgents near Sandala, Afghanistan. Thereafter, several members of the unit, including Chamblin, posed with and filmed themselves urinating on the dead bodies. The video was uploaded to YouTube in early 2012, went viral and drew widespread condemnation. Chamblin pleaded and was found guilty by a military judge of dereliction of duty for failing to supervise junior marines, wrongfully posing with a casualty, and wrongfully urinating on a deceased enemy combatant. The military judge sentenced

³⁶ 'Marine in Haditha, Iraq, Killings Gets Demotion, Pay Cut' CNN (online), 24 January 2012 <<http://www.cnn.com/2012/01/24/justice/california-iraq-trial/index.html?iref=allsearch>>.

³⁷ 'Military: Frank Wuterich No Longer in the Marine Corps' San Diego Union-Tribune (online), 20 February 2012 <<http://www.utsandiego.com/news/2012/Feb/20/military-frank-wuterich-no-longer-in-the-marine/>>.

³⁸ Tim McGirk, 'Collateral Damage or Civilian Massacre in Haditha?', Time Magazine (online), 19 March 2006 <<http://content.time.com/time/world/article/0,8599,1174649,00.html>>.

³⁹ 'Rep. John Murtha: Pentagon Tried to Hide Hadith', NPR News (online), 30 May 2006 <<http://www.npr.org/templates/story/story.php?storyId=5439344>>.

⁴⁰ Michelle Singer, 'The Killings in Haditha' CBS News (online), 15 March 2007 <<http://www.cbsnews.com/news/the-killings-in-haditha/>>.

⁴¹ James Joyner, 'Why We Should Be Glad the Haditha Massacre Marine Got No Jail Time', The Atlantic (online), 25 January 2012 <<http://www.theatlantic.com/international/archive/2012/01/why-we-should-be-glad-the-haditha-massacre-marine-got-no-jail-time/251993/>>.

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

Chamblin to confinement for 30 days, a \$2,000 fine, and reduction to lance corporal (E-3). However, Chamblin's guilty plea was part of a pre-trial agreement with the General Court-Martial Convening Authority. As per that agreement, the Convening Authority agreed to only approve the better (from Chamblin's perspective) of what the military judge imposed as punishment or reduction to sergeant (E-5) and forfeiture of \$500.⁴² As a result, Chamblin was reduced to sergeant (E-5) and forfeited \$500.

☛ *Posing With and Urinating on Dead Belligerents* [2012] Marine Corps Base Quantico, Virginia

Three unnamed marines, all non commissioned officers, pleaded guilty as part of non judicial punishment proceedings after urinating on and posing with the bodies of dead Taliban insurgents. Two of the marines pleaded guilty to wrongfully posing for a photograph with human casualties and admitted to the urination, which was considered conduct prejudicial to good order and discipline, as well as wrongfully posing with a human casualty. The third marine pleaded guilty to failing to report the mistreatment of human casualties by other marines and to making a false official statement to the Navy Criminal Investigative Service.⁴³

Cases — United States Military Courts — United States Navy

☛ *Afghanistan Quran Burning Incident* [2012]

Two unnamed Navy sailors who participated in the previously discussed burning of Qurans were sent back to the United States.⁴⁴ The Navy had considered but ultimately did not pursue administrative action against one of the sailors.⁴⁵

CHRIS JENKS

⁴² 'Staff NCO to Lose Rank in Urination Video' Marine Corps Times (online), 20 December 2012 <<http://www.marinecorpstimes.com/article/20121220/NEWS/212200321/Staff-NCO-lose-rank-urination-video>>.

⁴³ 'No Court-Martial in Koran, Urination Incidents' Military Times (online), 27 August 2012 <<http://www.militarytimes.com/article/20120827/NEWS/208270316/No-courts-martial-in-Koran-urination-incidents>>.

⁴⁴ 'Admin. Discipline Recommended in Quran Burning', Seattle Times (online), 19 June 2012 <http://seattletimes.com/html/nationworld/2018472946_apusafghanistanquranburning.html>.

⁴⁵ 'Pentagon Hands Down Punishment Over Burning Korans, Urinating on Corpses' Fox News (online), 27 August 2012 <<http://www.foxnews.com/politics/2012/08/27/pentagon-hands-down-punishment-over-burning-korans-urinating-on-corpses/>>.