

ARTICLES

STRENGTHENING AMERICAN WAR CRIMES ACCOUNTABILITY

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The United States needs to improve accountability for its service members' war crimes. President Donald J. Trump dangerously intensified a growing national misunderstanding regarding the critical nexus between compliance with the laws of war and the health and efficacy of the U.S. military. This Article pushes back against such confusion by demonstrating why compliance with the laws of war, and accountability for violations of these laws, together constitute vital duties owed to our women and men in uniform.

This Article reveals that part of the fog of war surrounding criminal accountability for American war crimes is due to structural defects in American military law. It analyzes such defects, including the military's failure to prosecute war crimes as war crimes. It carefully highlights the need for symmetry between the disparate American approaches to its enemies' war crimes and its own service members' battlefield offenses.

To help close the current war crimes accountability deficit, we propose a comprehensive statutory remedial scheme that includes: the enumeration of specific war crimes for military personnel analogous to those applicable to unlawful enemy

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belligerents as found in the Military Commissions Act; the formal addition of command responsibility liability doctrine to military criminal law; the provision of criminal defenses relevant to war crimes allegations; and the extension of court-martial jurisdiction over all enemy belligerents using the same enumerated war crimes proposed for U.S. service members.

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INTRODUCTION

The United States faces periodic and appropriate criticism for failing to hold its service members accountable for their battlefield criminality.¹ An example of impunity that prompted such condemnation occurred in 2019, when President Donald J. Trump granted pardons to military personnel either convicted of or facing charges for offenses that qualify as war crimes.² These pardons exacerbated a prevalent impression that

1. See, e.g., Maha Hilal, *Abu Ghraib: The Legacy of Torture in the War on Terror*, AL JAZEERA (Oct. 1, 2017), <https://www.aljazeera.com/indepth/opinion/abu-ghraib-legacy-torture-war-terror-170928154012053.html> [<https://perma.cc/2327-LJWS>] (arguing that accountability means more than a few criminal prosecutions and stating that “[f]or the United States in the war on terror, accountability has meant little other than prosecuting the so-called ‘bad apples’ . . . to make the point that they are an aberration, not a product of a system-wide policy of sanctioned abuse”); James Palmer, *America Loves Excusing Its War Criminals*, FOREIGN POL’Y (May 21, 2019, 6:14 PM), <https://foreignpolicy.com/2019/05/21/america-loves-excusing-its-war-criminals-trump-pardons> [<https://perma.cc/DW5S-FWGT>] (describing feelings of resentment against the U.S. military in places from Iraq to Japan, animated in part by a “long history of America’s failure to convict or punish its own personnel for war crimes,” particularly in Asia, and noting a widespread “anti-American tradition fueled by the United States’ own repeated failures to try its own soldiers fairly”); *USA/Somalia: Shroud of Secrecy Around Civilian Deaths Masks Possible War Crimes*, AMNESTY INT’L (Mar. 20, 2019), <https://www.amnesty.org/en/latest/news/2019/03/usa-somalia-shroud-of-secrecy-around-civilian-deaths-masks-possible-war-crimes> [<https://perma.cc/JV5K-3KQV>] (demanding that the U.S. government investigate reports of U.S. air strikes in Somalia that killed civilians).

2. Rachel E. VanLandingham, *Betrayer in Chief? Pardoning Troops Accused or Convicted of Murder Would Wound Military*, USA TODAY (May 21, 2019, 11:17 AM), <https://www.usatoday.com/story/opinion/2019/05/21/donald-trump-military-pardons-column/3744561002> (warning that President Trump’s pardon of a convicted war criminal, plus his threatened preemptive pardons of numerous U.S. service members accused of war crimes, will have a negative effect on U.S. “military good order and discipline”); Nicholas Wu & John Fritze, *Trump Pardons Servicemembers in High Profile War Crimes Cases*, USA TODAY (Nov. 15, 2019, 7:57 PM), <https://www.usatoday>

America is indifferent to its own battlefield misconduct. This perception of impunity degrades U.S. legitimacy. Additionally, the underlying truth it reveals—that the U.S. military has not been fulfilling its responsibility to appropriately punish war crimes—frustrates the governing legal regime’s humanitarian goals, challenges the military’s attainment of operational and strategic objectives, and harms individual service members.

This negative impression of America’s treatment of war crimes contrasts starkly with our modern military’s self-perception as a professional force, one that justly punishes those who fail to follow the laws of war.³ It also contrasts with most Americans’ belief that our military predominantly complies with the laws of war and that they *should* so comply—and that the widespread atrocities by U.S. forces in Vietnam have been left behind.⁴ On the other hand, criticism of how the United States handles war crimes that its own service members

.com/story/news/politics/2019/11/15/donald-trump-pardons-clint-lorance-mathew-golsteyn-war-crime-cases/1229083001 [https://perma.cc/S67R-4B4Z]; see also Margaret Colgate Love, *War Crimes, Pardons and the Attorney General*, LAWFARE (May 22, 2019, 6:42 PM), https://www.lawfareblog.com/war-crimes-pardons-and-attorney-general [https://perma.cc/ZPH7-RF3E] (noting that “pardoning war crimes still pending within the military justice system could erode the legitimacy of military law and undercut good order and discipline in the ranks” and “prejudice international relations and potentially jeopardize the safety of U.S. personnel abroad”); Danny Sjursen, *Whitewashing War Crimes Has Become the American Way*, COMMON DREAMS (June 7, 2019), https://www.commondreams.org/views/2019/06/07/whitewashing-war-crimes-has-become-american-way [https://perma.cc/FQ73-XQST] (observing, in the wake of the President’s pardons of war criminals and threatened preemptive pardons, that “[t]he U.S. military and the government in Washington have rarely held accused American war criminals accountable”).

3. See *infra* Section I.A.1; see also U.S. DEP’T OF DEF., LAW OF WAR MANUAL 70 (2016) [hereinafter DOD LOW MANUAL] (explaining that Department of Defense policy and doctrine make clear the importance of compliance with, implementation of, and enforcement of the law of war). See generally John R. Allen, *Keynote: The Modern Laws of War*, 46 SW. L. REV. 327, 329 (2017) (“[T]hese laws lay at the foundation of our very way of warfighting.”); Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 958 & n.64 (1998) (explaining that the concept of professional military forces includes regulation by and compliance with the laws and customs of war).

4. See generally Cody J. Foster, *Did America Commit War Crimes in Vietnam?*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/opinion/did-america-commit-war-crimes-in-vietnam.html [https://perma.cc/K9QW-3WVH] (arguing that American war crimes in Vietnam went far beyond the My Lai massacre); Howard Jones, *The Lessons of My Lai Still Resonate*, WASH. POST (Mar. 16, 2018, 11:08 AM), https://www.washingtonpost.com/opinions/the-lessons-of-my-lai-still-resonate/2018/03/15/4d35613a-2708-11e8-874b-d517e912f125_story.html (noting that following My Lai, “the Army sought to restore its image by developing a volunteer force based on personal character, along with improved discipline and training”).

commit seems rather consonant—disconcertingly so—with American society’s view regarding punishment of its service members for war crimes. Today, many Americans—with President Trump egging them on—seem to support impunity for war crimes that U.S. service members commit.⁵

These seemingly opposing views reflect that the American public fails to appreciate that accountability for war crimes is essential for the compliance it desires. We therefore strongly set out this link in detail in the first part of this Article.⁶

Away from the din of public opinion and President Trump’s tweets, the reality of U.S. military accountability for serious violations of the laws of war—typically referred to as war crimes—is nuanced. The current, perhaps endemic, political pressure to avoid domestic prosecutions of service members for war crimes, combined with certain systemic flaws, create a sinister war crimes accountability deficit. This deficit is sinister not only because it quietly corrodes the military’s internal discipline and moral compass, but also because it degrades the United States’ compliance with its state responsibility obligations to ensure such

5. See Jared Keller, *Trump’s Pardon Is in Line with Americans’ Views About War Crimes*, PAC. STANDARD (May 8, 2019), <https://psmag.com/news/trumps-pardon-is-in-line-with-americans-views-about-war-crimes> [<https://perma.cc/75YA-53JF>] (noting a 2018 poll that claimed “77 percent of Americans believed U.S. service members shouldn’t be prosecuted for overseas war crimes simply because ‘war is a stressful situation and allowances should be made’”); see also Scott D. Sagan & Benjamin A. Valentino, *Do Americans Approve of Trump’s Pardons for Court-Martialed Military Officers?*, WASH. POST (Dec. 16, 2019, 7:38 AM), <https://www.washingtonpost.com/politics/2019/12/16/do-americans-approve-trumps-pardons-court-martialed-military-officers> (concluding that while “Americans show much less tolerance for war crimes than they did during the war in Vietnam . . . [m]any Americans appear to believe that if troops are fighting a just war, they should be excused from responsibility for violent acts, even war crimes”); Simon Denyer, *One-Third of Americans Would Support a Preemptive Nuclear Strike on North Korea, Researchers Say*, WASH. POST (June 25, 2019, 3:16 AM), https://www.washingtonpost.com/world/one-third-of-americans-would-support-a-preemptive-nuclear-strike-on-north-korea-researchers-say/2019/06/25/25ed1314-9711-11e9-a027-c571fd3d394d_story.html (“[T]he U.S. public exhibits . . . a shocking willingness to support the killing of enemy civilians.”). But see Charli Carpenter & Alexander H. Montgomery, *Americans Want Their Leaders to Obey the Laws of War*, FOREIGN POL’Y (June 27, 2019, 2:02 PM) <https://foreignpolicy.com/2019/06/27/americans-want-their-leaders-to-obey-the-laws-of-war> [<https://perma.cc/3J9Y-R67W>] (characterizing as categorically false the conclusion that Americans do not care about war crimes, finding instead that “Americans care deeply about the protection of civilians” and that studies showing otherwise are skewed due to questioning methodology).

6. See *infra* Section I.A.

accountability⁷ and provides ammunition for those generally critical of military tribunals.⁸ Plus, this accountability deficiency dilutes the important signaling effects regarding U.S. commitment to accountability for war crimes that military adjudicatory processes can and should have.⁹

Current structural defects outlined in this Article exacerbate the inherent challenges of ensuring accountability for battlefield crimes, contributing to this deficit.¹⁰ While these existing challenges are often practical, such as limited availability of evidence, political pressure (of a type not unique to America) often accompanies such prosecutions.¹¹

7. See Int'l Comm. of the Red Cross, *Rule 149. Responsibility for Violations of International Humanitarian Law*, INT'L HUMANITARIAN L. DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149 (explaining the application of the general rule of state responsibility for actions of its organs in the law of armed conflict context as a "norm of customary international law applicable to violations committed in both international and non-international armed conflicts").

8. See Susannah George, *Rep. Duncan Hunter Says Footage Exonerates Accused Navy SEAL, Vows to Seek Trump Pardon*, NAVY TIMES (May 8, 2019), <https://www.navytimes.com/news/your-navy/2019/05/09/rep-duncan-hunter-says-footage-exonerates-accused-navy-seal-vows-to-seek-trump-pardon> [<https://perma.cc/AY8Z-BFTZ>] (describing a U.S. Congressman's doubt that the U.S. military could fairly prosecute a Navy SEAL for war crimes); Shane Reeves & Matthew Milikowsky, *Should the U.S. Military Receive the Benefit of the Doubt when Investigating Itself for Alleged War Crimes?*, LAWFARE (June 3, 2016, 8:30 AM), <https://www.lawfareblog.com/should-us-military-receive-benefit-doubt-when-investigating-itself-alleged-war-crimes> [<https://perma.cc/53J9-KU7H>] (noting the debates regarding efficacy and fairness of military justice as an accountability mechanism for U.S. war crimes).

9. Such signaling effects and the soft power they can help generate should not be underestimated. See Amy K. Lehr, *Pardoning Alleged War Criminals: Bad for the United States, Bad for the World*, CTR. FOR STRATEGIC & INT'L STUD. (May 24, 2019), <https://www.csis.org/analysis/pardoning-alleged-war-criminals-bad-united-states-bad-world> [<https://perma.cc/22GH-VCWR>] (outlining the numerous negative consequences of the United States' lack of commitment to accountability for war crimes, such as signaling to authoritarian regimes that they are free to commit such crimes with impunity).

10. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 331 (2010) (explaining that despite long-standing U.S. orders to report war crimes, there is a perception that "telling superiors of a possible crime committed by another soldier or Marine is 'ratting out' a buddy" and that this perception "inhibits reporting"); S.N., *Is Donald Trump Preparing Pardons for Troops Accused of War Crimes?*, ECONOMIST (May 21, 2019), <https://www.economist.com/democracy-in-america/2019/05/21/is-donald-trump-preparing-pardons-for-troops-accused-of-war-crimes> ("It is already extremely difficult for a prosecutor to reconstruct a shooting incident in a war zone and prove beyond a reasonable doubt that the shooter acted maliciously and not in reasonable fear of his or her life. Only the most egregious offenders, those whose actions were dreadful enough to have shocked their own comrades, come to trial.").

11. See, e.g., Camila Domonoske, *Israeli Soldier Convicted of Manslaughter for Killing Wounded Palestinian*, NAT'L PUB. RADIO (Jan. 4, 2017, 6:50 AM), <https://www.npr.org/>

For example, many Americans felt that Lieutenant William L. Calley's horrendous actions were either justified, or that he was simply a scapegoat for the 1960s My Lai tragedy (during which a U.S. Army platoon massacred hundreds of Vietnamese civilians) and that he should not have been prosecuted for murder.¹²

More recently, the U.S. President and Commander-in-Chief demonstrated similar politicized misunderstanding of the need for war crimes accountability. During his Administration, President Trump publicly condemned the prosecution of American military "heroes" for their alleged war crimes.¹³ Worse, he pardoned war criminals both after their military convictions¹⁴ as well as during the court-martial process.¹⁵ These actions were predicated not on mercy, but on the perversion of the entire war crimes accountability regime, seemingly in order to score political points. Clarifying the need for accountability, as well as strengthening the mechanism for achieving it, will help counter the harm that such actions have inflicted on our armed forces.

sections/thetwo-way/2017/01/04/508162405/israeli-soldier-convicted-of-manslaughter-for-killing-wounded-palestinian [https://perma.cc/6QN3-F73L] (describing deep divisions in Israeli public opinion regarding the military prosecution of Israeli soldier Elor Azaria, who shot and killed a wounded Palestinian assailant in the head as he lay incapacitated in 2016, noting that "large segments of the Israeli public . . . have rallied behind him").

12. See Ian Shapira, *He Was America's Most Notorious War Criminal, but Nixon Helped Him Anyway*, WASH. POST (May 25, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/05/25/he-was-americas-most-notorious-war-criminal-nixon-helped-him-anyway> (describing Calley's vast public support, noting that "[v]eterans and supporters of the Vietnam War believed Calley was simply carrying out orders and doing all he could to protect himself and the country"); cf. Samuel Brenner, *"I Am a Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight After My Lai and Abu Ghraib*, 205 MIL. L. REV. 1, 5 (2010) (noting that "there is historical precedent, and often good political reason, for [Congress] to avoid engaging in meaningful oversight of those investigations" regarding alleged war crimes).

13. See Wu & Fritze, *supra* note 2 (detailing several of President Trump's comments in which he has called alleged U.S. war criminals "heroes" and otherwise disparaged military prosecutions of alleged war crimes); see also Dave Phillips, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html> (announcing President Trump's war crimes pardons).

14. Leo Shane III et al., *Trump Grants Clemency to Troops in Three Controversial War Crimes Cases*, MILITARYTIMES (Nov. 15, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/11/16/trump-grants-clemency-to-troops-in-three-controversial-war-crimes-cases> [https://perma.cc/Z32C-D7SS].

15. Dave Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/2019/11/16/us/trump-pardon-military.html>.

This Article provides necessary awareness and outlines a path forward. It first identifies several structural legal defects, starting with military law's failure to criminalize war crimes as war crimes. While the statutory enumeration of military criminal offenses found in the Uniform Code of Military Justice¹⁶ (UCMJ) provides general authority to prosecutors to charge serious violations of the laws and customs of war, it does not delineate any specific war crimes¹⁷—and hence none are ever charged.¹⁸ Without specified war crime offenses, the U.S. military turns to what are often referred to as “common law crimes”—ordinary, non-war-related crimes such as murder, assault, battery, arson, theft offenses, and rape—to prosecute service members for what are more logically understood and characterized as war crimes.¹⁹ In the U.S. military system, the same generic murder offense used to convict a service member of murdering his or her spouse in downtown Los Angeles is used to prosecute a service member for killing a prisoner of war in U.S. custody in Iraq.

This approach fails to capture the full harm of the war crime, thereby degrading the law's retributive, deterrent, and international signaling effects.²⁰ This approach also feeds the perception that war crimes go unpunished within the U.S. military, given that service members are never convicted for war crimes as such. This failure to prosecute U.S. soldiers' war crimes *as war crimes* undermines the legitimacy of U.S. military operations by contributing to the impression that U.S. military personnel benefit from war crimes impunity.²¹

16. 10 U.S.C. §§ 801–946 (2018).

17. *See id.* (delineating the articles of the UCMJ).

18. *See infra* Section I.C.

19. *See, e.g.*, William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 680–81 (2000) (explaining that Congress “utilize[d] the Uniform Code of Military Justice to make the international concepts of war crimes a part of [U.S.] domestic national criminal law” in the wake of World War II).

20. *See id.* at 672 (noting that despite the difficulty in successfully prosecuting war crimes, “[p]ublicity, flowing from the very act of prosecution, fuels the engines of prevention that is the chief goal of prosecution”); *see also infra* Section I.A.

21. Such an impression is not totally false; unfortunately, particular components of the special operations community have earned a reputation of impunity based on real command failures to take appropriate action with regard to their members' criminality. *See, e.g.*, Nicholas Kulish et al., *Navy SEALs, a Beating Death and Claims of a Cover-Up*, N.Y. TIMES (Dec. 17 2015), <https://www.nytimes.com/2015/12/17/world/asia/navy-seal-team-2-afghanistan-beating-death.html> (“In addition to describing misconduct by the SEALs, villagers [in Afghanistan] complained that the Americans had empowered the local militia to act with impunity.”); Andrew Milburn, *How to Fix a Broken Special Operations Culture*, WAR ON THE ROCKS (Sept. 13, 2019), <https://warontherocks.com/2019/09/how-to-fix-a-broken-special-operations-culture>

We propose an easy fix: the United States should utilize the same enumerated war crimes already used to prosecute its enemies at Guantanamo Bay, Cuba through the Military Commissions Act of 2006²² (MCA) to prosecute U.S. service members for identical criminal conduct on the battlefield.²³ However, delineating offenses alone is insufficient for just and thorough fulfillment of this nation's obligations to its service members. This Article also assesses issues stemming from the lack of incorporation of specifics of the laws and customs of war—modernly often referred to as the law of war, the law of armed conflict (LOAC) or international humanitarian law—and its battlefield setting into the UCMJ. We accordingly propose adding tailored defenses to accompany the enumerated war crimes transplanted from the MCA.²⁴

A handful of scholars have previously expressed alarm at the lack of UCMJ war crimes; we both echo their concern and go further to comprehensively contextualize this defect within the norms of the LOAC, emphasizing the law's requirement of responsible command.²⁵

(noting the “descending pattern of illicit conduct in America’s special operations community”); Rachel E. VanLandingham, Geoffrey S. Corn & Robert Bracknell, *Is There a Values Crisis in Special Operations Forces? National Security Could Be at Risk*, USA TODAY (July 26, 2019, 3:15 AM), <https://www.usatoday.com/story/opinion/2019/07/26/special-forces-values-crisis-congress-must-investigate-fix-column/1790315001> [<https://perma.cc/T5KL-DVAL>] (“But the special ops brand . . . is now being undermined by reports of battlefield lawlessness, loyalty over integrity, a willingness to challenge commands and a seeming pattern of disciplinary impunity.”); Rachel VanLandingham, *Military Injustice: Politics, Machismo, Structural Defects*, HILL (Dec. 23, 2015, 8:00 AM), <https://thehill.com/blogs/congress-blog/judicial/264028-military-injustice-politics-machismo-structural-defects> [<https://perma.cc/8BMT-DJXL>] (“The military justice system, even more so than civilian criminal justice systems across America, lacks transparency, oversight, and accountability regarding how misconduct is handled.”).

22. Pub. L. No. 109-366, 120 Stat. 2600, 2602 (2006) (codified at 10 U.S.C. § 948c (2018)).

23. *Id.* 120 Stat. at 2600 (codified as amended in various sections of 10, 18, and 28 U.S.C.), *amended by* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified in various sections of 10 U.S.C.).

24. This Article uses the phrases “law of war,” “laws and customs of war,” “law of armed conflict” (LOAC), and “international humanitarian law” to refer to the *jus in bello*: the law governing the means and measures of war and the treatment of its victims. *See* SOLIS, *supra* note 10, at 1, 3, 11.

25. Major Mynda G. Ohman provides the only detailed analysis of the military penal code’s lack of enumerated war crimes to date. Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005). The author analyzes the relationship between Titles 10 and 18 of the U.S. Code, aptly concluding that “the most egregious crimes under the laws of war

Part I outlines the criticality of compliance, focusing on why accountability for war crimes is a necessary predicate of compliance; this Section also emphasizes the duties that flow from responsible command while highlighting internal benefits of the doctrine.²⁶ Part II highlights the asymmetry between the UCMJ's lack of war crimes in its punitive articles and the MCA's enumerated list applicable to captured alien "unprivileged belligerents" subject to military commission jurisdiction.²⁷ Here we recommend both incorporating the latter into the former, and extending command responsibility liability to U.S. commanders. Part III identifies additional deficiencies in current U.S. military criminal law regarding war crimes; this Part demonstrates why court-martial jurisdiction should be exercised over not only U.S. service members, but *all* captured enemy belligerents, both privileged and unprivileged.²⁸

Our conclusion notes that enactment of UCMJ-enumerated war crimes and defenses, coupled with delineation of appropriate court-martial jurisdiction over those whom the LOAC was designed to apply—both U.S. service members and enemy belligerents, lawful and unlawful—will together offset any necessity to invoke military commission jurisdiction for captured personnel, helping to end the ill-conceived military commission system at Guantanamo Bay and close the American war crimes accountability deficit.

committed by U.S. military members are charged as often less severe common crimes under the UCMJ." *Id.* at 5; *see also* David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 30, 49–50 (2009) (asserting with little analysis that "with respect to U.S. military courts, there exist many uncertainties and largely a theoretical power to prosecute war crimes rather than any significant precedent of doing so" and that "it is not possible to extract from the UCMJ, Title 10 of the United States Code, or the jurisprudence of U.S. military courts any definitive list of explicit war crimes which such military courts are empowered to prosecute against U.S. military personnel"); Martin N. White, *Charging War Crimes: A Primer for the Practitioner*, 2006 ARMY LAW. 1, 1 (2006) (detailing how to prosecute war crimes within the military justice system).

26. *See infra* Section I.B.

27. The punitive articles of the UCMJ are those that delineate specific criminal offenses and are found in Articles 77 through 134. *See* Uniform Code of Military Justice, 10 U.S.C. §§ 877–934 (2018). We also analyze the procedural and evidentiary impediments resulting from the termination of military jurisdiction over service members prior to discovery of their war crimes and propose that residual jurisdiction be specifically enacted over such individuals. *See infra* Part II.

28. *See infra* Section III.B.

I. U.S. APPROACH TO MILITARY WAR CRIMES ACCOUNTABILITY

A. *Why Should America Prosecute War Crimes?*

The U.S. military needs to improve its capability to prosecute war crimes for three main reasons, all predicated on the principle that compliance with legal rules requires accountability for their inevitable violations. The triad motivating enhanced accountability include the following: LOAC compliance is a legal duty of all service members; there are pragmatic warfighting benefits of said compliance; and the preservation of service members' moral compass depends upon LOAC compliance. This Section explores these principles.

1. *Compliance requires accountability*

The basic predicate underlying these assumptions is that accountability is essential to overall compliance with the law of war and therefore key to this legal regime's effectiveness. Indeed, the International Military Tribunal at Nuremberg noted that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."²⁹ The LOAC cannot achieve its humanitarian goal of reducing suffering in war if it is not followed; law that is not enforced is eventually law that is not effective.³⁰ Indeed, impunity for war crimes corrodes respect for and compliance with this law, a fact that has been tragically illustrated throughout history.³¹

29. See *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947); see also Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 554 (2006) (noting that prior to the Geneva Conventions, "[w]hile the law of war developed significantly over the course of the two Hague Conferences, mechanisms to enforce that law did not keep pace with it" and while "States could try their own nationals for war crimes, . . . they rarely did so").

30. See generally Keith N. Hylton, *Whom Should We Punish, and How? Rational Incentives and Criminal Justice Reform* 1, 2, 4 (Bos. Univ. Sch. Law, Paper No. 12-18, 2017) (describing a rational model of punishment, in which fear of punishment can deter rational people from criminal behavior).

31. See MARCO SASSÒLI ET AL., *HOW DOES LAW PROTECT IN WAR?* 44 (3d ed. 2011) ("The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [international humanitarian law] is law."); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst when Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) ("There seems little doubt that having a criminal justice system that punishes violators, as every organized society does, has the general effect of influencing the conduct of potential offenders.").

The recognition of criminal accountability's pivotal role in reinforcing the LOAC is evident not only from the international community's establishment of both ad hoc and standing tribunals to prosecute war crimes,³² but also from the foundational LOAC treaties themselves.³³ This is most apparent in the four Geneva Conventions of 1949; of their many contributions, one of the most significant was their enforcement trifecta that (1) specifies the most serious war crimes as "grave breaches;"³⁴ (2) obligates states both to enact domestic criminal legislation to prosecute these grave breaches and separately to suppress all other violations of the

32. See SASSÖLI, *supra* note 31, at 683–84 (describing the ad hoc tribunals for the former Yugoslavia and Rwanda as demonstrations of international commitment to accountability for war crimes, while characterizing the creation of the International Criminal Court as a "break-through" in the development of enforcement of the law of war); see also SOLIS, *supra* note 10, at 85 (explaining that the framers of the Conventions were "[m]indful of the[] advances" of the post-World War II International Military Tribunals at Nuremberg and Tokyo regarding personal criminal responsibility for violations of the laws and customs of war).

33. Jakob Kellenberger, *Foreword* to KNUT DÖRMANN ET AL., *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* ix (2003) (describing the inclusion in the Geneva Conventions and Additional Protocols of "specific rules on the penal repression of serious violations of international humanitarian law was founded on the conviction that a law which is not backed up by sanctions quickly loses its credibility").

34. Grave breaches as found in the Geneva Conventions of 1949, as well as in Additional Protocol I, indicate that willfully killing, willfully causing great suffering or serious injury to body or health, and taking hostages are considered some of the most serious violations of the law of war. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I] (entered into force June 19, 1931); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III] (entered into force October 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV] (entered into force October 21, 1950); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (entered into force December 7, 1978). These constitute a closed list within international armed conflicts, and while treaty law does not include grave breaches for non-international armed conflicts, tribunal decisions and customary international law—as well as some domestic legislation, such as 18 U.S.C. § 2441 (2018)—have extended the concept of grave breaches into non-international armed conflicts. See SOLIS, *supra* note 10, at 100 (concluding that "there are war crimes and grave breaches in non-international armed conflicts").

law of war;³⁵ and (3) establishes an *aut dedere aut judicare* (“surrender or judge”) obligation to search for and prosecute perpetrators of grave breaches within each treaty party’s jurisdiction, even when that state has no relationship to the conflict or the individual suspected of the grave breach.³⁶ The states drafting the Conventions enacted and agreed to such a robust enforcement paradigm because they recognized that “to effectively impose the requirements and prohibitions of the Conventions, there had to be a vehicle by which penalties could be imposed for violations—penalties of a criminal nature levied against the offending individuals.”³⁷

2. *Legal duty: Responsible command*

In addition to imposing on states these legal requirements regarding accountability and prosecution, the LOAC assigns primary responsibility—for both compliance with the law and accountability for violations—to military commanders through the doctrine of “responsible command.”³⁸ This doctrine is woven into the fabric of the law and is central to the aspiration that law can genuinely mitigate the suffering of war. Without commanders committed to implementing the law—those with requisite authority, with the legal duty, and for whom there is accountability for failures—the law is a mere fig leaf. As the U.S. Supreme Court has noted, “the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”³⁹

35. See, e.g., GC III, *supra* note 34, art. 129 (“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”).

36. *Id.*

37. SOLIS, *supra* note 10, at 85.

38. The concept of responsible command, though long a tenet of the laws and customs of war, was further refined and articulated by the Additional Protocol I to the Geneva Conventions of 1949, today largely considered to constitute customary international law. See AP I, *supra* note 34, art. 87 (requiring military commanders to prevent, suppress, and report violations of the Conventions and Protocols and obligating, inter alia, that state parties require “any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof”); see also CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1018 (Yves Sandoz et al. eds., 1987) (noting that at the troop level, “everything depends on commanders”).

39. *In re Yamashita*, 327 U.S. 1, 14–15 (1946).

Responsible command is integral to the LOAC regime, as demonstrated by the connection between it (responsible command) and the legal privilege to engage in hostilities with accordant combatant immunity for those who otherwise meet the “privileged belligerent” qualification. Belligerent or combatant’s privilege, also referred to as combatant immunity, is legal protection from domestic prosecution by a detaining power for wartime conduct that complies with the LOAC.⁴⁰ This privilege is absolutely contingent on the individual being part of an organization operating under responsible command (as well as the organization as a whole fulfilling several other criteria, such as conducting operations in accordance with the LOAC, carrying arms openly, etc.).⁴¹ That is, conducting operations in compliance with the LOAC’s targeting and humane treatment rules is insufficient by itself to trigger this international legal privilege; more is required.⁴² And that “more” is the link between the individual belligerent and a responsible commander.

40. Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL’Y REV. 253, 256 (2011). Belligerent privilege, or combatant immunity, is legally limited to international armed conflicts (IACs) only; however, this orthodox view is considered by some to ignore more nuanced historical treatment of fighters in non-international armed conflicts (NIACs) or rational justifications for a broader application of the privilege. *See generally id.* at 272 (explaining how granting the privilege to non-state actors in transnational NIACs could provide important incentives to enhance respect for the LOAC in these conflicts); *see also* Jens David Ohlin, *The Combatant’s Privilege in Asymmetric & Covert Conflicts*, 40 YALE J. INT’L L. 359–60 (2015) (noting pre-Common Article 3 examples of extension of combatancy to fighters in nineteenth century NIACs).

41. Since 1899, the law of war has explicitly required responsible command as a prerequisite for, *inter alia*, military personnel and their functional equivalent to enjoy combatant immunity—the privilege to engage in belligerent (and otherwise criminal) actions without criminal liability. *See* Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 118 L.N.T.S. 343 (entered into force June 19, 1931); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907 [hereinafter Hague Convention IV] (entered into force Jan. 26, 1910); Hague Convention with Respect to the Laws and Customs of War on Land art. 43, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II] (entered into force September 4, 1900); GC III, *supra* note 34, art. 4 (entered into force Oct. 21, 1950) (defining the term “prisoner of war” and outlining categories into which prisoners of war fall under this provision).

42. Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerillas, and Saboteurs*, 28 BRITISH Y.B. INT’L L. 323 (1951). However, the status of unprivileged belligerency by itself is not a war crime under international criminal law; violent conduct by an unprivileged belligerent does not violate the LOAC if the conduct otherwise conforms to the LOAC’s requirements outside of the criteria for gaining privileged belligerency—in other words, if it conforms to the LOAC’s targeting and humane treatment requirements. Rather, the lack of combatant immunity (due to status of unprivileged belligerency alone) allows for criminal prosecution by the

Furthermore, responsible command means more than just being in command; it means executing the duties of command responsibly. This requires that commanders, due to their special status as superior authoritative figures,⁴³ be responsible for the conduct of their subordinates over whom they exercise control.⁴⁴ Specifically, this control must ensure that operations under their command comply with the LOAC and that commanders hold their subordinates accountable for any and all LOAC violations.⁴⁵ These duties are often framed as a triad: the duty of responsible command requires that commanders prevent, suppress, and punish violations of the LOAC.⁴⁶

Given that LOAC violations are not wholly preventable—soldiers being human, and human nature being what it is—ensuring compliance means that commanders must take all reasonable measures to ensure military operations conducted by those under their control are planned and executed in accordance with the LOAC and stop those

respective local jurisdiction for common law crimes such as murder and arson under local criminal law. *See id.* But *see* MANUAL FOR MILITARY COMMISSIONS, UNITED STATES at IV-11, § 13(d), (2010 ed.), https://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf [<https://perma.cc/9Y2H-82ML>] (claiming commission jurisdiction over “murder committed while the accused did not meet the requirements of privileged belligerency . . . even if such conduct does not violate the international law of war”).

43. *See* Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT’L. & COMP. L. 419, 456 (2008) [hereinafter Hansen, *Changes in Modern Military Codes*] (recognizing that “the commander is the focal point of military discipline and order”).

44. A hierarchical command structure developed over millennia to help militaries effectively maneuver on the battlefield; military experts from Sun Tzu to Carl von Clausewitz have noted this key organizational feature of effective armed forces. *See* PILLOUD, *supra* note 38, at 1019 (“[T]here is no part of the army which is not subordinated to a military commander at whatever level.”). *See generally* CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret trans., 2007); SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., 1971) (describing different aspects of warfare while applying them to military strategy and tactics).

45. *See* Geoffrey S. Corn, *Contemplating the True Nature of the Notion of “Responsibility” in Responsible Command*, 96 INT’L REV. RED CROSS 901, 904 (2014) (dissecting the LOAC’s doctrine of responsible command, concluding that “[p]reparing a military unit to execute its combat function within the bounds of IHL is therefore an inherent expectation of responsible command”); *see also* AP I, *supra* note 34, art. 87 (requiring parties to armed conflicts to require their “military commanders . . . [to] prevent and, when necessary, to suppress and to report . . . breaches” and, for commanders who are aware of breaches or threatened breaches, to “initiate disciplinary or penal action against violators thereof”).

46. *See* AP I, *supra* note 34, art. 87.

violations when they do occur.⁴⁷ Commanders' third duty—to hold suspected violators accountable (in other words, to ensure appropriate consequences)—requires that commanders take reasonable measures within their authority in response to LOAC violations by those under their command. Such measures include investigating allegations of violations committed by those under their command, reporting such allegations to those with disciplinary authority, and, if vested with prosecutorial discretion, prosecuting such violations.⁴⁸ This responsible command duty to punish flows from the deep-seated recognition analyzed above that accountability through the imposition of appropriate disciplinary or criminal sanction is indelibly linked to general compliance with the law.⁴⁹

Given the recurring congressional debates about the UCMJ's vesting of prosecutorial discretion in non-lawyer commanders⁵⁰—a component of U.S. military law inherited from the British military justice system and central to U.S. military justice ever since⁵¹—it is important to note the evolution of related law in many other nations. Relevant changes in

47. The longstanding law of war requirement that commanders ensure that their subordinate forces adhere to the entire corpus of the LOAC is one of the law's foundational keystones, without which the law would be unable to achieve its goals. American military professionalism—the U.S. military's ethical, moral, and legal well-being, and ultimately its effectiveness—rests on responsible command. See David Kennedy, *War and International Law: Distinguishing Military and Humanitarian Professions*, 82 INT'L L. STUD. 3, 13 (2006) (explaining that law of war “[r]ules are not external expressions of virtue, but internal expressions of professional discipline”); see also Allen, *supra* note 3, at 328–30 (noting both that the law “provides an indelible foundation for the legitimacy of our military efforts” and that “the framework provided by the law is not an impediment to military operations, but is aligned with core military logic” and “[t]he law functions to preserve us, our moral compasses, as much as it works to reduce the suffering caused by war”); Corn, *supra* note 45, at 906 (“Responsible command is the *sine qua non* in the development of *this* type of discipline; the type of discipline that genuinely defines a professional military force.”).

48. See AP I, *supra* note 34, art. 873.

49. See Corn, *supra* note 45, at 904 (“[International humanitarian law (IHL)] is unquestionably and intuitively premised on the expectation that the proper exercise of command responsibility is essential to enhancing the probability of IHL compliance in the most physically and morally challenging martial situations.”).

50. See generally Military Justice Improvement Act of 2019, S. 1789, 116th Cong. (1st Sess. 2019); Military Justice Improvement Act of 2020, S. 4049, 116th Cong. (2d Sess. 2020). Senator K. Gillibrand has, beginning in 2013, annually introduced this bill to remove prosecutorial discretion for major crimes from commanders under the UCMJ and give it to military lawyers independent from the chain of command. See, e.g., Military Justice Improvement Act of 2020.

51. See Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 19 (2019).

foreign military justice systems⁵² strongly suggest that the LOAC responsible command duty to hold war criminals accountable for their misconduct need *not* require that military commanders *themselves* possess prosecutorial authority to decide what charges to bring, and whom to charge, in a criminal trial (even though some commanders within the U.S. military justice system do, in fact, wield exclusive prosecutorial authority).⁵³ As noted in the commentary to the Additional Protocol I to the Geneva Conventions:

The object of these texts is to ensure that military commanders at every level *exercise the power vested in them*, both with regard to . . . the Conventions and the Protocol, and with regard to other rules of the army to which they belong. Such powers exist in all armies. They may concern, at any level, informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, [] intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power[—]or[,] in the case of someone who holds such power himself[,] exercising it[] within the limits of his competence—and finally, remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find.⁵⁴

Various levels of command have long existed in American and foreign militaries. Within these various professional forces, while some commanders continue to wield court-martial prosecutorial power, most western states have moved away from this model of prosecutorial decision-making within their militaries. The United States, at its Founding, adopted Great Britain's system; in the interim, the now-United Kingdom has completely divested prosecutorial authority for criminal offenses from its military commanders and vested the authority to make these decisions in a civilian prosecutor.⁵⁵ Yet few would suggest

52. See generally Hansen, *Changes in Modern Military Codes*, *supra* note 43, at 437–40 (describing the removal of prosecutorial discretion from commanders in both the British and Canadian military justice systems).

53. See VanLandingham, *supra* note 51, at 19 (describing non-lawyer commanders' role in the U.S. military justice system).

54. See PILLOUD, *supra* note 38, at 1022–23 (emphasis added). This commentary notes that the responsible command duties involving reporting breaches and initiating appropriate disciplinary action require commanders to take measures within their control, a de facto recognition that not all military commanders possess disciplinary and prosecutorial powers. *Id.*

55. See Hansen, *Changes in Modern Military Codes*, *supra* note 43, at 438–42 (describing the “revolution” of the British military justice system that removed prosecutorial power from commanders).

the United Kingdom is, as a result, in violation of the international law obligation to ensure war crimes accountability.

However, there are a few American military justice scholars who protest that if U.S. commanders (like their U.K. counterparts) are divested of their current prosecutorial authorities, it will result in an inevitable breach of the U.S. obligation to implement the command duty to punish.⁵⁶ This concern is overstated and reflects a policy preference rather than a legally required modality of implementing this international law obligation. This is because the international law doctrine of responsible command requires that commanders “exercise the power vested in them,” which often is not the power to prosecute, but rather that of reporting to appropriate investigatory and accountability offices.⁵⁷ In other words, compliance with responsible command depends on the level of authority held and whether the commander wields the authorities they do possess in a reasonable manner.

The military helps ensure that duties such as those inherent in responsible command are fulfilled through its disciplinary and criminal justice systems, in which dereliction of duty can be the basis for imposition of consequences ranging from administrative to criminal. The classic military dereliction crime allows prosecution of any individual subject to military criminal jurisdiction for failing to exercise any of his or her military duties, which naturally includes those imposed on them by the law of war’s tenet of responsible command.⁵⁸ Unlike in international criminal law, which establishes indirect liability for the war crime itself, an American military commander is guilty of the military offense of dereliction of duty if she fails (with the requisite mental state) to intervene in a situation where it is reasonably foreseeable

56. See DAVID A. SCHLUETER & LISA M. SCHENCK, A WHITE PAPER ON AMERICAN MILITARY JUSTICE: RETAINING THE COMMANDER’S AUTHORITY TO ENFORCE DISCIPLINE AND JUSTICE 3 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644621. This concern seems partially fueled by an unsupported fear that independent military lawyers, if they wielded prosecutorial discretion instead of commanders, would fail to actually prosecute war crimes. See generally *id.*

57. PILLOUD, *supra* note 38, at 1022.

58. Uniform Code of Military Justice, 10 U.S.C. § 892 (2018); see also Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 NEW ENG. L. REV. 247, 254–55 (2008) (identifying the incommensurability of Article 92’s dereliction of duty offense with command responsibility). The provisions of the UCMJ are codified at Chapter 47 of the U.S. Code, encompassing 10 U.S.C. §§ 801–946(a); in military practice UCMJ provisions are cited to the UCMJ more commonly than to the U.S. Code, hence this Article frequently follows suit. See DAVID A. SCHLUETER, 1 MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 48 n.77 (10th ed. 2018) (describing this convention).

that a war crime will occur, or fails to take appropriate investigatory, reporting, or prosecutorial action regarding alleged war crimes within her command.⁵⁹ We explain why indirect liability for the actual war crimes is needed in Section II.C.

3. *Pragmatic necessity*

Avoiding criminal charges for failure to exercise one's responsible command duties is hardly the only dynamic, or the most important one, that incentivizes military commanders to ensure that their subordinates both comply with the LOAC and are held accountable when they do not. Instead, the recognition and appreciation of the reality that adherence to the law is essential to combat effectiveness is the most powerful incentive for LOAC compliance and accountability.⁶⁰

As others have noted:

General George Washington stated at the beginning of the Revolutionary War that [the war] would be “carried on agreeable to the rules which humanity formed” and that both sides should “prevent or punish every breach of the rules of war within the sphere of our respective commands.” [He] believed in punishing war crimes because he instinctively understood that impunity for violations corrodes confidence in leadership; challenges the moral foundation of the men and women put under arms; increases the enemy's will to resist; and undermines the broader legitimacy of military action.⁶¹

Throughout history, the notion of military command has included mechanisms for the imposition of discipline for subordinates' criminal

59. See SOLIS, *supra* note 10, at 385 (emphasizing that “[t]he fact that the commander had no hand in the actual crime is immaterial”); see also Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 169 (2000) (“Even if the commander takes no direct part in crimes committed by subordinates, the commander will, by operation of law, be considered a principal if the commander's action or inaction in response to the criminal activity is so derelict as to rise to the level of criminal negligence or acquiescence.”).

60. See Charles J. Dunlap Jr., *Military Justice*, in THE MODERN AMERICAN MILITARY 241, 259 (David M. Kennedy ed., 2013) (explaining the link between military effectiveness and discipline); see also LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 3 (2010) (“The core demand of a military organization is obedience to lawful orders, and in this regard military discipline is tied to military effectiveness.”).

61. Donald J. Guter, John D. Hutson & Rachel VanLandingham, *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SECURITY (May 24, 2019), <https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code> [<https://perma.cc/XE6U-4U3U>].

misconduct.⁶² The fairness and legitimacy of these processes has varied widely among armed forces and has evolved substantially over time.⁶³ However, the common thread that runs through this history is the recognition that accountability contributes to unit effectiveness because it buttresses the expectation that commanders' orders will be followed, even when subordinates face enormous risk.⁶⁴ As others have noted, "[m]isconduct on the battlefield loses wars."⁶⁵ To prevent the breakdown of good order and discipline, it is axiomatic that misconduct must be dealt with swiftly—and fairly, as unjust punishment is equally corrosive to good order and discipline.⁶⁶ This recognition is found in examples of misconduct punishable as military crimes dating back to the Roman Legions; professional militaries have utilized military penal codes since at least the fourteenth century to delineate specific consequences for misconduct by members of armed forces.⁶⁷

62. See generally WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17–18 (2d ed. 1920) (describing how ancient military organizations utilized these principles for disciplinary purposes); John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 3 (2000) (stating that “[u]nder the Articles of War military justice was a command-dominated system” created to guarantee “obedience to the commander”); Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000) (reviewing evolving military justice globally, comparing different military justice systems across numerous countries, and lamenting that the United States pays little attention to such evolutions).

63. See David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 203–05 (2015) (discussing various changes in American military justice).

64. George Washington wrote during the U.S. Revolutionary War against the British that “[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all.” U.S. Army Ctr. of Military History, *Washington Takes Command of Continental Army in 1775*, U.S. ARMY (June 5, 2014), https://www.army.mil/article/40819/washington_takes_command_of_continental_army_in_1775 [<https://perma.cc/U6G2-BLWR>]; see also David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990’s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 11 (1991) (“Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed . . . Development of this state of mind among soldiers is a command responsibility and a necessity.” (quoting COMM. ON THE UNIF. CODE OF MILITARY JUSTICE GOOD ORDER & DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 11 (1960) [hereinafter POWELL REPORT])).

65. Eckhardt, *supra* note 19, at 694.

66. See Schlueter, *supra* note 64, at 11 (describing a court-martial as “an instrument of justice” and noting that “in fulfilling this function it will promote discipline” (quoting POWELL REPORT, *supra* note 64, at 12)).

67. See MORRIS, *supra* note 60, at 2 (noting that while Gustavus Adolphus is credited with laying the foundation for modern military justice through his codification of

In addition to good order and discipline, there are other equally pragmatic incentives for military commanders to ensure appropriate accountability for war crimes. One is the reward of compliance itself: without accountability there is less compliance, and law of war compliance ultimately not only helps reduce suffering in armed conflict, but it also helps win wars—not only because well-disciplined troops are more likely to respect the obligations imposed on them by superiors more reliably, but also because LOAC compliance enhances the legitimacy of military and national action.⁶⁸ In contrast, violations of the LOAC invigorate the enemy,⁶⁹ degrade domestic and international legitimacy,⁷⁰ and undermine the potential for a lasting peace.⁷¹ LOAC adherence “differentiates war from riot, piracy, and generalized insurrection.”⁷²

Legitimacy is an even more significant interest in modern armed conflicts in which victory is rarely defined as complete submission of an enemy. Victory today is substantially more nuanced, involving political, diplomatic, and military end states. In the context of most contemporary armed conflicts, both domestic and international legitimacy of a nation’s conduct—by and through its armed forces—is greatly influenced by perceptions of its adherence to the LOAC.⁷³ The perception of

military criminal offenses, Richard II in 1385 “publish[ed] the first comprehensive articles of war”); *see also* WINTHROP, *supra* note 62, at 17–18 (describing ancient military offenses).

68. *See* Allen, *supra* note 3, at 331 (“[T]hese laws were only agreed to because they continue to allow modern professional military forces to successfully wage war.” (emphasis omitted)); David Kennedy, *Reassessing International Humanitarianism: The Dark Sides*, 8–9 (June 8, 2004), <https://pdfs.semanticscholar.org/2348/b2569c136c27a3ced44a59daf0b04caa48a0.pdf> [<https://perma.cc/FJG8-W3S9>] (describing the U.S. military’s belief that “humanitarian law is not a way of being nice”; instead it “will make your military more effective”).

69. *See* B. V. A. Röling, *Are Grotius’ Ideas Obsolete in an Expanded World?*, in HEDLEY BULL ET AL., *HUGO GROTIUS AND INTERNATIONAL RELATIONS* 281, 286–88 (1990) (noting that unnecessary killing and devastation “merely increases hostility and hampers the willingness to surrender”).

70. *See* CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS A-4 (Aug. 11, 2011) (“Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.”).

71. *See generally* SOLIS, *supra* note 10, at 9 (“[B]attlefield crimes may lessen the prospect of an eventual cease-fire. War, then, must be conducted in the interest of peace.”).

72. *Id.* at 7.

73. *See* Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 675, 686–87 (2d ed. 2008) (discussing the role of public opinion regarding international humanitarian law compliance); *see also* GEOFFREY S. CORN ET AL., *THE LAW OF ARMED*

disregard of the law and impunity for its violators can cause strategic losses on and off the battlefield.⁷⁴

This relationship between law, legitimacy, and operational and strategic success is reflected by the elevation of legitimacy to the status of a principle of military operations in U.S. military joint operational doctrine. This recently recognized military principle emphasizes that it is the reality *and perception* of legal compliance that provides that critical legitimacy, specifically noting that:

Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian populations in the OA [Operational Area], and nations and organizations around the world.⁷⁵

4. *Moral imperative*

Another often overlooked reason for ensuring full accountability for war crimes is the preservation of the morality of service members ordered by their state or other authority to engage in armed conflict. Simply put, adherence to the law of war, including accountability for those who fail to adhere, helps military commanders maintain their subordinates' sense of humanity and decency. Democracies ask their service members to wield great violence on their citizens' behalf; they expect them to do what is normally unthinkable while respecting the legal and moral lines of permissible conduct established by international law.⁷⁶ Commanders bear an obligation to protect these

CONFLICT: AN OPERATIONAL APPROACH xxv (2012) (describing the nexus between law of war compliance and domestic and international legitimacy of operations).

74. See Kennedy, *supra* note 68, at 13–14 (describing the “CNN effect” in armed conflict manipulated by the human rights community); see also Allen, *supra* note 3, at 330 (“[P]rotecting civilians from the harmful effects of war is the contemporary touchstone of military legitimacy, and legitimacy is today recognized as a core principle of war, alongside Clausewitzian principles such as offensive, mass, and economy of force.”). See generally Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, 87 INT’L L. STUD. 315, 317 (2011) (describing the requirement of sensitivity to perceptions, particularly in counter-insurgencies).

75. JOINT CHIEFS OF STAFF, JOINT PUBL’N 3-0, JOINT OPERATIONS, A-4, GL-13 (Jan. 17, 2017) (incorporating changes through Oct. 22, 2018).

76. See TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 40–41 (1970); Corn, *supra* note 45, at 907–08. As the chief American prosecutor at Nuremberg recounted:

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the

women and men from not only the physical, but also the moral and psychological risks of mortal combat so they are able to return home and resume healthy lives. As James McDonough explained in his seminal memoir of his time as an infantry platoon leader in Vietnam:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed.⁷⁷

The LOAC helps commanders maintain these lines and preserve moral clarity by providing the framework for morally correct and humane behavior even in the most austere, violent, and challenging of conditions.⁷⁸ Failure to hold transgressors accountable not only makes future LOAC compliance less likely, but it is also morally corrosive to those who witnessed or know of the violation and subsequently observe impunity. It also diminishes the value of those who forego the temptation to cross into the realm of illegality, even at great risk to themselves and their subordinates. As Retired U.S. Marine Corps General John R. Allen eloquently stated in a 2016 speech:

The tool that helps preserve each soldier's moral compass, the tool that allows them to wreak destruction, to engage in warfare that, despite our best efforts, lawfully kills and maims innocent men, women and children, and yet allows them to be able sleep at night, and to look themselves in the eye every day for the rest of their lives—is this body of law.⁷⁹

participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.

TAYLOR, *supra*, at 40–41.

77. JAMES R. McDONOUGH, *PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT* 77–78 (1985).

78. See SOLIS, *supra* note 10, at 7 (noting that “repugnant acts” are done on battlefield); Allen, *supra* note 3, at 330 (describing how it is impossible to put “the physical, intellectual, and spiritual demands of war” into words).

79. See Allen, *supra* note 3, at 334, 335 (emphasis omitted) (“The laws of war reduce the inherent suffering caused by war, contribute strategically to mission accomplishment, help preserve our military members’ moral integrity, and finally[.]

Effective law requires accountability: “[j]ust and fair consequences for violations safeguard overall fidelity to the law, contributing to the good order and discipline of military units.”⁸⁰ Furthermore, accountability for violations, and hence overall compliance with the LOAC, lays the moral foundation of the U.S. armed forces—“[w]e obey LOAC because we cannot allow ourselves to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs.”⁸¹

B. Why Military Instead of Civilian Prosecutions for War Crimes

Domestic courts, and historically military courts, remain the principal fora for prosecuting war crimes around the globe.⁸² Having military courts prosecute war crimes has long been understood as having the most significant deterrent and regulatory effect on military members,⁸³ who of course are the individuals most likely to commit war crimes. In U.S. practice, subjecting service members to prosecution in courts-martial for misconduct that violates the laws and customs of war dates back to the American Revolution.⁸⁴ Indeed, the Lieber Code (General Orders No. 100 issued at the direction of President Lincoln) specifically indicated that the military justice system should be used to punish infractions of its enumeration of rules of conduct based on the laws and customs of war, the world’s first.⁸⁵ This was ultimately manifested in the military prosecutions for violations of the laws of war of more than 1,000 Confederate soldiers following the Civil War.⁸⁶

U.S. federal civilian courts’ concurrent jurisdiction over war crimes prosecutions does not diminish the normative preference for military

[] assure the world that the United States stands for something in this moment of gravest inhumanity . . . war.”).

80. Guter, Hutson & VanLandingham, *supra* note 61.

81. SOLIS, *supra* note 10, at 9–10.

82. *See id.* at 100; *see also* Wolfrum & Fleck, *supra* note 73, at 684.

83. *See* Wolfrum & Fleck, *supra* note 73, at 687.

84. WINTHROP, *supra* note 62, at 47.

85. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 11, 14 (1863).

86. *See generally* Martin Kelly, *4 Criminals Prosecuted During the American Civil War*, THOUGHTCO. (July 3, 2019), <https://www.thoughtco.com/prosecuted-war-criminals-during-civil-war-104542> [<https://perma.cc/M84W-FAY8>] (describing the actions of Confederate officers that ultimately led to their prosecutions, including those of Commander Henry Wirz, who was tried for his inhumane treatment of captured soldiers and for murdering prisoners).

courts.⁸⁷ These tribunals—courts-martial when the accused is a member of the U.S. armed forces subject to the UCMJ (in contrast to the use of military commissions to try captured enemy personnel for pre-capture war crimes)⁸⁸—make sense because for centuries they have served as the preeminent means to attain individual accountability for *all* service-member misconduct.⁸⁹ Military courts’ deterrent effect and important role as a command tool for maintaining good order and discipline make them an integral component of the U.S. military.⁹⁰

Contemporary assessments of our military justice system note its evolution from a system of harsh and often grossly unfair discipline, to one with procedural safeguards that in some respects exceed those found in the U.S. civilian federal criminal system.⁹¹ War crimes are

87. 18 U.S.C. § 2441 (2018) (providing for prosecution of U.S. service members and U.S. nationals (and others when either category are the victim) for war crimes defined as grave breaches of the Geneva Conventions, and certain Common Article 3 offenses as well as certain Hague Regulation violations). *But see* David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT’L HUM. RTS. 30, 32, 49 (2009) (noting that both “U.S. federal criminal law and military law have become comparatively antiquated during the last seventeen years in their respective coverage of atrocity crimes, while international criminal law has evolved significantly during that period”).

88. *See* EUGENE R. FIDELL, *Preface to MILITARY JUSTICE: A VERY SHORT INTRODUCTION* (2016) (distinguishing U.S. “courts-martial, which are overwhelmingly concerned with the prosecution of crimes committed by military personnel rather than enemy forces,” from military commissions, which are “best thought of as *sui generis*” and are “being used to little effect . . . at Guantánamo Bay, Cuba” to prosecute foreign unprivileged belligerents).

89. *See* MORRIS, *supra* note 60, at 2.

90. *See* RESPONSE SYS. TO ADULT SEXUAL ASSAULT CRIMES PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 5, 137 (2014), https://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf [<https://perma.cc/5XCU-ZU6G>] (“Both civilian and military justice systems ‘pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.’” (quoting Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 161 (2000))).

91. Numerous authors, many of whom are former military lawyers, have canvassed the history, as well as the strengths and weaknesses, of the American court-martial and the U.S. military justice system writ large. *See, e.g.*, EUGENE R. FIDELL ET AL., *Preface to the Third Edition of MILITARY JUSTICE: CASES AND MATERIALS* xxvii (3d ed. 2020) (describing key aspects of American military justice system, including its early origins, with comparison to foreign systems); MORRIS, *supra* note 60, at 2 (discussing the arbitrary nature of ancient punishments); WINTHROP, *supra* note 62, at 21–24 (providing a hoary treatise narrating the early evolution of American military disciplinary code); Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 213–14, 216 (2002) (comparing and contrasting the military justice system with the civilian criminal justice system through

simply one variant of military criminal conduct, and it is therefore pragmatic and logical to leverage this carefully crafted system to ensure credible accountability for such misconduct.⁹² Courts-martial have long contributed to the development and maintenance of unit effectiveness by reinforcing military discipline, to include compliance with the LOAC.⁹³ Accordingly, the stated U.S. military policy remains the same today as it has for the last two centuries: military courts serve as the primary means to prosecute U.S. service members accused of crimes, including serious violations of the LOAC.⁹⁴

When physically in the United States, military members are often subject to both military and civilian criminal jurisdiction; it is not uncommon for civilian state (and federal) prosecutors to exercise that jurisdiction over service members for non-military-related crimes committed in the United States such as child pornography, fraud, etc.⁹⁵

a hypothetical case); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 6, 16 (2013) (examining the various themes courts and commentators use when analyzing the military justice system).

92. For a recent description by the U.S. Supreme Court of the military courts-martial system as one constituting a fair system resembling that of its civilian equivalent, see *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018), explaining how “[i]n the exercise of its authority over the armed forces, Congress has long provided for specialized military courts to adjudicate charges against service members And courts-martial are now subject to several tiers of appellate review, thus forming part of an integrated ‘court-martial system’ that closely resembles civilian structures of justice.”

93. See *id.* at 2175–76; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) (“Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops.”).

94. See DOD LOW MANUAL, *supra* note 3, at 71, 1119 (“The principal way for the United States to punish members of the U.S. armed forces for violations of the law of war is through the Uniform Code of Military Justice.”). While some states no longer use military tribunals as the forum of choice for prosecuting members of their own armed forces accused of war crimes, the United States, in policy and practice, remains committed to reliance on its military justice system for war crimes committed by service members over whom the military maintains jurisdiction. See DOD LOW MANUAL, *supra* note 3, at 1087–88.

95. For example, numerous federal cases were brought against U.S. Navy officers for their involvement in the “Fat Leonard” fraud and corruption scandal involving a U.S. military contractor and a large number of senior naval service members, though the Navy did court-martial as well as impose lesser disciplinary measures on some personnel involved. See, e.g., Mark D. Faram, *Navy’s ‘Fat Leonard’ Case Implodes*, NAVY TIMES (Sept. 1, 2018), <https://www.navytimes.com/news/your-navy/2018/09/01/navys-fat-leonard-case-implodes> [<https://perma.cc/UYS4-9Q9L>] (recounting the conviction of Commander David Morales for his failure to “report foreign contacts on his security clearance renewal”); Gidget Fuentes, *SECNAV Censures 2 Captains as Part of ‘Fat Leonard’ Investigation*, USNI NEWS (May 14, 2019, 8:42 PM), <https://news.usni>

In marked contrast, the exercise of federal civilian jurisdiction for offenses committed by active-duty U.S. service members participating in military operations abroad, while provided for in the federal criminal code, is extremely uncommon. Instead, federal jurisdiction has been leveraged primarily for former service members whose previous criminal misconduct is not discovered until after the termination of military jurisdiction (which ends upon discharge from military service).⁹⁶

The federal prosecution of war crimes committed by an American serviceman in Mahmudiya, Iraq during the Iraq War exemplifies this atypical exercise of U.S. federal criminal jurisdiction over a former service member.⁹⁷ The U.S. Department of Justice convicted Steven Green in U.S. federal civilian criminal court of federal common law crimes—not of committing war crimes, though his acts certainly qualified as such, but instead of raping a fourteen-year-old Iraqi girl and murdering her and her family in Iraq.⁹⁸ Green was no longer in the military when his crimes came to light, but federal law provided extraterritorial reach of U.S. federal law, thus allowing his prosecution in civilian court.⁹⁹

Interestingly, the Department of Justice has *never* utilized the federal War Crimes Act¹⁰⁰—which in 1996 belatedly implemented the U.S. obligation to enact domestic penal legislation for grave breaches

.org/2019/05/14/secnav-censures-2-captains-as-part-of-fat-leonard-investigation [https://perma.cc/HTB5-MX5H] (“[S]everal dozen senior officers, retired commanders and command staff personnel have been punished—some criminally through federal prosecution”); Rose L. Thayer, *Air Force Colonel Pleads Guilty to Child Pornography Charges*, MILITARY.COM (Oct. 8, 2019), <https://www.military.com/daily-news/2019/10/08/air-force-colonel-pleads-guilty-child-pornography-charges.html> [https://perma.cc/HG5Q-MPCS] (describing federal civilian prosecution of active-duty Air Force officer on child pornography charges).

96. U.S. ex-service members no longer subject to military jurisdiction can be prosecuted in U.S. federal court for crimes committed while previously in uniform if there is extraterritorial application of the relevant federal crime, such as that provided in the Military Extraterritorial Jurisdictional Act (MEJA), 18 U.S.C. § 3261–67 (2018). Unlike those discharged from the military, retired military personnel remain subject to the UCMJ for post-service conduct. *See* 10 U.S.C. § 802(a)(4) (2018).

97. *United States v. Green*, 654 F.3d 637, 640–41 (6th Cir. 2011) (holding an American service member liable for criminal acts committed while stationed in Iraq).

98. *Id.* at 641–42.

99. *Id.* at 641, 653; *see also* James Dao, *Ex-Soldier Gets Life Sentence for Iraq Murders*, N.Y. TIMES (May 21, 2009), <https://www.nytimes.com/2009/05/22/us/22soldier.html> (noting that at least four of Green’s colleagues were convicted for their roles in the rape and murders in military courts-martial).

100. Pub. L. No. 104–192, 110 Stat. 2104 (1996) (codified at 18 U.S.C. § 2441 (2018)).

under all four Geneva Conventions—to convict anyone of any crime.¹⁰¹ Instead of turning to this Act, in 2018 federal prosecutors (after numerous failed attempts) successfully convicted a former U.S. Department of Defense security contractor of murder for his role in a 2007 massacre of fourteen Iraqi civilians in Baghdad.¹⁰² As in the aforementioned *United States v. Green*¹⁰³ civilian criminal case, the government once again pursued the federal crime of murder instead of an offense under the War Crimes Act, leaving this Act in complete desuetude.¹⁰⁴

With *Green* as a rare exception, military courts-martial continue to be the primary, and presumptively exclusive, prosecutorial venue for the vast majority of crimes committed by U.S. service members, particularly for those service members alleged to have committed grave breaches and other serious LOAC violations—in other words, for war crimes. Accordingly, it is essential that the UCMJ provide military leaders the tools they need to ensure effective military criminal sanctions for such criminal behavior. The current system risks diluting the many interests implicated by such offenses and requires the straightforward reform proposed in this Article.

Despite the obvious pragmatic and disciplinary advantages of relying on the military justice system to prosecute war crimes allegedly committed by U.S. service members, the recommendations in this Article are made with the awareness of growing unease, both international and domestic, with the legitimacy of military justice systems.¹⁰⁵ Procedural fairness

101. Both current and former service members, as well as any U.S. national, can be prosecuted through the War Crimes Act for, inter alia, grave breaches of the Geneva Conventions, though it has never been so utilized; non-U.S. citizens can also be prosecuted under this Act if their victim is either a member of the U.S. armed forces or a U.S. national. See War Crimes Act, 18 U.S.C. § 2441 (2018); see also MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL33662, THE WAR CRIMES ACT: CURRENT ISSUES 3 (2009) (highlighting concerns about the Act's scope, given its non-utilization).

102. *United States v. Slatten*, 865 F.3d 767, 776–77 (D.C. Cir. 2017); see also Michael Balsamo, *Ex-Blackwater Contractor Found Guilty in 2007 Iraq Shooting*, MILITARYTIMES (Dec. 19, 2018), <https://www.militarytimes.com/news/pentagon-congress/2018/12/20/ex-blackwater-contractor-found-guilty-in-2007-iraq-shooting> [<https://perma.cc/QD8A-UQFC>].

103. 654 F.3d 637 (6th Cir. 2011).

104. Nicholas Slatten was one of four civilians convicted for conduct that, for all purposes, was a war crime; the Department of Justice used the same special extraterritorial jurisdiction law it employed to convict the former U.S. soldier for rape and murder a few years earlier whose war crimes had not been discovered until after he left the service. See *Slatten*, 865 F.3d at 777, 779.

105. See, e.g., Schlueter, *supra* note 63, at 205–07 (detailing the many recent criticisms of the U.S. military justice system); Noémi Mercier, *The Monolith of Canadian Military Justice: Blindness, Deafness and General Recalcitrance*, GLOBAL MIL. JUST. REFORM (Jan. 19, 2016), <http://globalmjreform.blogspot.com/2016/01/the-monolith-of->

concerns and the mishandling of sexual assault cases and other non-military crimes have prompted much of this discomfort.¹⁰⁶ Critics have also articulated concerns regarding war crimes accountability.¹⁰⁷ Reflective of the more general unease with military justice systems, a 2013 United Nations Special Rapporteur recommended that military tribunals should be limited to crimes of a “strictly military nature” that “relate exclusively to legally protected interests of military order, such as desertion, insubordination, or abandonment of post or command.”¹⁰⁸

In the United States, scrutiny of the military justice system, including increased congressional oversight, has been substantial—seemingly more extensive than the attention devoted to the civilian criminal justice system.¹⁰⁹ Perhaps because of such interest, the American military justice system generally provides fair and credible adjudication of allegations of criminal misconduct (to include substantial procedural safeguards for those accused of such misconduct); it also offers the greatest incentive to ensure accountability for battlefield misconduct,

canadian-military.html (interview with His Honor Judge Jeff Blackett, “deplor[ing] the lack of independence and impartiality of the Canadian penal military justice”); *see also* FIDELL, *supra* note 91, at 863. *But see* Kenneth Watkin, “*Fiat Justitia*: Implications of a Canadian Military Justice Decision for International Justice,” JUST SECURITY (Aug. 21, 2019), <https://www.justsecurity.org/65861/fiat-justitia-implications-of-a-canadian-military-justice-decision-for-international-justice> [<https://perma.cc/3KUN-MU7Q>] (outlining the Canadian Supreme Court’s decision in the Beaudry case, vigorously upholding the constitutionality and appropriateness of the Canadian military justice system).

106. *See* Erin J. Heuring, *Til It Happens to You: Providing Victims of Sexual Assault with Their Own Legal Representation*, 53 IDAHO L. REV. 689, 703–06 (2017) (annotating the various sexual assault scandals in the U.S. military that prompted legislative reform).

107. Alan F. Williams, *Overcoming the Unfortunate Legacy of Haditha, the Stryker Brigade “Kill Team,” and Pantano: Establishing More Effective War Crimes Accountability by the United States*, 101 KY. L.J. 337, 341 (2012) (“The handling of the Pantano case is a prime example of the blind eye that the U.S. military has often cast upon its own war crimes cases. In dozens of instances military authorities have either dismissed charges or given light punishment for acts of U.S. personnel that appear to be serious violations of the law of war or grave breaches of the Geneva Conventions.”).

108. Rep. of the Special Rapporteur on the Independence of Judges and Lawyers, ¶ 98, U.N. Doc. A/68/285 (Aug. 7, 2013).

109. The Vanderbilt Report, named after its chairman Arthur T. Vanderbilt, responded to criticisms of the World War II-era military justice system and influenced the 1950 UCMJ. ADVISORY COMM. ON MILITARY JUSTICE, REPORT OF WAR DEPARTMENT 1, 4 (1946); *see also* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758–61 (2013) (requiring the Secretary of Defense to appoint both a “Judicial Proceedings Panel” to assess courts-martial of adult sexual assault offenses following changes to substantive UCMJ offense, and a “Response Systems Panel” to assess the systems used to prosecute and investigate sexual assault crimes within the military).

never-mind experience with battlefield conditions.¹¹⁰ As with any system of justice there is certainly room for improvement,¹¹¹ but the overall credibility of this system explains why it routinely receives great deference from the U.S. Supreme Court and lower federal appellate courts.¹¹² Congress should not overlook the opportunity to build on this solid foundation to enable the military justice system to achieve its full potential in relation to war crimes accountability.

C. *The Contemporary U.S. Military Approach to War Crimes*

The seriousness of a nation's commitment to the rule of law generally, and to the LOAC specifically, is indicated in large measure by how it responds to violations of this law by members of its own armed forces. The deterrent effect of domestic prosecution of war crimes is greater—at least when such prosecutions are considered fair—than that of international tribunals' prosecutions of those crimes, hence the complementarity rule found in the International Criminal Court's Rome Statute; this rule limits the tribunal's jurisdiction to cases where a national legal system cannot or will not hold appropriate proceedings.¹¹³

110. But see Mike Gooding, *Report: Black Military Members Twice as Likely as Whites to Face Court-Martial*, 13 NEWS NOW (June 16, 2020, 7:09 PM), <https://www.13newsnow.com/article/news/national/military-news/report-spotlights-racial-disparity-in-military-justice/291-4575b055-40bc-43a9-b50b-f31869b822ad> (detailing racial disparities in commander-run military justice system).

111. See, e.g., SHADOW ADVISORY REPORT GRP. OF EXPERTS (SARGE), *ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHARGES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE 13* (2020), <http://globalmjreform.blogspot.com/2020/04/shadow-advisory-report-submitted-to.html> (recommending that prosecutorial discretion be vested in military lawyers for felonies instead of non-lawyer commanders); Rachel E. VanLandingham & Geoffrey Corn, *Two for One: The Ethical Pursuit of Justice in the Military, and Battlefield Success, Through Joint Prosecutorial Decisions*, 45 SW. L. REV. 495, 495 (2016) (analyzing proposals to remove prosecutorial discretion from non-lawyer commanders and recommending retention of limited command role in this arena); see also FIDELL, *supra* note 91, at 865 (recommending improved access to the U.S. Supreme Court and standing courts-martial).

112. See, e.g., *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018) (“[T]he judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.”).

113. See Shai Dothan, *Deterring War Crimes*, 40 N.C.J. INT'L L. & COM. REG. 739, 740 (2015) (“Complementarity was adopted because the drafters of the statute thought that it would create better incentives for states to prosecute crimes in their own national courts and thereby increase deterrence.”); see also Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 36 STUD. TRANSNAT'L LEGAL POL'Y 211, 229 (2004) (stating that the International

However, there is skepticism as to the U.S. commitment to LOAC accountability, in part due to the fact that service members are never charged with offenses labeled as war crimes, at least not since the 1950 creation of the UCMJ (with two little-known Vietnam War exceptions).¹¹⁴ The consistent practice and stated policy has been to instead allege violations of offenses enumerated in the punitive articles of the UCMJ which, while addressing the same basic underlying misconduct prohibited by international law, are titled as common law offenses.¹¹⁵ By policy, commanders' legal counsel advise them to charge the misconduct as a violation of the UCMJ's punitive articles and not as a war crime *per se*.¹¹⁶ This practice of charging such common law-type offenses instead of actual war crimes may make pragmatic sense, as the former are both enumerated and well understood; this practice does not, *ipso facto*, indicate a lack of commitment to accountability.

A little background is in order. Congress is vested with the constitutional authority to dictate whether or not conduct by a member of the armed forces is subject to criminal sanction pursuant to the UCMJ.¹¹⁷ In 1950, Congress unified military criminal law into a "uniform" system for all the armed forces (and the small category of individuals subject to

Criminal Court will only take jurisdiction over a case where national courts cannot or will not).

114. There are only two little-known cases of war crimes being charged under the UCMJ as war crimes under UCMJ Articles 18 and 21, and Rule for Courts-Martial 307(c)(2); one resulted in an acquittal and in the other, charges were dropped before trial. *See SOLIS, supra* note 10, at 86 & n.53.

115. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 507 (1956) ("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 Code."); *see also* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 19 (1972) ("It should be apparent, however, that it is basic policy of the United States to try alleged criminal violations by its soldier citizens before regularly convened courts-martial for violations of cognizable domestic law."). Colonel Kenneth Howard was the presiding military judge during the Vietnam-era court-martial of Captain Ernest L. Medina, who was acquitted of murder charges that were predicated on both his individual actions and his failures as the company commander of First Lieutenant William Calley's platoon that perpetrated the massacre of civilians at My Lai, Vietnam, in 1968. *Id.* at 7-8.

116. *See* U.S. DEP'T OF THE ARMY, REG. 27-10, LEGAL SERVICES, MILITARY JUSTICE 7 (1996) (noting that commanders should exhaust nonjudicial punishment options before resorting to more serious punishments); *see also* U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-1, LEGAL GUIDE FOR COMMANDERS 7-0 (Jan. 13, 1992) (instructing commanders to begin with the least severe punishment necessary).

117. U.S. CONST. art. I, § 8, cl. 14 (giving Congress constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces").

military jurisdiction even though not members of the armed forces, such as prisoners of war and civilians accompanying the force in the field) by enumerating punitive articles in the UCMJ.¹¹⁸ Since then, Congress has occasionally amended the punitive articles, with significant reform occurring most recently through the Military Justice Reform Act of 2016.¹¹⁹

When Congress adopted the UCMJ, the Senate was also considering whether to give advice and consent to the President to ratify the four Geneva Conventions of 1949.¹²⁰ One of the significant developments reflected in these four treaties, three of which updated their 1929 predecessors, was the inclusion of a provision in each Convention requiring state parties to adopt penal legislation to punish any individual responsible for committing what the treaties defined as a “grave breach.”¹²¹ By ratifying these four treaties, the U.S. committed itself to adopting such domestic penal laws providing criminal jurisdiction for the prosecution of such grave breaches, jurisdiction that was supposed to extend to *any* person found within the United States.¹²²

The Senate concluded that the UCMJ was sufficient to cover such crimes (in other words, that the UCMJ provided the treaty-required jurisdiction) and thus consented to the Conventions.¹²³ Because of this conclusion, Congress did not take further action regarding the enumeration of grave breaches or other war crimes in the extant UCMJ’s punitive articles.¹²⁴ This lack of further legislation at the time was not extraordinary. Several scholars have noted that “[m]ost High Contracting Parties comply with the common Article’s domestic legislation requirement through their military justice systems.”¹²⁵

118. See MORRIS, *supra* note 60, at 2.

119. 10 U.S.C. §§ 801–946(a) (2018); see David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L.J. 1, 1 (2017) (comprehensively analyzing 2016 UCMJ reform).

120. See 95 CONG. REC. 5772 (1949) (discussing the need for language revisions to the UCMJ to ensure proper jurisdiction in future treaties).

121. See SOLIS, *supra* note 10, at 85 (noting that the Geneva Conventions are meant to be enforceable legal rules).

122. Wolfrum & Fleck, *supra* note 73, at 684 (describing the evolution of universal jurisdiction under the Geneva Conventions).

123. See Williams, *supra* note 107, at 344 (“When the Conventions were ratified by the U.S. in 1955, the Senate Foreign Relations Committee determined that existing federal law—the newly-minted UCMJ—provided a sufficient legal framework to achieve compliance with obligation to prosecute war crimes under the Conventions.”).

124. See War Crimes Act of 1996, H.R. REP. NO. 104-698, at 3–4 (1996) (quoting SEN. EXEC. REP. NO. 84-9, at 27 (1955)).

125. SOLIS, *supra* note 10, at 86.

As the Senate realized when consenting to the Geneva Conventions, while the UCMJ has never enumerated serious violations of the LOAC as specific offenses, the UCMJ does explicitly grant general courts-martial both subject matter and personal jurisdiction for war crimes charged as war crimes through UCMJ Articles 18 and 21.¹²⁶ The Rules for Courts-Martial (RCM), which the President provides in the Manual for Courts-Martial (MCM),¹²⁷ implement these articles and provide, *inter alia*, that “[g]eneral courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against . . . [t]he law of war.”¹²⁸ However, despite this grant of jurisdiction to a general court-martial to prosecute a U.S. service-member under the UCMJ for an actual war crime, for reasons of prosecutorial efficiency, it is U.S. policy to allege enumerated UCMJ offenses to address such misconduct.¹²⁹

While we detail below why such prosecutorial policy is not sound, it does lend greater simplicity to the prosecutorial process. For example, imagine an incident where a U.S. soldier summarily executes an enemy prisoner of war.¹³⁰ This is about as clear an example of a war crime as one might imagine—a grave breach of the Geneva Convention

126. Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (2018); *see also* MANUAL FOR COURTS-MARTIAL UNITED STATES, I-1, II-11 (2019) [hereinafter 2019 MCM] (stating that the sources of military jurisdiction include “the laws of war” and noting that “[i]n addition to the power to try persons for offenses under the UCMJ, general courts-martial have power to try certain persons for violations of the law of war”).

127. The Code delegated to the President the authority to adopt procedural and evidentiary rules and to add certain clarifications to the code’s punitive articles; the MCM is a compilation of these supplemental rules, while also including the UCMJ. 2019 MCM, *supra* note 126, at Preface, I-1. Part IV of the MCM enumerates all of the offenses established by this penal code, adding limitations on maximum permissible punishments and detailing the elements of each offense with necessary explanations. *Id.* at xxvi, IV-1. The MCM states that “[t]he 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.” *Id.* at I-1.

128. *Id.* at II-13.

129. *See* SOLIS, *supra* note 10, at 86 (discussing this punitive practice); *see also* Ohman, *supra* note 25, at 3 (noting that service member war crimes are charged as common law-type crimes under the UCMJ); Williams, *supra* note 107, at 348 (noting that the U.S. military resorts to the UCMJ’s punitive articles to address war crimes).

130. Ian Shapira, *The Al-Qaeda Suspect Was Stripped Naked and Shot. Will Trump Pardon His Murderer?*, WASH. POST (Apr. 23, 2019, 3:34 PM), https://www.washingtonpost.com/local/the-al-qaeda-suspect-was-stripped-naked-and-shot-will-trump-pardon-his-murderer/2019/04/23/9ddc425a-5710-11e9-814f-e2f46684196e_story.html.

Relative to the Treatment of Prisoners of War.¹³¹ Pursuant to the UCMJ and the MCM, a military prosecutor theoretically could craft a war crimes charge alleging a violation of the Third Geneva Convention.¹³²

If charged as a war crime, subject matter jurisdiction would require proof that the killing occurred in the context of an international armed conflict within the meaning of Common Article 2 of the Conventions and that the victim qualified as a prisoner of war pursuant to Article 4 of the third Geneva Convention. With no enumerated penalty for this offense, the military judge would be required to fashion a maximum permissible punishment, as well as instructions for this novel crime. In contrast, if charged as a violation of Article 118 of the UCMJ (as it was in the case of U.S. Army Lieutenant Michael Behenna, who was pardoned in 2019 after being convicted for killing a detainee in Iraq),¹³³ these jurisdictional challenges disappear; the MCM enumerates the minimum and maximum punishment, and standard and tested jury instructions are readily available.¹³⁴

Yet the easy way is not always the best way. Though simpler for the military prosecutor, treating war crimes as common law-type crimes significantly contributes to the perception that the United States fails to pursue just and full accountability for its service members' war crimes, as the discussion below explains.

II. AMENDING THE UCMJ TO INCLUDE RECOGNIZED WAR CRIMES

A. *UCMJ Versus Military Commissions Act*

While Congress decided in 1950 not to specifically enumerate war crimes in the newly-minted UCMJ, it did so later—just not for U.S. military personnel.¹³⁵ Fast-forward over five decades from the UCMJ's codification to immediately following the terrorist attacks on September 11, 2001, when President George W. Bush ordered the Secretary of Defense to create a military commission to try to capture al Qaeda and

131. GC III, *supra* note 34, art. 50.

132. See *supra* Section I.A.

133. United States v. Behenna, 71 M.J. 228, 229–30 (C.A.A.F. 2012); Bill Chappell, *Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner*, NAT'L PUB. RADIO (May 7, 2019, 10:17 AM), <https://www.npr.org/2019/05/07/720967513/trump-pardons-former-soldier-convicted-of-killing-iraqi-prisoner> [https://perma.cc/JWQ5-XMXR].

134. 2019 MCM, *supra* note 126, at A12-1.

135. See War Crimes Act of 1996, H.R. REP. NO. 104-698, at 3–4 (1996) (discussing why Congress had not previously enumerated war crimes).

Taliban personnel for violations of the laws and customs of war.¹³⁶ The Department of Defense executed this order through the instructions and regulations that created the first military commission to try alleged war crimes since the post-World War II era.¹³⁷ One of the first defendants before this commission, Salim Hamdan, challenged the legality of the tribunal based on both a substantive and procedural argument.¹³⁸ Hamdan argued that conspiracy to commit war crimes he was alleged to have participated in was not itself a war crime subject to the jurisdiction of a “law of war” military commission.¹³⁹ The Supreme Court ruled in his favor, specifically concluding that “at least in the absence of congressional authorization” the government had failed to prove that conspiracy to commit war crimes was an offense in violation of the laws and customs of war within the war crimes jurisdiction of a military commission.¹⁴⁰

In response, Congress chose to provide specific statutory authority for military commissions for individuals who, like Hamdan, were captured in the context of what the United States considered an armed conflict and also, like Hamdan, failed to qualify as prisoners of war.¹⁴¹ This effort culminated in the Military Commissions Act of 2006 (MCA). This original version of the MCA extended jurisdiction to what it defined as “unlawful enemy combatants,”¹⁴² which was later amended in 2009 to “unprivileged enemy belligerent[s]”; both terms covered the identical captives: those who stood in the same position as Hamdan.¹⁴³

The MCA established subject matter and in personam jurisdiction over unprivileged enemy belligerents, as well as comprehensive procedures and rules of evidence for such trials.¹⁴⁴ But unlike its predecessor

136. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

137. *Id.*; see also Anne English French, Note, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1255–57 (2002) (chronicling the creation of the post-9/11 military commissions).

138. *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557, 566, 575 (2006).

139. *Id.* at 567, 611–12.

140. *Id.* at 611–12.

141. See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 174–75 (2008) (chronicling the creation of the Military Commissions Act of 2006).

142. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2601–02 (2006).

143. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (2009) (codified as amended at 10 U.S.C. § 948c (2018)).

144. *Id.* (mirroring to a substantial extent the procedures in the UCMJ for trial by courts-martial).

created by the Department of Defense, Congress chose not to leave the subject-matter jurisdiction of this new tribunal to the common law of war. Congress understood that pursuant to both longstanding U.S. practice and the Supreme Court's decision in *Hamdan v. Rumsfeld*,¹⁴⁵ a military commission convened as a "law of war" court could properly exercise jurisdiction only for offenses in violation of the laws and customs of war (war crimes).¹⁴⁶ Accordingly (and central to this Article), the MCA included a section enumerating offenses falling within military commission jurisdiction, thus providing a clear indication of what misconduct Congress believes constitutes war crimes.¹⁴⁷

This enumeration of war crimes for a specific class of enemy belligerents stands in stark contrast to the UCMJ's complete dearth of such offenses for U.S. service members. While reliance on the common law of war through Article 18 or punishment for the substance of war crimes by prosecution for violations of the UCMJ may have been acceptable to Congress in 1950, it is difficult to justify the omission of enumerated war crimes applicable to U.S. forces when Congress has since enumerated them for punishment of enemy captives. The MCA's enumeration should provide clarity and momentum for incorporating war crimes into the UCMJ's punitive articles. Doing so will not only enhance the ability to treat war crimes as such but will also reflect an appropriate symmetry between the accountability for U.S. and captured personnel alike, given that it is the same body of law—the LOAC—that is being addressed.

B. Now Is the Time to Enumerate War Crimes in the UCMJ

1. Adhering to criminal law logic

The lack of enumerated war crimes within the UCMJ functionally prevents the military justice system from punishing war crimes as war crimes.¹⁴⁸ Treating war crimes as common law murders, rapes, or other crimes that could just as easily occur in the peacetime zone of Main Street, USA as in an armed conflict zone such as My Lai, Vietnam

145. 548 U.S. 557 (2006).

146. See Glazier, *supra* note 141, at 131, 141 (tracing development of "law of war court" jurisdiction over war crimes); Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1582–86 (2017) (tracing the jurisprudential findings supporting law of war commissions trying war crimes).

147. § 1802, 123 Stat. at 2576.

148. See *supra* Section I.C (explaining the policy and practice that U.S. service members are not punished for actual war crimes under the current statutory scheme).

distorts the true gravamen of the misconduct and fails to clearly signal accountability for violations of the laws and customs of war. Failing to convict military offenders for their actual war crimes prevents punishing the true nature of the offense. Part of the harm inflicted by a war crime—e.g., the violation of the important and near-universally accepted international rules of conduct in armed conflict—is simply not part of any crime a military offender is currently found guilty of violating.

In essence, the unique social harm of a war crime is mischaracterized and greatly minimized when charging such a crime as a common law offense.¹⁴⁹ This contradicts the basic equation of criminal culpability and accountability: actus reus, mens rea, and attendant circumstances, all elements of crime designed to capture the social harm of particular conduct plus the moral culpability of the offender.¹⁵⁰ War crimes, unlike common law analogues, represent a different nature of societal offense; as violations of international law, they harm not merely the victim, but also military society, as well as the international order.¹⁵¹ By failing to arm the military justice system with enumerated war crimes to allow for the imposition of such accountability, the penological purposes of criminal law—primarily deterrence and retribution—are undermined.¹⁵² Accordingly, a war crime should be prosecuted as a war crime and, where supported by sufficient evidence, condemned as such.¹⁵³

149. See generally LON L. FULLER, *THE MORALITY OF LAW* 157–58 (1964) (discussing the normative force of criminal law’s rules-like approach).

150. See generally Kenneth W. Simmons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 *BUFF. CRIM. L. REV.* 219, 238–39, 242–43 (2002).

151. See generally YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 263–26 (2d ed. 2010) (detailing the various definitions of war crimes).

152. This Article assumes that punitive justice is the appropriate legal theory for providing accountability for war crimes committed by U.S. service members and enemy belligerents. For U.S. service members, punitive justice contributes to future compliance through deterrence as the primary penological purpose for such prosecutions; the retributive aspects of punitive justice are likely more pertinent to the prosecution of enemy belligerents for such crimes. But see Ezzat A. Fattah, *Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a Non-Punitive Justice System Feasible?*, 2007 *ACTA JURIDICA* 209, 209–10 (2007) (arguing for a restorative justice model).

153. Of course, where jurisdictional or evidentiary impediments indicate that charging a common law-based offense substantially enhances the prospect of accountability, the commander will retain that option.

2. *Countering stain of Guantanamo Bay*

An alignment between punitive accountability for war crimes for both U.S. and enemy personnel will also enhance U.S. credibility regarding subjecting captured enemy personnel to prosecution for enumerated offenses. As the ongoing military commission litigation has demonstrated, there is (amongst other significant criticisms¹⁵⁴) controversy over the validity of designating some of the offenses in the MCA as war crimes, in particular conspiracy to violate the law of war and material support for terrorism.¹⁵⁵ Incorporating war crimes into the UCMJ would force Congress to carefully assess whether it believes what is “good for the goose” (the captured enemy) is also “good for the gander” (the U.S. service-member).¹⁵⁶

This could produce two outcomes. First, Congress could decide to enumerate all the offenses currently included in the MCA, which would add significant weight to the government position that these offenses fall within the scope of what has labeled the U.S. common law of war. Second, Congress might reconsider its prior decision to characterize these offenses as war crimes when the potential defendants are U.S. service members,¹⁵⁷ which would suggest removing them from

154. See David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903, 904–05 (2014) (providing a thorough critique of the military commissions conducted at Guantanamo Bay, Cuba); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND LEGAL ISSUES 1 (2014) (noting with understatement that “[t]he use of military commissions to try suspected terrorists has been the focus of intense debate (as well as significant litigation)”).

155. See *Al Bahlul v. United States*, 767 F.3d 1, 27 (D.C. Cir. 2014) (en banc), *aff’d per curiam on reh’g en banc*, 840 F.3d 757 (D.C. Cir. 2016). See generally Helen Klein Murillo & Alex Loomis, *A Summary of the Al Bahlul Decision*, LAWFARE (Oct. 21, 2016, 9:36 AM), <https://www.lawfareblog.com/summary-al-bahlul-decision> [<https://perma.cc/V27M-C4NT>] (reviewing the D.C. Circuit opinion upholding Al Bahlul’s conviction by military commission of conspiracy to violate the law of war).

156. See generally Victor Hansen, *What’s Good for the Goose Is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 343–44 (2006) [hereinafter Hansen, *What’s Good for the Goose*] (providing an excellent analysis of the failure of the UCMJ to explicitly provide command responsibility liability).

157. Both offenses have been subject to judicial scrutiny. See Quinta Jurecic, *DC Circuit Upholds Conspiracy Conviction in al-Bahlul*, LAWFARE (Oct. 20, 2016, 10:53 AM), <https://www.lawfareblog.com/dc-circuit-upholds-conspiracy-conviction-al-bahlul> (noting that the en banc D.C. Circuit reversed the Court’s earlier panel decision and affirmed Al Bahlul’s conviction by military tribunal); see also *Military Commissions Unraveling, Gitmo Attorneys Say*, CTR. CONST. RTS. (Nov. 8, 2013), <https://ccrjustice.org/>

the jurisdiction of the military commission. That is, our elected leaders may be more discerning about the definition of war crimes—particularly whether such crimes include the MCA crimes of conspiracy to violate the law of war and material support to terrorism—when the potential subjects of prosecution are members of our own armed forces. If Congress chose to omit these controversial offenses from incorporation into the UCMJ, it would send a powerful signal that they never were legitimately included within the scope of military commission jurisdiction in the first place and add greater legitimacy to prosecutions going forward.

3. *Countering efforts risking noncompliance*

As noted in this Article's Introduction, in 2019 President Trump pardoned several U.S. service members convicted of conduct that constituted war crimes under the MCA and customary international law.¹⁵⁸ In addition, President Trump publicly ridiculed the military's accountability efforts for soldiers accused of war crimes.¹⁵⁹ Previously, as a presidential candidate, Mr. Trump also publicly advocated for conducting military operations in a manner that would result in war crimes, and the public has perceived his statements as President as advocating the same.¹⁶⁰ Mr. Trump while the sitting President also

home/press-center/press-releases/military-commissions-unraveling-gitmo-attorneys-say [https://perma.cc/24L7-T2NN] (noting material-support-for-terrorism MCA convictions).

158. See *supra* note 2 (describing such pardons).

159. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM), <https://twitter.com/realdonaldtrump/status/1183016899589955584?lang=en> (tweeting “[t]he case of Major Mathew Golsteyn is now under review at the White House. Mathew is a highly decorated Green Beret who is being tried for killing a Taliban bombmaker. We train our boys to be killing machines, then prosecute them when they kill!”); see also Phil McCausland, *Trump Announces ‘Review’ of Green Beret Murder Case: ‘We Train Our Boys to Be Killing Machines,’* NBC NEWS (Oct. 12, 2019, 12:34 PM), <https://www.nbcnews.com/politics/donald-trump/trump-announces-review-green-beret-murder-case-we-train-our-n1065421> (“President Donald Trump used Twitter . . . to come to the defense of an army officer charged with murder and said the man’s case was now under review at the White House”).

160. See, e.g., Rachel E. VanLandingham & Geoffrey S. Corn, *Trump Is Unfit to Command the Military: Column*, USA TODAY (Mar. 3, 2016, 3:53 PM), <https://www.usatoday.com/story/opinion/2016/03/03/donald-trump-commander-in-chief-war-crimes-military-torture-civilian-targeting-column/81271916> [https://perma.cc/VFY6-G46J] (condemning candidate Trump’s advocacy of torture). For an analysis of Trump’s comments during his electoral campaign advocating for such war crimes as torture of enemy combatants and retaliatory killing of their families, see GREGORY S. GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 262–63 (2017).

indicated that he wanted such convicted, now-pardoned, war criminals to help him campaign for re-election.¹⁶¹

Many view such a pattern of pardoning convicted war criminals, truncating prosecutions, and celebrating misconduct as condoning war crimes¹⁶²—because that is exactly what it is.¹⁶³ That particular Commander-in-Chief made every military leader's job more challenging when training her soldiers, marines, sailors, and airmen to obey the LOAC. Furthermore, President Trump potentially eroded the military justice system's efficacy at holding such service members accountable for their misconduct. This indifference to and tolerance of battlefield misconduct, which some vocal advocates supported,¹⁶⁴ may very well disincentivize service members from appropriately reporting LOAC violations that their peers commit. Furthermore, the blunt messages—of might makes right and damn the law—inherent in such actions complicates the ability of military leaders at every echelon to impose accountability for LOAC violations and encourage adherence to LOAC itself.

There is no guarantee that this pattern of presidential response to these incidents would have been any different had our proposal been previously implemented. However, perhaps the Commander-in-Chief of the armed forces would have been more hesitant to engage in such interventions had the offenses he was addressing been clearly and unambiguously labeled and prosecuted as war crimes. Indeed, the increased gravitas accordant in that characterization is the thread that runs through all the recommendations in this Article—a weight that will ideally lead to greater consideration of the impact of such high-level interventions on good order and discipline, legally compliant

161. See Dave Phillipps, *From the Brig to Mar-a-Lago, Former Navy SEAL Capitalizes on Newfound Fame*, N.Y. TIMES (Dec. 31, 2019), <https://www.nytimes.com/2019/12/31/us/navy-seals-edward-gallagher-trump.html>; see also Maggie Haberman, *Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. TIMES (Dec. 8, 2019), <https://www.nytimes.com/2019/12/08/us/politics/trump-war-crimes-pardons.html>.

162. See *supra* note 2 and accompanying text.

163. This means President Trump is guilty, through command responsibility theory of liability, of the same war crimes he pardoned because he failed to exercise responsible command's requirement to punish war criminals. However, his pardon power under Article II of the U.S. Constitution would supersede any international criminal law theory of liability, at least in domestic courts.

164. The non-profit advocacy group United American Patriots has loudly criticized the U.S. military justice system. See, e.g., *Why We Do It*, UNITED AM. PATRIOTS <https://www.uap.org/uap-situation> [<https://perma.cc/D7US-U3UF>] (stating that “[s]ome of our Nation’s Warriors are wrongfully accused and convicted of ‘War Crimes’”).

military operations, and command authority in the most demanding of missions.

4. *Reversing current policy's illegitimacy effect*

Starting with the Vietnam War, the U.S. military has frequently been accused of indifference or insufficient response to its service members' war crimes.¹⁶⁵ Such criticisms are due to myriad factors, such as (1) the increased media access to combat operations and explosion of communications technology since the onset of the Vietnam War;¹⁶⁶ (2) the increased exposure of civilians to battlefield operations given the nature of the conflicts the United States has engaged in since the Korean War;¹⁶⁷ (3) the increased complexity and promulgation of the LOAC, particularly governing targeting, since World War II;¹⁶⁸ (4) the realization by opponents that allegations of war crimes can erode the domestic and international legitimacy of U.S. combat operations;¹⁶⁹ (5) the unfortunate impact of President Trump's apparent disinterest in requiring strict adherence to the LOAC;¹⁷⁰ and (6) the failure to prosecute war crimes as war crimes.

These criticisms have continued long past Vietnam, and they remain with us today.¹⁷¹ The reality is that such criticisms—that the U.S.

165. The U.S. military has also been accused of committing war crimes that were not investigated in conflicts prior to Vietnam. See Blaine Harden, *The U.S. War Crime North Korea Won't Forget*, WASH. POST (Mar. 24, 2015), https://www.washingtonpost.com/opinions/the-us-war-crime-north-korea-wont-forget/2015/03/20/fb525694-ce80-11e4-8c54-fb5ba6f2f69_story.html (characterizing the U.S. carpet bombing campaign in North Korea during the Korean War as a war crime); see also Tim Shorrock, *Can the United States Own up to Its War Crimes During the Korean War?*, NATION (Mar. 30, 2015), <https://www.thenation.com/article/archive/can-united-states-own-its-war-crimes-during-korean-war> (noting the allegations that the United States committed war crimes in North Korea by bombing civilians).

166. See William Hays Parks, *The Law of War Adviser*, 31 JAG J. 1, 19 (1980) (claiming that “[c]rimes on the battlefield were no more frequent in Vietnam than in past wars, but the microscopic examination of combat operations through modern news media for the first time surfaced for public scrutiny the cruel realities of the battlefield”).

167. *Id.* at 20.

168. See SOLIS, *supra* note 10, at 119–20.

169. See ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 5 (2016) (noting, *inter alia*, “the increasing power of law as a weapon of war”).

170. See Phillips, *supra* note 13 (noting President Trump's 2019 spate of pardons of U.S. service members for war crimes). See generally Williams, *supra* note 107, at 357 (noting in particular regarding detainee treatment that “many have persuasively argued that high-level leaders in the Bush Administration fostered a climate that encouraged deviation from the norms established under the Geneva Conventions”).

171. For example, in 2005, U.S. Marines in Haditha, Iraq allegedly massacred twenty-four Iraqi civilians; however, this incident resulted in no serious consequences

military fails to appropriately investigate and punish war crimes—occasionally have merit.¹⁷² Indeed, the high-profile war crimes committed in the hamlets of My Lai and Son Thang during the Vietnam War, and the subsequent handling of these tragedies, spurred the creation of the Department of Defense's Law of War program.¹⁷³ This program emphasizes preventive measures ranging from training to incident reporting,¹⁷⁴ all of which ideally enhance command accountability efforts.

Nonetheless, implementation of these obligations has not always been ideal. For example, the mistakes associated with the tragic massacre of Iraqi civilians in 2005 in Haditha, Iraq by U.S. Marines resulted in departmental-level soul-searching and recommendations

for any involved members, and because of that accountability failure, a later Department of Defense report recommended that military services not handle their own war crimes investigations. See Thom Shanker, *U.S. Combat Commanders Should Handle War Zone Investigations, Panel Says*, N.Y. TIMES (May 30, 2013), <https://www.nytimes.com/2013/05/31/us/us-combat-commanders-should-handle-war-zone-investigations-panel-says.html>; see also Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Request for Authorisation of an Investigation Pursuant to Article 15, ¶ 191 (Nov. 20, 2017) (finding, inter alia, “a reasonable basis to believe that members of the US armed forces and the CIA have committed the war crime of torture and cruel treatment” in Afghanistan); DEF. LEGAL POLICY BD., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 1 (2013) [hereinafter DEFENSE REPORT] (proposing improved methods for handling allegations of war crimes based on such allegations in Iraq and Afghanistan); Williams, *supra* note 107, at 352–53 (noting the inadequacy of the military disciplinary response to the leadership of the “Kill Team” unit of U.S. Army soldiers who killed civilians for sport in 2010 in Afghanistan).

172. For a description by a former U.S. Marine of the handling of an alleged war crime—murder of Iraqis in his custody—by Marine Lieutenant Pantano outside Fallujah, Iraq in 2004, see Williams, *supra* note 107, at 337, 341, describing “the blind eye that the U.S. military has often cast upon its own war crimes cases” where “[i]n dozens of instances military authorities have either dismissed charges or given light punishment for acts of U.S. personnel that appear to be serious violations of the law of war.” See Nicholas Kulish et al., *Navy SEALs, a Beating Death and Claims of a Cover-Up*, N.Y. TIMES (Dec. 17, 2015), <https://www.nytimes.com/2015/12/17/world/asia/navy-seal-team-2-afghanistan-beating-death.html> (detailing how U.S. soldiers credibly accused Navy SEALs of abusing detainees in Afghanistan in 2012, but the SEAL command with responsibility for accountability, against the weight of the evidence, shamefully exonerated its men without prosecution).

173. See Parks, *supra* note 166, at 18–19; see also Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 181 (1993) (describing the advent of the Law of War program). See generally GARY D. SOLIS, SON THANG: AN AMERICAN WAR CRIME (1997).

174. Addicott & Hudson, *supra* note 173, at 182.

for reform.¹⁷⁵ And some credible efforts to impose accountability have also been compromised by the exercise of the pardon power or preemptive presidential action that terminated accountability processes. While clearly within the scope of the President's constitutional authority, such interventions contribute to the broader misconception of war crimes impunity, and they risk producing a chilling effect on service members regarding bringing war crimes to light.¹⁷⁶

The broader record is, however, much more aligned with genuine commitment to accountability. In every armed conflict, including Vietnam, incidents of suspected war crimes by U.S. service members have been investigated and many service members have been tried by court-martial for violations of the UCMJ that could have also been charged as war crimes.¹⁷⁷ While some of these cases have triggered substantial public interest and calls for both greater and lighter punishment—and most credibly, for greater accountability for those higher up the chains of command—they demonstrate that assertions that U.S. commanders and the military lawyers who advise them regularly ignore credible allegations of war crimes, other than the exceptional case, are usually not accurate.¹⁷⁸

However, in a world where legitimacy is recognized by civilian leaders and military commanders as a key principle of effective military operations, and where information plays an increasingly significant role in strategic and operational success, perception is often as important—if not more important—than reality. To help counter perceptions of impunity and to appropriately capture the full harm of war crimes, Congress should enumerate war crimes in the UCMJ's punitive articles. Doing so will provide the clarity and simplicity in charging and prosecuting such offenses that already exists for current

175. See Williams, *supra* note 107, at 339; Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic & International Law*, 30 MICH. J. INT'L L. 251, 275–80 (2009); John M. Hackel, *Planning for the "Strategic Case": A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 240 (2009) ("For many Marine leaders, it was a time of shock and doubt.").

176. Williams, *supra* note 107, at 340.

177. See CORN, *supra* note 73; see also SOLIS, *supra* note 10, at 331. See generally DEFENSE REPORT, *supra* note 171, at 3 ("[The UCMJ] has provided commanders the means and methods to administer justice effectively across the spectrum of operations in both Iraq and Afghanistan . . . [W]ith rare exception, Service members alleged to have committed offenses during combat operations over the past decade, including civilian casualty offenses, have been dealt with fairly and efficiently.").

178. But see Williams, *supra* note 107, at 341 (claiming, without evidence, to the contrary).

enumerated offenses, thereby facilitating charging misconduct as the war crimes they constitute. This will strengthen accountability measures and more clearly align perception and reality of U.S. commitment to the LOAC.

5. *Influencing evolution of the Law of Armed Conflict*

International law is not static, and the United States has a legitimate role as a member of the community of nations in contributing to its evolution.¹⁷⁹ Congress plays an important role in that evolution through the exercise of its enumerated constitutional authority to “define and punish” offenses in violation of the law of nations.¹⁸⁰ Incorporating the MCA’s war crimes into the UCMJ will ideally contribute to this evolution by allowing Congress to periodically reconsider the nature of offenses it determines fall within the scope of war crimes jurisdiction.¹⁸¹

The scope of this define and punish authority has concededly been the subject of intense debate in the context of military commission litigation.¹⁸² However, while there is clearly some limit to what Congress may designate as a war crime pursuant to this authority, designating offenses as war crimes subject to trial by court-martial *or* military commission undoubtedly influences the formation of international law. Accordingly, incorporating war crimes into the punitive articles of the UCMJ with the accordant debates this will generate, coupled with periodic review of these offenses and consideration of adding new offenses, could positively contribute to the formation of international law.¹⁸³

179. See generally CORN, *supra* note 73, at 55 (noting that the components of customary international law include state practice).

180. U.S. CONST. art. I, § 8, cls. 10–11.

181. This is not to suggest that Congress should arbitrarily expand the offenses enumerated in the MCA.

182. See, e.g., ELSEA, *supra* note 154, at 12–13 (noting the debates over what constitutes a war crime under the MCA); Lederman, *supra* note 146, at 1582–86 (examining the limits of the Constitution’s Article III criminal trial protections and the historical application of military tribunals to domestic offenses).

183. One example of periodic review contributing to the evolution of a developing area of LOAC is the progression of laws against genocide. Compare Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100–606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. § 1091 (2018)) (permitting prosecution of genocide only when committed in the United States or by a U.S. national), with Genocide Accountability Act of 2007, Pub. L. No. 110–151, 121 Stat. 1821 (2007) (amending 18 U.S.C. § 1091 to permit prosecution of any perpetrator of genocide found within the United States irrespective of country of occurrence or nationality of the defendant).

C. Policy Recommendation: Incorporate MCA Provisions into the UCMJ

Because of the MCA, there is an obvious disparity between how the United States addresses accountability for war crimes committed by its own personnel compared to accountability for its captured enemy. For unprivileged enemy belligerents subject to the jurisdiction of the MCA, prosecutors may allege specifically enumerated offenses in the MCA. Even if the U.S. military sought to try a future captured enemy who does not come within the jurisdiction of the MCA—such as a captured enemy soldier who qualifies as a prisoner of war¹⁸⁴—the MCA’s enumerated offenses would almost certainly be relied on to craft an offense in violation of the common law of war subject to trial by military tribunal pursuant to Article 21 of the UCMJ.¹⁸⁵ In stark contrast, as explained earlier, U.S. service members are never prosecuted for actual war crimes under the current statutory scheme and customary practice.¹⁸⁶

Other than convenience and rote adherence to past practice, there seems to be no compelling justification for the continued omission of enumerated war crimes in the UCMJ. There is no rational reason why the statutory basis for war crimes accountability should be different for U.S. military personnel than it is for captured enemy personnel. Because accountability for war crimes is intended to be nationality-neutral, and because war crimes by members of one’s own armed forces are corrosive to good order and discipline, justifying this disparity on nationality of the alleged wrongdoer lacks merit. Indeed, the commentary to the First Geneva Convention notes that the grave breaches proceedings should be uniform whatever the nationality of the accused, and it prohibits special tribunals for the enemy.¹⁸⁷

Accordingly, Congress should amend the UCMJ by incorporating the punitive articles of the MCA. The MCA offenses should be utilized because they represent the most obvious manifestation of what Congress considers war crimes subject to trial by military tribunal.¹⁸⁸ There are no viable alternatives. The federal War Crimes Act is severely

184. GC III, *supra* note 34, art. 4.

185. Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (2018).

186. See *supra* note 115 and accompanying text.

187. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean Pictet ed., 1952) [hereinafter ICRC, COMMENTARY TO FIRST GENEVA CONVENTION].

188. These offenses, like the common law offenses in the UCMJ, may of course be modified given the evolution of customary international law. Additionally, offering greater prosecutorial options would not prevent military prosecutorial decision makers from utilizing common law-based offenses to address service members’ misconduct.

under-inclusive and therefore is not a helpful template. While other scholars have recommended incorporating war crimes listed in the charters of international tribunals such as the International Criminal Court,¹⁸⁹ there is simply no need to reach outside of current federal law to international bodies. These tribunals' delineated list of war crimes do not significantly differ from the MCA, outside of the MCA's controversial war crimes of conspiracy, terrorism, aiding the enemy, and material support for terrorism.

As alluded to previously in this Article, the validity of designating these offenses—conspiracy, terrorism, aiding the enemy, and material support for terrorism—as war crimes is questionable, and has been the subject of substantial litigation.¹⁹⁰ While conspiracy and aiding the enemy are existing enumerated UCMJ offenses, this in no way supports extending them to the realm of enumerated *war crimes*. As existing offenses in the punitive articles of the UCMJ, they apply only to those individuals subject to the UCMJ, meaning the jurisdiction for prosecuting these offenses is not derived from international law, but from U.S. military law.

Accordingly, there is no jurisdictional analogy between these existing UCMJ offenses and an extension of these offenses to an enumeration of war crimes in the Code. Whether such offenses should be included in the war crimes enumeration recommended herein must be based on the status of such offenses as violations of the laws and customs of war. Because the assertion of such status remains dubious and hotly contested, the MCA offenses of terrorism and material support for terrorism *should not* be included in the addition of enumerated war crimes in the UCMJ's punitive articles.¹⁹¹ Furthermore, because of the uncertainty as to the validity of including these specific offenses within the scope of military commission law of war jurisdiction, Congress

189. *But see* Scheffer, *supra* note 87, at 32 (recommending that Congress incorporate the war crimes found in the International Criminal Court's Rome Statute).

190. *See, e.g.,* Bahlul v. United States, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (per curiam); Patrick McDonnell, *Court of Military Commissions Review Upholds Life Sentence for al-Bahlul*, LAWFARE (Apr. 2, 2019, 8:25 AM), <https://www.lawfareblog.com/court-military-commissions-review-upholds-life-sentence-al-bahlul>. *But see* Hamdan I, 548 U.S. 557, 568–69 (2006).

191. Article 134 of the UCMJ already provides a mechanism to assimilate existing federal crimes such as material support to terrorism, 18 U.S.C. § 2339B, into the UCMJ for court-martial prosecution against a service member; this would simply reflect the authorized charging of a U.S. federal crime and not prosecution of a war crime, given the lack of recognition of terrorism and material support as war crimes under international law. *See* 10 U.S.C. § 934 (2018).

should also consider removing terrorism, material support for terrorism, conspiracy, and aiding the enemy from the enumerated offenses in the MCA. While we recognize the government has achieved some success in defending the validity of this expansion of law of war-based military commission jurisdiction,¹⁹² we believe the “mirror image” approach to war crimes proposed herein will be better served if Congress limits military commissions jurisdiction to those war crimes it believes should apply to members of our own armed forces.

Additionally, enumeration of a finite number of war crimes based on the MCA’s extant list would not foreclose the opportunity to allege other war crimes based on emerging norms of international law. This issue is easily addressed by inclusion of a residual provision in the enumerated set of offenses, one indicating that any other offense in violation of the customary laws of war is subject to prosecution. In essence, this provision would preserve the existing jurisdiction of both military commissions pursuant to Article 21 of the UCMJ and general courts-martial pursuant to Article 18.¹⁹³

Furthermore, incorporating MCA war crimes into the UCMJ should be complemented by amending the MCA itself to expand its in personam jurisdiction. There is no reason to continue the MCA’s narrow jurisdictional aperture, one that extends only to those *unprivileged* enemy belligerents associated with al Qaeda or the Taliban.¹⁹⁴ If the offenses enumerated in the MCA legitimately reflect war crimes subject to trial by military tribunal, *and* if Congress incorporates such offenses into the UCMJ, they logically should apply to *any* captured enemy in any armed conflict, to include *privileged* enemy belligerents (prisoners of war) whose pre-capture conduct exceeds the scope of their combatant immunity. Expanding the statutory authority to utilize military commissions to try captured enemy personnel for allegations of war crimes that aligns with the jurisdiction established over U.S. service members will facilitate accountability for all war criminals based on a consistent standard.¹⁹⁵

Finally, though the numbers are historically exceedingly small, war crimes committed by American civilians, including U.S. service members

192. See *Bahlul*, 840 F.3d at 758 (holding conspiracy to commit war crimes was a triable offense under the MCA).

193. Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (2018).

194. *Id.* § 948(c).

195. Additionally, for consistency’s sake, we recommend that war crimes committed by American civilians, including U.S. service members whose war crimes were not discovered until after they left active duty, be prosecuted under the War Crimes Act, 18 U.S.C. § 2441 (2018).

whose war crimes were not discovered until after they left active duty, should ideally be tried as war crimes under federal criminal law, and not as common law crimes. The same policy and legitimacy reasons as those discussed above regarding prosecuting service members for actual war crimes, versus simply for murder or rape, strongly support such “war crimes as war crimes” prosecutions for civilians as well. While 18 U.S.C. § 2441 (2006), the War Crimes Act, provides a viable mechanism for charging civilians with war crimes (though it also could benefit from greater enumeration analogous to the MCA), another federal statute—18 U.S.C. § 3261 (2000), the Military Extraterritorial Jurisdiction Act (MEJA)—has been the statute of choice for prosecuting American civilians (including former service members no longer subject to the UCMJ) with common law-type federal crimes, despite their misconduct also qualifying as war crimes, as demonstrated by the Green and Blackwater prosecutions.¹⁹⁶ Congress should amend MEJA to establish a presumption that misconduct that constitutes war crimes pursuant to 18 U.S.C. § 2441 be charged as a violation of that provision (the War Crimes Act), with resort to MEJA reserved for only those cases where jurisdictional impediments or the interests of justice demand. MEJA, in turn, should be used primarily to address overseas misconduct that does not qualify as an offense in violation of the War Crimes Act.¹⁹⁷

D. Policy Recommendation: Close Command Responsibility Loophole

Any legislative reform of military war crimes accountability should include the addition of a command responsibility mode of liability provision to the UCMJ. A commander’s knowing or negligent failure to exercise responsible command is far graver than other misconduct punished by dereliction convictions. It is an omission morally equivalent

196. See *supra* notes 97–99, 102, 104 and accompanying text.

197. To enhance the process of utilizing the War Crimes Act over any U.S. national who commits a war crime, in particular individuals who had been subject to the UCMJ at the time of the misconduct, we recommend establishing a coordinated institutional process between the Department of Defense and the Department of Justice to investigate and prosecute such individuals. Utilizing Judge Advocate officers designated as Special Assistant U.S. Attorneys to lead such prosecutions—a process currently utilized for civil litigation involving the U.S. Army and other services for the prosecution of civilians who commit violations of federal criminal law on U.S. military installations—is logical in war crimes cases. Such an approach would inject experienced military prosecutors into these prosecution efforts, thus helping ensure that the interests of the armed forces in demonstrating effective war crimes accountability was a central aspect to the implementation of this federal law. See 32 C.F.R. § 516.4 (2019) (outlining current military special assistant U.S. attorney responsibilities).

to the ordering of the war crimes themselves, and thus should impute the war crimes to the commander *as if* he had ordered, assisted with, or otherwise physically committed them himself.¹⁹⁸ International criminal law's doctrine of command responsibility liability provides the vehicle for doing so.

1. *Current UCMJ accomplice liability*

As mentioned earlier, the UCMJ treats responsible command duty as any other military duty, one subject to a criminal dereliction of duty prosecution for knowing or negligent failure to exercise these duties.¹⁹⁹ In other words, failure by U.S. commanders to fulfill “command responsibilities” results in unjustifiably limited criminal liability under the UCMJ²⁰⁰ unless the evidence establishes the shared criminal intent required for aiding and abetting liability. Thus, even if a commander “should have known” subordinates were likely to commit war crimes and her failure to take appropriate disciplinary or corrective action contributed to those war crimes, the commander would not be criminally responsible for the war crime itself.²⁰¹ It is important to note

198. See *United States v. von Leeb*, Judgment of the American Military Tribunal, reprinted in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 543 (1950); L.C. Green, Comment, *The Role of Discipline in the Military*, 42 CANADIAN Y.B. INT'L L. 385, 414 (2004) (“Just as a superior demands discipline from his subordinates, so he must also exercise the discipline that goes with command.”).

199. See *supra* Section I.A.2.

200. In theory only, given that commanders are rarely ever held accountable for any of their command duties, never mind responsible command under the LOAC, which is why one of these authors advocates for removing prosecutorial discretion from commanders and vesting it in military lawyers independent from the chain of command, as she believes this record shows commanders' bias. The only post-Vietnam case in which a commander was criminally charged with a dereliction of duty offense regarding his responsible command duties dealt with the Haditha massacre, and the prosecution was terminated due to unlawful command influence. See *Marine Cleared in Haditha Massacre*, CBS NEWS (June 17, 2008, 9:18 AM), <https://www.cbsnews.com/news/marine-cleared-in-haditha-massacre> [<https://perma.cc/K37Y-J5C9>] (noting that Lieutenant Colonel Jeffrey Chessani was the highest-ranking officer charged with combat-related misconduct since Vietnam War).

201. The permissible punishment for dereliction of duty will not be anything close to that authorized for the subordinates' substantive war crimes. See 10 U.S.C. § 892(3)(b) (2018) (codifying dereliction of duty in the UCMJ); see also 2019 MCM, *supra* note 126, IV-27 to -28 (outlining the maximum punishments for dereliction of duty offenses as prescribed by the President, ranging from a few months to a maximum of two years' confinement if death results from a willful dereliction). Furthermore, one is hard-pressed to find any military cases in which commanders are charged with dereliction of their duties, as commanders (the only figures currently with

that it is almost unheard of that a U.S. military commander today will be disciplined for, never mind criminally charged with, dereliction of duty offenses related to the commander's responsible command duties.²⁰²

While international criminal law allows for imputed liability for subordinates' war crimes due to a commander's responsible command failures, the UCMJ does not. The UCMJ only imputes liability for the war crimes physically committed by others to aiders and abettors of those crimes, aligned with traditional common law accomplice principles.²⁰³ Article 77 of the UCMJ provides in pertinent part that "a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures" an offense is guilty of that offense.²⁰⁴ However, he or she must also possess a mental state of wanting the assisted crime to be achieved: the assistor must "[s]hare in the criminal purpose or design."²⁰⁵

This accomplice mode of liability fails to capture the larger field of imputed liability found in the international criminal law theory of command responsibility because of this mental state (*mens rea*) element. In the UCMJ's mode of accomplice liability, a defendant need not only assist the target crime in some manner as described above—the defendant has to desire its accomplishment. Only a commander who *willfully* contributes to the commission of a war crime by a subordinate—meaning that the commander not only had actual knowledge that the crime was going to be committed but also shared the criminal intent for its commission—is criminally responsible for that crime as if she committed it.²⁰⁶ Absent proof of that specific intent, liability for a subordinate's war crimes cannot be established.²⁰⁷

prosecutorial discretion) largely fail to hold other commanders to account for such offenses, at least by criminal justice means.

202. A notable exception is the U.S. Marine Corps' failed 2017 attempt at such accountability regarding war crimes allegedly committed in Haditha, Iraq. *See Marine Cleared in Haditha Massacre*, *supra* note 200.

203. 10 U.S.C. § 877.

204. 2019 MCM, *supra* note 126, at IV-1; *see also* 10 U.S.C. § 877.

205. 2019 MCM, *supra* note 126, at IV-2.

206. *United States v. Simmons*, 63 M.J. 89, 93 (C.A.A.F. 2006) (emphasizing that while Article 77 liability can rest on an omission if there is a duty to act, it must be accompanied by the requisite *mens rea* of a "shared purpose" that the assisted crime be committed).

207. *Id.* at 92.

2. *Command responsibility*

The UCMJ's accomplice mode of liability stands in contrast to the international criminal law doctrine of command responsibility, which this Article mentioned earlier is a mode of liability developed to reinforce the LOAC's tenet of responsible command.²⁰⁸ This criminal law analogue to the LOAC's responsible command doctrine imposes vicarious criminal liability on commanders for their subordinates' war crimes; it requires that a commander knew, or reasonably should have known, that such crimes would occur and that this commander failed to prevent, suppress, or punish (take appropriate action within the commander's power) said war crimes.²⁰⁹

While this doctrine of vicarious criminal responsibility for commanders resonated in post-World War II U.S. Supreme Court jurisprudence²¹⁰ and is considered customary international law, the UCMJ fails to expressly include it, and military jurisprudence has seemingly excluded it.²¹¹ The

208. See JEAN-MARIE HENCKAERTS ET AL., INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 559 (2005) (recognizing that "criminal responsibility of commanders for war crimes committed by their subordinates, based on the commanders' failure to take measures to prevent or punish the commission of such crimes is a long-standing rule of customary international law"); see also Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055; Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U.J. INT'L L. & POL. 797, 797–98 803 (2002) (highlighting the ways in which the command responsibility doctrine reinforces a commander's incentive to "suppress violation of the laws of war"); Smidt, *supra* note 59, at 155–56 (arguing for the integration of the command responsibility doctrine into the UCMJ).

209. See DINSTEIN, *supra* note 151, at 271–75 (tracing history of command responsibility through the various international tribunals).

210. *In re Yamashita*, 327 U.S. 1, 14–15 (1946) (answering in the affirmative the question "whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and . . . whether he may be charged with personal responsibility for his failure to take such measures when violations result").

211. While Article 18 of the UCMJ seemingly allows for such liability, it was only (and unsuccessfully) attempted in the infamous court-martial of Captain Ernst Medina to attach direct liability to him for his subordinates' war crimes during the My Lai massacre. See Douglas O. Linder, *Excerpt from Prosecution Brief on Command Responsibility*, US. vs Medina, FAMOUS TRIALS, <https://famous-trials.com/mylaicourts/1635-myl-law3> [<https://perma.cc/C9MT-CM2T>] (noting that while commanders should be responsible for war crimes of subordinates they should have known about, "[t]his command responsibility does not . . . extend to criminal responsibility unless the commander knowingly participates in the criminal acts of his men or knowingly fails

UCMJ should be revised to include this mode of liability, and we now explain the what and the why of such revision.

Command responsibility builds upon the duties imposed on commanders by the canon of responsible command and is a mode of liability for war crimes that subjects a commander to liability for crimes committed by her subordinates.²¹² It is a distinct mode of vicarious criminal liability, one based on a reckless omission to fulfill the responsible command duty to control subordinates, instead of based on the accomplice's act plus shared intent to commit a crime.²¹³ Command responsibility liability makes commanders criminally liable for their subordinates' serious violations of the LOAC if they knew or *should have known* of their subordinates' forthcoming criminal violations and failed to take "necessary and reasonable measures" to prevent or stop it.²¹⁴ Furthermore, they are also

to intervene and prevent the criminal acts of his men when he had the ability to do so"); see also CORN, *supra* note 73, at 552–53 (detailing the Medina prosecution's theory of liability and noting that he was ultimately acquitted because of difficulty of proving actual knowledge); Sepinwall, *supra* note 175, at 285 n.192 (noting that while military prosecutors attempted a command responsibility-type theory of liability against Medina in his court-martial for his soldiers' massacre of civilians at My Lai, the military judge found that such liability was not permitted by U.S. military law); Smidt, *supra* note 208, at 193 (explaining that while Medina could have been prosecuted under the command responsibility "knew or should have known" standard . . . the court elected to apply a more narrow, actual knowledge theory of personal criminal responsibility").

212. This doctrine is also called superior responsibility and can apply to civilians, at least under the Rome Statute. See DINSTEIN, *supra* note 151, at 278.

213. Command responsibility does not impose strict liability on commanders for their subordinates' war crimes, nor should it. *But see* Wm. C. Peters, *Article 37 of the UCMJ and Command Responsibility for War Crimes—Unlawful Command Influence as (Rogue) Elephant in the Room*, 5 ELON L. REV. 329, 329, 333–34 (2013) (chronicling arguments for commanders' strict liability for subordinates' war crimes).

214. Compare Prosecutor v. Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 359, 369 (June 15, 2009) (holding that a wartime commander must have been "virtually certain" that a war crime will take place as a result of his or her acts or omissions before he or she is held responsible for the acts of subordinates), *vacated*, ICC-01/05-01/08A ICC App. Ch. (June 8, 2018), and Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (convicting Blaškić on the basis of individual and superior criminal responsibility), with Prosecutor v. Delalić Case No. IT-96-21-A, Judgment (Int'l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001) (finding Delalić not guilty following discussion of whether he had exercised superior authority over the prison-camp). Delalić, known as the *Čelebići* case, substitutes a "reason to know" standard for a negligence "should have known" standard in regards to command responsibility liability for subordinates' war crimes. See Robert Cryer, *Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element?*, EJIL: TALK! (July 20, 2009), <https://www.ejiltalk.org/command-responsibility-at-the-icc-and-icty-in-two-minds-on->

liable for such crimes when they knowingly or negligently fail to appropriately *punish* commission of war crimes—that is, when they fail to discharge the third leg of the responsible command triad of duties.²¹⁵

Regarding this third duty, command responsibility makes commanders liable for their subordinates' war crimes if the commander fails to take reasonable steps to investigate and "punish" subordinates' war crimes that the commander knew or should have known had occurred.²¹⁶ This third dimension of LOAC's concept of responsible command reflects the expectation that commanders will exercise due diligence in response to indications of prior subordinate misconduct. As mentioned in Section I.A.1, the expectation is that commanders will take the appropriate investigative, reporting, or prosecutorial actions that are within their power; vicarious liability is predicated on a commander's failure to take reasonable actions *within the scope of his or her extant command authority*.²¹⁷

If a commander lacks prosecutorial authority, liability based on failure to punish is based only on his or her failure to investigate or report. This is important to note, given the strained arguments by some that command responsibility is somehow unfair to impose on U.S. commanders if they do not also possess prosecutorial discretion to refer charges to courts-martial.²¹⁸ Such an argument is without merit because, first, most commanders on the ground leading troops—the leaders most directly responsible for ensuring LOAC compliance, such as at the battalion level—already lack such authority to convene general courts-martial given that this authority is almost always vested in three- and four-star flag officers, not at the field grade battalion

the-mental-element [<https://perma.cc/H887-VP3H>] (noting that the International Criminal Court Gombo decision seems to reject AP I Articles 86 and 87 "reason to know" standard for imposing command responsibility for subordinates' war crimes).

215. See Hansen, *What's Good for the Goose*, *supra* note 156, at 348 (characterizing command responsibility as a type of "derivative imputed liability" that includes alternative actus reus, including failure "to punish his forces for their commission of past war crimes"); *supra* note 46 and accompanying text (explaining the responsible command triad of duties). Failing to act in good faith to impose accountability for subordinate misconduct may also provide evidence that the commander should have known subsequent violations would occur.

216. See *Prosecutor v. Gombo*, ICC-01/05-01/08 Judgment Pursuant to Art. 74 of the Statute, ¶ 206 (Mar. 21, 2016) ("[T]he duty to repress also encompasses an obligation to punish forces after the commission of crimes.").

217. See *supra* Section I.A.1 (outlining the LOAC's responsible command duties).

218. See, e.g., Hansen, *supra* note 43, at 457 (arguing that removing prosecutorial discretion from commanders will make it somehow unfair to subject them to command responsibility liability).

level.²¹⁹ Despite not having felony-level prosecutorial authority, commanders still must fulfill all of their responsible command duties. Second, the LOAC never envisioned the responsible command duty to punish as literally meaning the commander herself has to wield prosecutorial discretion.²²⁰ Third, obviously Congress already concluded it is fair to impose command responsibility on commanders who lack prosecutorial discretion, given that they included it as a mode of responsibility for unlawful belligerents in the MCA—individuals who do not possess prosecutorial authority, as explained in the next section.

There is no good reason why the UCMJ should continue to omit this doctrine of international war crimes accountability. The laws and customs of war imposes a duty on commanders, like Admiral Yamashita in the Philippines during World War II, Captain Ernest Medina in the village of My Lai, Vietnam, and Marine Lieutenant Colonel Jeffrey Chessani in Haditha, Iraq, to effectively and responsibly command their subordinates.²²¹ The failure to do so—that is, to take effective measures to prevent foreseeable subordinate misconduct or failure to report, investigate, and punish such crimes—is more than a mere dereliction of duty. It is a sufficient contribution to their subordinates' war crimes to justify extending responsibility to the derelict commander for the crimes themselves, thus constituting an explicit recognition of the incredible importance of this duty.

3. *Use the MCA to amend the UCMJ*

Ironically, Congress has demonstrated its support for this mode of liability by including it in the MCA. As a result, like our proposal related to substantive war crimes enumerated in the MCA, adding command responsibility to the UCMJ is a simple exercise of cutting and pasting from the extant MCA. Congress need only amend Article 77 to align it with the scope of principal liability established in section 950q of the MCA, which provides:

219. See RESPONSE SYS. TO ADULT SEXUAL ASSAULT CRIMES PANEL, *supra* note 90, at 73–74.

220. See PILLOUD, *supra* note 38, at 62–63.

221. See Sepinwall, *supra* note 175, at 278–79. U.S. Marine Lieutenant Colonel Chessani was charged in 2007 with dereliction of duty regarding his reporting and investigation into his men's alleged 2005 massacre of twenty-four Iraqi civilians in Haditha, Iraq; however, his court-martial was terminated due to unlawful command influence. Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25, 39–45 (2010); see also Reuters, *Case Dropped Against Officer Accused in Iraq Killings*, N.Y. TIMES (June 18, 2008) <https://www.nytimes.com/2008/06/18/us/18haditha.html>.

Principals

Any person punishable under this chapter who—

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
 - (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
 - (3) is a superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof,
- is a principal.²²²

III. THE NEED FOR NEW AFFIRMATIVE DEFENSES & OTHER FIXES

One of the consequences of relying almost exclusively on the currently enumerated UCMJ offenses to address incidents that also qualify as war crimes is that, like the available offenses, the range of available defenses are also common law-based. In the abstract, this seems logical, as these defenses derive from the same common law foundation as the offenses to which they relate. However, when these common law offenses are utilized to impose accountability on service members for alleged battlefield misconduct, the established defenses are inadequate to address the armed conflict context of such crimes.

Extant common law defenses fail to take into account the belligerent nature of the situation that gave rise to the underlying charged misconduct. The current military law defenses insufficiently address the contextual reality of alleged war crimes, just as the current UCMJ offenses fail to do so on the other side of the equation.²²³ Congress should therefore consider supplementing the Code with at least the below affirmative defense.

222. Military Commissions Act of 2009, 10 U.S.C. § 950q (2018).

223. *See supra* Section II.B.1 (discussing the incomplete nature of common law offenses when applied to war crimes).

A. *Reasonable Mistakes as to What Qualifies as “Unnecessary” Suffering*

1. *Legal ambiguity of unnecessary suffering*

One of the LOAC’s cardinal principles is the prohibition against the infliction of unnecessary suffering.²²⁴ The roots of this principal run deep in the both customary and treaty law.²²⁵ As originally codified, the rule prohibited the “calculated” infliction of unnecessary suffering, and this “calculation” element is still central to the U.S. interpretation of the prohibition.²²⁶ However, for state parties to the Additional Protocol I to the Geneva Conventions of 1949, this prohibition applies to any method or means of warfare intended to cause or “of a nature” to cause unnecessary suffering.²²⁷ This broader definition includes not only the calculated or intended infliction of unnecessary suffering, but also what appears to be more of an objective standard: was the method or means reasonably likely to produce such suffering?²²⁸

The most difficult aspect of interpreting and applying this rule is not the scienter component regarding calculation, but rather the identification of what suffering in war qualifies as “unnecessary.”²²⁹ According to the 2019 U.S. Army Field Manual 6-27, *The Commander’s Handbook on the Law of Land Warfare*, this prohibition is grounded in the principle of humanity:

Humanity is the LOAC principle that forbids inflicting suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Humanity is sometimes referred to as the principle of avoiding unnecessary suffering or the principle of avoiding superfluous injury. Commanders should exercise leadership to ensure that Soldiers and Marines under their command know that cruelty and the infliction of unnecessary suffering will not be tolerated.²³⁰

224. See DINSTEIN, *supra* note 151, at 8; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 1996) (referring to unnecessary suffering as one of two “cardinal principles” of the LOAC and “intransgressible”).

225. See DINSTEIN, *supra* note 151, at 63–67 (tracing the principle from its first formal inception in the preamble of the 1868 St. Petersburg Declaration to Additional Protocol I to the Geneva Conventions).

226. See DoD LOW MANUAL, *supra* note 3, at 358 (noting that “the phrase ‘calculated to cause superfluous injury’ may be regarded as the more accurate translation”).

227. AP I, *supra* note 34, at 21, 30.

228. See DINSTEIN, *supra* note 151, at 65.

229. *Id.* at 64 (highlighting the ambiguities in defining “unnecessary” suffering); see also SASSÖLI, *supra* note 31, at 176 (“This standard seems too vague to be effective.”).

230. U.S. DEP’T OF ARMY & U.S. DEP’T OF NAVY, *THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE*, FM 6-27, 1-28 (Aug. 2019), https://fas.org/irp/doddir/army/fm6_27.pdf [<https://perma.cc/9GND-XGAZ>] [hereinafter FM 6-27].

This very broad definition provides a useful touchstone but leaves many unanswered questions. While it makes clear that the infliction of suffering with no rational relationship to the accomplishment of the military mission would violate the principle, it does not address what limits, if any, apply to the infliction of suffering that *are* rationally related to the military mission. Indeed, explaining what is “unnecessary” without first explaining what suffering is “necessary” seems especially confusing.

The Field Manual provides another explanation that is more detailed, although it also indicates that, pursuant to U.S. interpretation, the rule is related exclusively to weapons systems and by implication not methods or tactics. Specifically:

A weapon review addresses whether the weapon is calculated to cause unnecessary suffering or superfluous injury in violation of the standard stated in Hague Regulations Article 23(e). The terms “unnecessary suffering” and “superfluous injury” are synonymous in the context of this analysis. Superfluous injury generally is determined in light of the practice of nations and in evaluation of a specific weapon. Superfluous injury is assessed in the sense of the design of a particular weapon or its employment, and not in terms of how a person affected by the weapon would be subjectively affected by it.²³¹

Use of “calculated to cause” in the Hague Regulations, 1907, Article 23(e), helps convey that the legal standard is focused on assessing the intended purpose or purposes of the weapon’s development.²³² The prohibition of weapons calculated to cause superfluous injury or unnecessary suffering constitutes acknowledgement that the use of weapons in war causes suffering, including injury and loss of life, and a weapon cannot be declared unlawful merely because it may cause severe injury or suffering.²³³

There is, however, no internationally agreed upon definition for superfluous injury.²³⁴ The determination is whether a weapon’s

231. *Id.* at 2-206.

232. Compare Hague Convention IV, *supra* note 41, art. 23(e) (prohibiting weapons “calculated to cause unnecessary suffering”), with Hague Convention II, *supra* note 41, art. 23(e) (prohibiting weapons “of a nature to cause superfluous injury”).

233. See DINSTEIN, *supra* note 151, at 64–65. Nor is a lawyer reviewing the legality of a weapon required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be misused in ways that might be prohibited.

234. See, e.g., Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 129 (Dieter Fleck ed., 2d ed. 2008) (referring to the prohibition against unnecessary suffering as a “rather abstract prohibition”); PILLOUD, *supra* note 38, at 403 (“[T]he principle of the prohibition on superfluous damage and injury was . . . thoroughly studied and questioned, both in the light of past

employment for its normal or expected use would be prohibited under some or all circumstances.²³⁵ A weapon would be deemed to cause superfluous injury only if it inevitably, or in its normal use, has a particular effect, and the injury caused as a result of this use is considered by governments as manifestly disproportionate to the military necessity for said use.²³⁶ In other words, it would cause excessive injury when compared to the anticipated military advantage to be gained from its employment.²³⁷ Furthermore, a weapon's effects must be weighed in light of comparable, lawful weapons in use on the modern battlefield.²³⁸

Importantly, the effect of the use of a weapon in combat is not the sole criterion for determining whether a weapon is calculated to cause superfluous injury; effects will differ widely as a result of the constantly shifting nature of the battlefield.²³⁹ For example, a weapon that can incapacitate or wound lethally at 300 meters or longer ranges may result in a greater degree of incapacitation or greater lethality when used against targets at lesser ranges. Similarly, the use of a weapon sufficiently lethal to destroy a reinforced object, such as a tank, bunker, or aircraft hangar, may have a devastating effect on enemy military personnel in, on, or adjacent to that object at the time of its attack, or on enemy military personnel struck directly by a weapon intended for a vehicle or entrenched defensive position. In both cases, the use of these weapons would be lawful.²⁴⁰

These references reinforce a basic premise woven into this prohibition: the LOAC allows for the infliction of substantial *necessary* suffering.²⁴¹ As a result, and as is also reflected in these sources, identifying the line

experience and from the point of view of modern military necessity. The principle was never contested, but neither did it form the subject of a wide-ranging agreement on its significance and its scope as far as actual means used in combat are concerned.”).

235. See DOD LOW MANUAL, *supra* note 3, at 338 (“[T]he rules relating to weapons are generally characterized as prohibitive law forbidding certain weapons or the use of weapons in certain instances.”).

236. See *id.* at 359.

237. See *id.* (explaining this rule and concluding that “[t]hus, the suffering must be assessed in relation to the military utility of the weapon”); see also SASSÒLI, *supra* note 31, at 175–76 (“In practice, the application of this basic rule is always a compromise . . . interpreted as meaning not justified by military utility, either because of the lack [of] or existence of only minimal utility or because utility is considerably outweighed by the suffering caused.”).

238. See CORN, *supra* note 73, at 204.

239. *Id.*

240. *Id.* at 205 (succinctly analyzing the unnecessary suffering prohibition applied to weapons’ use).

241. See DINSTEIN, *supra* note 151, at 64; see also PILLOUD, *supra* note 38, at 393–94.

between necessary and unnecessary suffering is extremely complex.²⁴² This complexity is only increased when the regulatory scope of the principle is extended beyond weapons (means) to tactics (methods) as is required by state parties to the Additional Protocol I to the Geneva Conventions of 1949.²⁴³

Nonetheless, soldiers at every level are routinely instructed on their obligation to “prevent unnecessary suffering.”²⁴⁴ Even in the U.S. military, which, as indicated in the sources above, operates pursuant to a more restricted interpretation of the principle, this instruction is routine, beginning at entry-level training.²⁴⁵ It is important that soldiers understand that basic notions of humanity extend even to their enemy in combat, and that law and morality accordingly impose limits on the nature of measures that may be used to subdue that enemy.

However, it is unrealistic to expect every soldier to be capable of navigating the analytical complexity related to what is or is not necessary suffering in war when that analysis vexes even the most accomplished legal experts. More significant is the question whether criminal consequences should flow from a good-faith, reasonable decision to implement this amorphous principle that turns out to be legally erroneous—thus, we think a special defense is in order, as explained below.

2. *Captain Rogelio Maynulet*

U.S. Army Captain Rogelio Maynulet was tried by General Court-Martial in 2005 for assault with intent to commit murder for shooting and killing a mortally wounded enemy belligerent after a firefight. The trial involved the issue of whether his asserted honest (though perhaps unreasonable) understanding of what the unnecessary suffering principle required with regard to his victim justified allowing him to offer the military jury a mistake of law defense.²⁴⁶ Maynulet was involved

242. See Oeter, *supra* note 234, at 131 (noting that “the notion of ‘suffering’ is not quantifiable”).

243. See AP I, *supra* note 34, at 30.

244. United States v. Maynulet, 68 M.J. 374, 376 (C.A.A.F. 2010); see also DEP’T OF THE ARMY, YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR, FM 27-2, 11 (1984), https://www.loc.gov/rr/frd/Military_Law/pdf/conduct-in-combat-1984.pdf [<https://perma.cc/66PY-3A2F>] (exhorting soldiers to not “cause unnecessary injury or suffering to the enemy”); see also FM 6-27, *supra* note 230, 1-28.

245. See CORN, *supra* note 73, at 568 (describing U.S. Army LOAC training).

246. *Maynulet*, 68 M.J. at 375. One of this Article’s authors, Professor Geoffrey S. Corn, has first-hand recollection of the facts of the case. He was present during the trial, discussed the case with defense counsel and the defendant, and gave testimony

in a combat action in Iraq in 2004 that resulted in an insurgent being mortally wounded.²⁴⁷ Maynulet ordered his medic to attend to the insurgent, but after an initial evaluation the medic informed Maynulet that there was nothing he could do for the wounded man and that he would die within five to ten minutes as a result of a head and chest wound.²⁴⁸ Maynulet then ordered the medic to move away from the casualty and proceeded to shoot and kill the wounded fighter.²⁴⁹ Unbeknownst to Maynulet, or his medic, all of this was being observed by a remotely piloted vehicle (drone) operator.²⁵⁰ That operator immediately informed his superior officer that he had just recorded what he thought was a war crime.²⁵¹

When questioned, Maynulet indicated that he acted pursuant to his training to prevent unnecessary suffering, and persisted in this assertion throughout the ensuing investigation and court-martial.²⁵² At the close of the evidence in his case, his defense counsel requested that the members of the court (the military jury) be instructed on mistake of law, arguing that “mistake of law may be a defense when the mistake results in the reliance on the decision or announcement of authorized public official or agency.”²⁵³ In support of this request, the military judge permitted the defense to present evidence from Professor Geoffrey S. Corn, one of this Article’s authors, who at that time was acting as a consulting expert on the asserted basis for the mistake.²⁵⁴ During this testimony, this expert reviewed PowerPoint slides from a pre-deployment LOAC briefing, which included a slide on the principle of unnecessary suffering.²⁵⁵ That slide was highly misleading,

as an expert witness during the court-martial on the question of whether the military judge should grant the defense request for a mistake of law instruction, a request ultimately denied.

247. See Matthew Milikowsky, “*There Are No Enemies After Victory*”: *The Laws Against Killing the Wounded*, 47 GEO. J. INT’L L. 1221, 1262–63 (2016) (chronicling the Maynulet killing based on records and first-hand accounts); see also Mohammad Naqib Ishan Jan & Abdul Haseeb Ansari, *The Care of Wounded and Sick and the Protection of Medical Personnel in the Time of Armed Conflicts*, 11 ISIL Y.B. INT’L HUMANITARIAN & REFUGEE L. 47, 59 (2011) (detailing the Maynulet killing).

248. *Maynulet*, 68 M.J. at 375; see also Milikowsky, *supra* note 247, at 1262–63.

249. *Maynulet*, 68 M.J. at 375.

250. See notes on file with author (Corn).

251. *Id.*

252. See *Maynulet*, 68 M.J. at 375–76.

253. *Id.* at 376.

254. See notes on file with author (Corn).

255. See *id.*

as it indicated unnecessary suffering requires soldiers to “do the right thing.”²⁵⁶

However, applying traditional criminal law doctrine as reflected in military jurisprudence, the military judge denied the instruction.²⁵⁷ According to the judge, mistake of law (as opposed to mistake of fact) would only be relevant if the defendant’s mistake about the law negated a specific intent requirement that Maynulet knew the law as an element of the offense.²⁵⁸ Since no such knowledge of the law was an element of the charged offense, the request was denied.²⁵⁹ Maynulet was convicted.²⁶⁰ While he did not testify in the findings phase of his general court-martial, he did testify under oath during the sentencing phase, explaining the motivation for his action.²⁶¹ The military jury then sentenced him to be dismissed from the Army (the officer equivalent of a dishonorable discharge) but rejected the prosecution request to include a period of confinement in its sentence.²⁶²

The Court of Appeals for the Armed Forces (CAAF)—the highest military appellate court—upheld Maynulet’s conviction, although it differed slightly in its reasoning.²⁶³ The CAAF applied an alternate theory of mistake of law (one codified in the MCM): mistake of law based on good-faith reliance on an authorized pronouncement of the law.²⁶⁴ However, the CAAF found that, “[t]he problem with [Maynulet’s] argument is that the record is devoid of any erroneous pronouncement or interpretation of military law or the [LOAC] upon which he could have reasonably relied to justify his killing of the injured driver.”²⁶⁵

This significance of Maynulet’s case requires placement in the general context of mistake of law as an affirmative defense. In U.S. criminal law, knowledge of the law is typically irrelevant to assessing

256. *See id.*

257. *Maynulet*, 68 M.J. at 376.

258. *Id.* at 376–77; *see* notes on file with author (Corn).

259. *See* notes on file with author (Corn).

260. *Maynulet*, 68 M.J. at 374.

261. *Id.* at 375; *see* notes on file with author (Corn).

262. *Maynulet*, 68 M.J. at 374.

263. *Id.* at 377.

264. *See* 2019 MCM, *supra* note 126, at II-132. While the Rules for Courts-Martial state that “[i]gnorance or mistake of law, including general orders or regulations, ordinarily is not a defense,” the discussion states that “mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency.” *Id.*

265. *Maynulet*, 68 M.J. at 376.

the culpability for its violation, and military criminal law is no exception.²⁶⁶ This irrelevancy assumption originated with the *malum in se* nature of common law crimes, a characterization of evil that led to the conclusion that a defendant need not know what the law prohibited in order to form a guilty mind in relation to commission of common law offenses.²⁶⁷ As criminal codes expanded to include numerous *malum prohibitum* offenses, this assumption regarding irrelevancy of the law's strictures was criticized.²⁶⁸ In light of this criticism, and at the suggestion of the American Law Institute's Model Penal Code, many U.S. jurisdictions amended their codes to recognize a limited mistake of law defense theory: a defendant may raise mistake of law not only when relying on a high-level authoritative statement of the law that turned out later to be false,²⁶⁹ but also when knowledge of the law is actually a material element of the charged offense.²⁷⁰

This two-prong concept of mistake of law is reflected in military law. For example, the pattern instructions for U.S. courts-martial provide:

Ignorance or mistake of law is generally not a defense. However, when actual knowledge of a certain law or of the legal effect of certain known facts is necessary to establish an offense, ignorance or mistake of law or legal effect will be a defense. Also, such unawareness may be

266. See *People v. Marrero*, 507 N.E.2d 1068, 1074 (N.Y. 1987) (Hancock, J., dissenting) (tracing the medieval roots of the maxim "*ignorantia legis neminem excusat*"); see also *United States v. Ward*, 16 M.J. 341, 348 (C.A.A.F. 1983) (discussing the mistake of law defense); 2019 MCM, *supra* note 126, at II-132 ("Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.").

267. See *Marrero*, 507 N.E.2d at 1074–75 (Hancock, J., dissenting) ("[O]bjection to the maxim '*ignorantia legis neminem excusat*' may have had less force in ancient times when most crimes consisted of acts which by their very nature were recognized as evil (*malum in se*). In modern times, however, with the profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*), the 'common law fiction that every man is presumed to know the law has become indefensible in fact or logic.'" (internal citations omitted)); see also MODEL PENAL CODE § 2.04 cmt. 3, at 274–76 (AM. LAW INST., Proposed Official Draft 1962) [hereinafter MPC] (explaining such link).

268. See, e.g., *Marrero*, 507 N.E.2d at 1074 (Hancock, J., dissenting) (noting today's "widespread criticism of the common-law rule mandating categorical preclusion of the mistake of law defense"). See generally Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1382–94 (1995) (surveying various cases and criminal offenses where courts have distinguished between *malum in se* and *malum prohibitum* conduct).

269. MPC, *supra* note 267, § 2.04(3) note (describing the exception of allowing a defendant to "raise his belief in the legality of his conduct as a defense to a criminal charge" and noting that "instances in which this is permitted are narrowly drawn so as to induce fair results without undue risk of spurious litigation").

270. See 2019 MCM, *supra* note 126, at II-132; see also MPC, *supra* note 267, § 2.04(1), § 2.04 cmt. 1.

a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. For example, an honest belief the accused was, under the law, the rightful owner of an automobile is a defense to larceny even if the accused was mistaken in that belief.²⁷¹

This instruction obviously limits mistake of law to the specific intent-type and is therefore not as inclusive as the Model Penal Code proposal (the instruction also appears to confuse mistake of law with mistake of fact with its use of the mistaken belief of legal ownership nullifying intent to steal). This under-inclusive approach to mistake of law is especially troubling when considering a case like that of Maynulet. If, as Maynulet sought to argue, his reliance on a misleading or erroneous explanation of the LOAC principle of unnecessary suffering was reasonable under the circumstances, denying the defense seems inequitable, especially considering the unique and at times complex situations involving LOAC implementation. Indeed, while it is impossible to know exactly why his military jury imposed a relatively lenient sentence, it may very well be that it understood this inherent inequity.

Offenses resulting from a mistaken understanding of the LOAC's unnecessary suffering rule do not require proof of knowledge of the law as a material element. As a result, detrimental reliance on such training or advice could never be relevant to establishing the elements of offenses against the person such as that committed by Maynulet no matter how reasonable that reliance may be under the circumstances.²⁷² However, what distinguishes the soldier from the citizen in the normal peacetime context is the overall obligation to know and implement the LOAC.²⁷³

271. DEP'T OF THE ARMY, MILITARY JUDGES' BENCHBOOK, Pamphlet 27-9, at 1697 (2020), <https://www.jagcnet.army.mil/Sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=80086608B92177D285257B48006924A1> [hereinafter MILITARY JUDGES' BENCHBOOK].

272. And neither will the other extant permissible mistake of law defense, that of reasonable reliance on an authoritative pronouncement of the law, given its narrow confines to high public officials or agencies; in Maynulet's case, the appellate court found that there simply was no authoritative pronouncement to rely on (which seems a correct holding, given that no one told Maynulet that the LOAC allowed him to shoot a wounded detainee; indeed, his rules of engagement cards clearly stated the opposite). *See* *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010).

273. *See* *United States v. Ohlendorf* (The Einsatzgruppen Case), *reprinted in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 358-59, 470-88 (1950) ("The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent . . . The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand

International law imposes on soldiers an individual obligation to comply with the LOAC, an obligation that transcends any domestically imposed duty of obedience.²⁷⁴ This is reflected in the qualification of obedience to orders as a defense to a criminal act:

Obedience to an unlawful order does not necessarily result in criminal responsibility of the person obeying the order. The acts of the accused if done in obedience to an unlawful order are excused and carry no criminal responsibility unless the accused knew that the order was unlawful or unless the order was one which a person of ordinary common sense, under the circumstances, would know to be unlawful.²⁷⁵

This instruction is consistent with the near universal understanding of the relationship between the duty of obedience and the limits of that duty imposed by this individual obligation.²⁷⁶ Central to this limitation of obedience as an excuse for committing an act or omission in violation of the LOAC is the expectation that the subordinate *know* and *comply* with the limits imposed by that body of law on conduct during armed conflict. In short, all soldiers bear an obligation at all times to know the basic requirements of the law.²⁷⁷

Denying a soldier accused of misconduct arising in the context of armed conflict—especially during the conduct of hostilities—the opportunity to demonstrate that an alleged unlawful act or omission was motivated by an honest and reasonable, but mistaken, LOAC understanding therefore produces an inequity: the soldier is legally accountable for compliance with the law but legally vulnerable for

put to him. . . . The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense.”).

274. See Osiel, *supra* note 3, at 946 (explaining exceptions to obedience duty).

275. MILITARY JUDGES’ BENCHMARK, *supra* note 271, at 1690; see also 2019 MCM, *supra* note 126, at II-129 (“An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.”).

276. See SOLIS, *supra* note 10, at 350–52 (tracing the history of the defense of obedience to superior orders, noting its inapplicability to manifestly unlawful orders in U.S. military law, and explaining the shift to superior orders being a complete defense that occurred just prior to World War II as well as the reversion back to the manifestly unlawful approach toward the end of World War II); cf. 2019 MCM, *supra* note 126, at II-132.

277. See The Einsatzgruppen Case, *supra* note 273, at 470–71; see also Martha Minow, *Living up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 17–18 (2007) (reviewing the history of superior orders defense).

action pursuant to a *reasonable* mistake about what the law requires. Considering the myriad of situations to which the basic LOAC obligations arise, the limited education of soldiers on legal obligations, and the urgency and complexity of combat decision-making, a different rule seems more than justified.

Of course, allowing a soldier to plead mistake to legally excuse objectively unlawful conduct also produces a risk of overbreadth, as it would open the door to such a plea in almost any use of unlawful violence. Perpetuating the common law hostility to the mistake of law defense is not, however, an ideal solution to such overbreadth. Instead, a more logical solution is to recognize a modified version of the defense, one that requires a finding of both a subjectively honest misunderstanding of the law, coupled with a finding of objective reasonableness. Central to this reasonableness requirement would be the basis for the mistaken understanding, thus implicitly requiring proof of detrimental reliance on a mistaken or misleading statement of the law by an authority responsible for interpreting or, in the operational context, advising on the law—exactly what Maynulet sought to assert. This reliance component would serve as a significant check on assertion of the defense because, absent some evidence to support that reliance, a defendant would be unable to make a *prima facie* showing justifying the defense.

Furthermore, because this theory of mistake of law will not negate a material element of an offense, it should be treated as an affirmative defense. Unlike applying mistake of law to an offense that requires proof of knowledge of the law to satisfy a material *mens rea* element of an offense—the theory of mistake of law already recognized in U.S. military law²⁷⁸—a soldier like Captain Maynulet will not be raising the defense to create reasonable doubt as to the *mens rea* element of the alleged offense. Instead, the mistake will be raised as an excuse. The significance of this difference in application is that unlike the existing recognized variants of the defense, the excuse theory will be treated as an affirmative defense, arising only after the prosecution satisfies its *prima facie* burden of production on the alleged offense and requiring the defense to prove the excuse by a preponderance of the evidence.²⁷⁹

Interestingly, we also note that there has been similar criticism regarding the International Criminal Court's treatment of mistake of

278. See 2019 MCM, *supra* note 126, at II-132.

279. *But see* 2019 MCM, *supra* note 126, at II-129 (requiring the government to prove beyond a reasonable doubt that the extant affirmative defenses do not exist).

fact as related to war crimes.²⁸⁰ The United States should take the lead in moving the proverbial needle in a more equitable direction by incorporating a mistake of law defense applicable to allegations of misconduct associated with armed conflict, one that excuses a defendant, as we recommend, when the mistake was both honest and reasonable under the circumstances. This will produce three benefits. The first operates at a micro level. In particular, when validly asserted, it will protect soldiers from criminal conviction in specific cases and thus promote justice. It will also confer benefits at the macro level. More specifically, it will provide an example for other countries, and ideally the International Criminal Court, to emulate.

Finally, and perhaps most importantly, it will enhance the emphasis on effective training and education of service members so that they enter combat with an accurate and comprehensive understanding of the LOAC obligations relevant to their battlefield functions. This third advantage, while collateral to the main focus of recognizing such a defense, is far from insignificant. Ideally, the education and training of military forces would negate the viability of such a proposed mistake of law defense because a mistake would never be objectively reasonable. However, when that education and training is ineffective at best, or misleading at worst, there will be a causal connection between the institutional failure to adequately prepare forces for combat and the accused soldier's plea of mistake. Accordingly, expansion of the mistake of law defense will incentivize more effective education and training so as to avert such mistakes from ever arising.²⁸¹

B. Closing the Golsteyn Gap: New Disobedience Offense

There is one aspect of wartime accountability that necessitates not the enumeration of a war crime, nor a new defense, but an enhanced version of the existing military offense of willful disobedience of an

280. See ANNEMIEKE VAN VERSEVELD, MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIMES 81–100 (2012).

281. Captain Maynulet's case provides a troubling illustration of this relationship between training and mistake of law. Prior to his deployment to Iraq as an armored company commander, Maynulet was given a LOAC briefing by a military lawyer; the briefing slides were offered as evidence in the inquiry conducted by the military judge presiding over his court-martial to determine whether to instruct the military jury on mistake of law. See *United States v. Maynulet*, 68 M.J. 374, 375 (C.A.A.F. 2010). The defense sought to raise the issue that the training Maynulet received on preventing unnecessary suffering reasonably explained his mistaken belief that killing the mortally wounded victim was consistent with his legal obligation. See *id.* at 376; see also notes on file with author (Corn).

order instead. Such an offense is needed to close a potential accountability gap that arises when a U.S. service member uses force against a target that qualifies as a lawful object of attack pursuant to the LOAC, but nonetheless violates rules of engagement or tactical directives.

Consider the crime Major Matthew Golsteyn was charged with committing before his commander's effort to bring him to trial by general court-martial was terminated by President Trump's preemptive pardon.²⁸² According to the public record, the charge of premeditated murder against Golsteyn was based on an allegation that he intentionally and *unlawfully* killed an Afghan detainee who had been released apparently pursuant to directives from higher authority.²⁸³ Golsteyn allegedly disagreed with the decision to release him because he believed the detainee was a member of the Taliban forces; Golsteyn then took action to confront this former detainee and killed him.²⁸⁴

Because the case was never tried, it is impossible to determine what the factual record would have ultimately established. However, would such a killing (or any other assault or battery) qualify as *unlawful* if, as Golsteyn may have asserted at trial, the target of the attack was reasonably assessed as a lawful one within the meaning of international law? In short, does the fact that the action violated a command order or directive render the killing unlawful for purposes of criminal responsibility, or is the killing lawful because the LOAC provides that enemy belligerents (unless *hors de combat*) can be killed even when defenseless, based on their status?²⁸⁵

282. See Wu & Fritze, *supra* note 2; see also Todd South, *Army Green Beret Major Pleads Not Guilty to Afghan Murder Charge*, ARMY TIMES (June 27, 2019), <https://www.armytimes.com/news/your-army/2019/06/27/army-green-beret-major-pleads-not-guilty-to-afghan-murder-charge> [<https://perma.cc/9MEP-XT98>].

283. See Dan Lamothe, *Inside the Stunning Fall and War-Crimes Investigation of an Army Green Beret War Hero*, WASH. POST (May 19, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/05/19/inside-the-stunning-fall-and-war-crimes-investigation-of-an-army-green-beret-war-hero>; Michelle Tan, *Army Reopens Investigation into Former Green Beret Matthew Golsteyn*, ARMY TIMES (Dec. 8, 2016), <https://www.armytimes.com/news/your-army/2016/12/09/army-reopens-investigation-into-former-green-beret-matthew-golsteyn>.

284. Lamothe, *supra* note 283; see also Tommy Christopher, *Here's The Fox Interview that Got Former Green Beret and Trump 'Hero' Indicted for Murder*, MEDIAITE (Dec. 17, 2018), <https://www.mediaite.com/tv/heres-the-fox-interview-that-got-former-green-beret-and-trump-hero-indicted-for-murder> [<https://perma.cc/UTV2-RNFN>] (interview in which Golsteyn admits to the killing in question).

285. Uniform Code of Military Justice, 10 U.S.C. § 918 (2018); 2019 MCM, *supra* note 126, at IV-76. Given that the UCMJ defines murder as an unlawful killing, "without justification or excuse" plus requisite intent, the LOAC theoretically could provide such justification, thus making a killing not murder. 10 U.S.C. § 918.

There is no dispute that a willful violation of rules of engagement (or of other command directives limiting uses of force that otherwise comply with the LOAC) qualifies as disobedience in clear violation of the UCMJ.²⁸⁶ For example: if, as it seemingly was in the Golsteyn case, the authority to engage individuals—even those reasonably determined to be members of the enemy organized armed group—was restricted to situations where the target posed an actual or imminent threat to friend forces, the positive identification as enemy belligerent would not justify a use of force in violation of the order. But does the fact that a subordinate like Golsteyn exercised authority that had been withdrawn from him by superior command render the killing unlawful, and hence murder, or does it simply indicate that there was an orders violation?²⁸⁷

This may be a decisive question for a soldier like Golsteyn charged with murder in violation of the UCMJ. If the violation of the rules of engagement rendered the killing unlawful, there is little question about his guilt. In contrast, if the *status* of the alleged victim rendered the attack lawful within the meaning of the LOAC, there is a credible argument that the killing was lawful. That is, the LOAC may provide a legal justification for the killing. Rule for Courts-Martial 916 provides that “[a] death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful,” and its MCM discussion explicitly states that “killing an enemy combatant in battle is justified.”²⁸⁸

Hence, a defendant like Golsteyn could (assuming he had made a reasonable status determination that the target indeed was an enemy belligerent, a fact-based determination) argue that the killing was legally justified pursuant to international law, even if the killing violated an order such as the rules of engagement. If this argument were to prevail, the maximum penalty for the disobedience offense would be trivial compared to that authorized for murder.²⁸⁹

It is not clear that this argument would be effective. The government would argue that the authority, derived from international law, to

286. See 10 U.S.C. § 892.

287. Alternatively, depending on the temporal duration between the release and killing, such a former detainee could perhaps be considered to have still been in “constructive custody” and hence the killing was—irrespective of enemy belligerent status—the war crime of killing someone *hors de combat*.

288. 2019 MCM, *supra* note 126, at II-129 (noting in the discussion that “[t]he duty may be imposed by statute, regulation, or order Also, killing an enemy combatant in battle is justified”).

289. The maximum punishment for an Article 92 failure to obey offense is, confinement-wise, only two years. *Id.* app. 12 at A12-2.

attack identified enemy belligerents and other targets, is granted to the individual soldier only in his or her capacity as an agent of the state. Accordingly, it is the prerogative of the state to choose where, when, and how to delegate that authority in the agent. And when rules of engagement restrict that authority, there is no valid claim to it by a subordinate.

U.S. military criminal law has not addressed this particular issue; therefore, it is unclear whether the government would be successful with such an argument, leaving a potential accountability gap. It is one that could be closed by enacting an aggravated form of disobedience in UCMJ Article 92, the disobedience offense. This offense would supplement the current prohibition against willful disobedience of an order by providing an authorized maximum punishment analogous to the maximum punishment in the situations in which a homicide or assaultive offense results from disobedience of a battlefield order. Accordingly, even if a general court-martial were to find that a killing resulting from a willful violation of the rules of engagement was legally justified by the LOAC and therefore not an unlawful killing (hence not murder), the punishment for the underlying and separately charged willful orders violation would be analogous to the offense that would have been established had the killing been unlawful.

C. Curing the Curious Defect in Detainee Jurisdiction

In creating the military commissions in response to President Bush's 2001 executive order, the Secretary of Defense bypassed the option provided by existing military law of trial by general court-martial pursuant to well-established procedural and evidentiary rules applicable to such trials.²⁹⁰ The nearly two decades of debate and litigation related to that decision and the ongoing military commission trials seem to support an assumption that the military commission is an appropriate or perhaps even the only military tribunal for use when subjecting a captive to military jurisdiction.²⁹¹

This assumption is false and potentially dangerous in terms of compliance with international law. To understand why, it is necessary

290. See generally Glazier, *supra* note 141, at 134 (noting that the UCMJ gives jurisdiction to general courts-martial to try any law of war violations).

291. See generally David Cole, *Military Commissions and the Paradigm of Prevention 1* (Georgetown Pub. Law and Legal Theory, Research Paper No. 12-154, 2013), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2119&context=facpub> [https://perma.cc/JUE4-P4C7] (noting this potential and arguing that "the civilian criminal court and the court-martial are preferable venues for many reasons").

to analyze the different sources of military criminal jurisdiction over captured and detained personnel during situations of armed conflict. This analysis must focus on the statutory jurisdiction established over such individuals by Congress through both the UCMJ and MCA.

When assessing the exercise of military criminal jurisdiction over captured enemy personnel, detainees fall into two general categories: those who qualify for protections enumerated by one of the four Geneva Conventions of 1949 and those who do not.²⁹² Specifically, the first category includes individuals who qualify as prisoners of war pursuant to Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War and would also include prisoners of war who benefit from the protections of the First Geneva Convention (the Wounded and Sick Convention) or Article 4 of the Second Geneva Convention (the Wounded, Sick and Shipwrecked at Sea Convention, due to being wounded, sick or shipwrecked), as well as civilians who qualify as Protected Persons pursuant to Article 4 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.²⁹³ Individuals in this category all must be captured in the context of what the Conventions define as an international armed conflict (an inter-state armed conflict) and must meet the qualification requirements of the respective treaty establishing the relevant protected status.²⁹⁴

In U.S. practice, all other captives would be considered detainees who are guaranteed humane treatment but would not qualify for a specific status established by any of these treaties.²⁹⁵ This would include all individuals captured in the context of an armed conflict not of an international character, meaning any conflict with a non-state organized armed group; and any individual captured during an international armed conflict failing to qualify for specifically enumerated status pursuant to one of the four Geneva Conventions.²⁹⁶

The type of misconduct a detainee may have committed falls within three general categories. First is violation of U.S. domestic law prior to capture *and* unrelated to the armed conflict. For example, General Manuel Noriega was charged and convicted of pre-capture *and* pre-conflict violations of U.S. extraterritorial criminal laws related to

292. See CORN, *supra* note 73, at 314.

293. GC II, *supra* note 34, art. 4; GC III, *supra* note 34, art. 4; GC IV, *supra* note 34, art. 4.

294. See CORN, *supra* note 73, at 314.

295. See *id.* at 339.

296. See *id.* at 315 (noting the extension of Common Article 3's humane treatment standard to those in an international armed conflict who fail to qualify for other categories).

narcotics trafficking.²⁹⁷ This type of misconduct falls completely beyond the scope of any U.S. military jurisdiction and would be exclusively subject to U.S. federal criminal jurisdiction pursuant to federal long-arm jurisdiction. Second, a detainee may commit war crimes prior to capture; as explained below, this category of misconduct is subject to the jurisdiction of either a general court-martial or a military commission.²⁹⁸ Third, a detainee may commit misconduct *after* capture and while in U.S. military custody.

The U.S. military has a legitimate interest in asserting jurisdiction over the second and third category of offenses. The second, violations of the laws and customs of war, has historically triggered military jurisdiction following the enemy's capture.²⁹⁹ The rationale for this jurisdiction is that it is related to deterring enemy violations of the law and demonstrating U.S. commitment to accountability.³⁰⁰ Congress provided concurrent jurisdiction over such offenses by either a general court-martial convened pursuant to the UCMJ and the RCM or by a military commission convened on order of the President or a subordinate commander.³⁰¹

While history indicates a consistent U.S. practice of using the military commission to prosecute captured enemy personnel—a preference that was reaffirmed by the decision to use such a tribunal to try captured al Qaeda and Taliban personnel for alleged war crimes—the choice between these two tribunal options has always been vested in the President. So long as the alleged offense qualifies as a violation of the laws and customs of war subject to military jurisdiction, either tribunal may be used as the forum for adjudication.³⁰²

Subjecting captured enemy personnel to trial by either type of military tribunal for alleged violation of international law does not, however, subject them to U.S. substantive law. Those tribunals, while vested with jurisdiction to try individuals *subject to the UCMJ*—most notably members of the U.S. armed forces—were traditionally not vested with analogous jurisdiction over captured enemy personnel for allegations of pre-capture misconduct. Instead, the jurisdiction vested in these military tribunals over such captives is adjudicatory: the authority

297. See *United States v. Noriega*, 808 F. Supp. 791, 793 (S.D. Fla. 1992).

298. See Glazier, *supra* note 141, at 134.

299. *Id.*

300. See generally Minow, *supra* note 277 (discussing the superior orders defense in the context individual accountability).

301. Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (2018).

302. *Id.*

to adjudicate allegations of pre-capture violations of international law. This is an important limitation on these tribunals for the simple reason that for conduct committed prior to capture, the U.S. has no legitimate basis to extend its domestic military criminal code to members of opposition armed forces or other organized armed groups. Indeed, subjecting such individuals to the UCMJ's punitive articles could be considered inconsistent with customary international law principles of state jurisdiction.³⁰³

However, no analogous impediment applies to subjecting these individuals to the UCMJ's punitive articles once they are captured and held in U.S. custody. Indeed, subjecting prisoners of war to the military jurisdiction of the detaining power is not only consistent with customary international law principles of jurisdiction (as such detainees fall within the territorial principle of jurisdiction) but is a well-accepted exercise of jurisdiction to ensure accountability for serious crimes while in captivity.³⁰⁴ This is reflected in Article 84 of the Geneva Convention Relative to the Treatment of Prisoners of War.³⁰⁵

Unfortunately, the jurisdiction established by the UCMJ over enemy personnel is both over- and under-inclusive. Article 2 of the UCMJ enumerates "persons subject to this chapter," listing the categories of individuals subject to the UCMJ. Individuals falling into one of these categories are, therefore, subject to the criminal proscriptions enumerated in the Code's punitive articles.³⁰⁶ The statute's overbreadth results from Article 2(13), which subjects certain captives to the jurisdiction of the punitive articles for *pre-capture* misconduct. Article 2 is also under-inclusive because it excludes from this same jurisdiction detainees who fail to qualify as prisoners of war. Both of these defects should be cured.

303. See CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 12 (2016) (outlining the five primary international law principles for criminal jurisdiction).

304. GC III, *supra* note 34, art. 82 ("A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders.").

305. GC III, *supra* note 34, art. 84 (stating in pertinent part that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war"). This is logical, as prisoners of war and other individuals captured during armed conflict will normally be subject to military detention. As a result, the military authorities of the detaining power have a legitimate interest in exercising jurisdiction over incidents of serious misconduct occurring during captivity.

306. 10 U.S.C. § 802(a)(9).

Article 2(13) is a relatively new amendment to the UCMJ, added in the National Defense Authorization Act for Fiscal Year 2010;³⁰⁷ it includes jurisdiction over “[i]ndividuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.”³⁰⁸ Though poorly drafted, the reference to the law of war suggests that this amendment may have been motivated by a desire to foreclose the option of using general courts-martial as an alternative to the MCA military commission system for the trial of unprivileged belligerents. By limiting the scope of jurisdiction to only captives who qualify for prisoner of war status pursuant to the Third Geneva Convention, any detainee designated by the United States as an unprivileged belligerent (which includes all detainees associated with non-state organized armed groups) would be excluded.

But if this were the intent, the mechanism used is incoherent. Captured enemy personnel, whether privileged or unprivileged, have never been subject to the criminal proscriptions of the UCMJ—the punitive articles—prior to capture (the period of time when they might commit violations of the law of war). Instead, as explained above, Article 18 of the UCMJ has, since its 1950 inception (and even earlier in the predecessor Articles of War) authorized use of general courts-martial as a forum to adjudicate such captive’s violations of international law, to wit, the LOAC: the laws and customs of war.³⁰⁹

In contrast, Article 2 outlines categories of individuals, who, at all times, are subject to the UCMJ’s punitive articles.³¹⁰ Since the punitive articles currently do not include enumerated war crimes, it is near impossible to understand the effect of this Article 2(1) provision. On

307. Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified in various sections of 10 U.S.C.).

308. *Id.* § 1803(a)(1), 123 Stat. 2612 (delineating Sec. 1803, Conforming Amendments).

309. *Compare* MANUAL FOR COURTS-MARTIAL UNITED STATES 419 (1951) https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf [<https://perma.cc/G6JH-CX27>] [hereinafter 1951 UCMJ] (“General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”), *with* 10 U.S.C. § 818 (“General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”).

310. *See* 1951 UCMJ, *supra* note 309, at 17 (explaining that “general courts-martial have power to try any person subject to the code for any offense made punishable by the code”).

one hand, it indicates that enemy personnel who qualify upon capture as prisoners of war were subject to the Code *prior* to capture for UCMJ offenses, just like U.S. service members.³¹¹ On the other hand, it expressly indicates this scope of jurisdiction extends only to violations of the law of war, which are not even enumerated in the Code. Hence, it functionally does nothing.

This leads to only one logical conclusion: Congress amended the wrong article of the UCMJ. If Congress seeks to prohibit the use of general courts-martial to prosecute unprivileged belligerents for pre-capture violations of the law of war, it should amend Article 18 of the UCMJ. That amendment need only say that a general court-martial may exercise jurisdiction over any person who qualifies as a prisoner of war upon capture for any violation of the law of war subject to trial by military tribunal. This would compel the use of a military commission (or a civilian federal criminal prosecution under the War Crimes Act if a U.S. soldier or citizen is a victim of said war crime) to prosecute law of war violations by any detainee who fails to qualify for prisoner of war status.³¹² And, while we believe such an amendment is ill-advised, as it will restrict the forum selection flexibility that has always been provided by the UCMJ, there is simply no credible justification for the even more ill-advised current, and meaningless, Article 2(13).

Ironically, the same detainees excluded from UCMJ jurisdiction for violations of the law of war by Article 2(13) should be, but are not, subject to UCMJ jurisdiction while actually detained by the U.S. military. As noted above, subjecting prisoners of war to the military criminal jurisdiction of a detaining power is a traditional method of ensuring accountability for serious misconduct during captivity, one integrated within the Third Geneva Convention.³¹³ Consistent with this tradition, Article 2(9) of the UCMJ includes within those subject to the punitive articles of the Code prisoners of war in the custody of the armed forces. This means that *once captured*, prisoners of war are subject to the UCMJ's punitive articles no differently from the U.S.

311. Such extension is nonsensical as it contradicts international law bases of a sovereign's criminal jurisdiction. *See generally* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 250–55 (1991) (analyzing the basis for state application of its domestic law to those external to its territory when state interests are affected).

312. *See supra* note 101 (discussing the War Crimes Act, 18 U.S.C. § 2441 (2018)).

313. *See* GC III, *supra* note 34, art. 84, 87 (providing in Article 87, for example, that “[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts”).

military personnel standing guard over them.³¹⁴ However, this provision is clearly under-inclusive as it fails to include within the scope of this jurisdiction detainees in military custody who *do not* qualify as prisoners of war, most notably those designated as unprivileged belligerents. And because of the limits inherent in Article 2(13) explained above, these detainees are also excluded from that particular UCMJ jurisdictional grant.

This creates a troubling jurisdictional shortfall. If, hypothetically, one unprivileged belligerent detainee at the U.S. detention facility in Guantanamo Bay Naval Base killed another, finding jurisdiction to prosecute him for this crime would be challenging. If these detainees qualify as prisoners of war, the killer could be easily tried by court-martial for violation of the relevant UCMJ offense, such as Article 118 proscribing murder.³¹⁵ However, a court-martial would, under today's UCMJ, lack jurisdiction over the killing: the detainee is not a person "subject to this chapter" pursuant to Article 2.³¹⁶ Nor would such a killing qualify as a violation of the law of war falling within the scope of military commission jurisdiction. Accordingly, the only way the killer might be held accountable would be if the killing fell within the scope of a federal crime that provides for extraterritorial jurisdiction, which is infrequent.³¹⁷

Individuals detained after being designated as unprivileged belligerents should be subject to the same scope of *post-capture* military jurisdiction as their privileged belligerent counterparts. Accordingly, Congress should amend the UCMJ to expand jurisdiction to encompass these detainees by simply adding "unprivileged belligerents" to the jurisdiction established by Article 2(9) of the UCMJ over prisoners of war in U.S. custody. Its new form should read: "(9) Prisoners of war and unprivileged belligerents in custody of the armed forces." By amending the UCMJ to cure the above defects, Congress will align U.S. military jurisdiction with its historically established parameters and in so doing provide an example that can be emulated by other nations.

D. Eliminating GWOT's MCA Manipulations of the UCMJ

Unfortunately, Article 2(13) does not seem to be the only manifestation of misguided congressional manipulation of the UCMJ to somehow bolster the validity of the military commissions established to try unprivileged

314. 10 U.S.C. § 802(a)(9) (2018); *see also* 1951 UCMJ, *supra* note 309, app. 2 at 413.

315. 10 U.S.C. § 918.

316. *Id.* § 802(a)(9).

317. *See generally* DOYLE, *supra* note 303, at 1 (explaining how federal criminal law can apply extraterritorially).

belligerents at Guantanamo Bay, Cuba. In 2006, Congress reached into the UCMJ's punitive articles as well, and actually enumerated what it mistakenly thought was a war crime: conspiracy to commit a serious violation of the LOAC. In other words, there actually is one current exception to the absence of enumerated war crimes in the punitive articles. Article 81, which enumerates the crime of conspiracy, provides that:

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person *to commit an offense under the law of war*, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.³¹⁸

Paragraph (b) of Article 81 was not added to the UCMJ until 2006, the only amendment to this crime since the UCMJ's enactment following World War II.³¹⁹ This suggests the amendment was motivated by an effort to bolster the validity of an analogous provision in the MCA.³²⁰

Since the inception of the military commission trials of unprivileged enemy belligerents, the government has struggled to justify characterizing conspiracy to violate the law of war as an offense traditionally subject to trial by military commission.³²¹ Even following enumeration of this offense in the MCA, the validity of treating such a conspiracy as an offense subject to trial by military commission has been the source of significant litigation.³²² As a result, both the timing of this amendment and the fact that it is the *only* enumeration of an offense referencing

318. 10 U.S.C. § 881 (emphasis added).

319. Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(b), 120 Stat. 2631 (2006).

320. See Military Commissions Act of 2009, 10 U.S.C. § 950t(29).

321. In *Hamdan I*, 548 U.S. 557, 598–600 (2006), the Supreme Court rejected the government's assertion that such a conspiracy violated the customary law of war.

322. See David Glazier, *Al Bahlul, Conspiracy, and the Misuse of History*, LAWFARE (Oct. 3, 2013, 4:00 PM), <https://www.lawfareblog.com/al-bahlul-conspiracy-and-misuse-history> [<https://perma.cc/G5HS-ULLL>]. See generally Hiromi Sato, *The Separate Crime of Conspiracy and Core Crimes in International Criminal Law*, 32 CONN. J. INT'L L. 73, 76 (2016) (noting, inter alia, the haphazard development of this crime in international criminal law).

the law of war in the entire UCMJ suggests a connection between the amendment and the government's efforts to justify including such an offense within the subject-matter jurisdiction of the military commission.

Given this Article's recommendation that the MCA's offenses be added to the UCMJ as enumerated war crimes (with the exception of those MCA offenses of dubious international validity, such as conspiracy), Article 81 of the UCMJ should be restored to its original status. Unless and until the question of the validity of designating conspiracy to violate the law of war as a war crime falling within the scope of military commission jurisdiction is definitively resolved—a resolution still lacking as the result of the fractured *en banc* Al Bahlul decision by the U.S. Court of Appeals for the District of Columbia Circuit³²³—this offense should be eliminated from the UCMJ. Allowing it to linger in the MCA may be necessary to enable the government to continue to assert that validity, but it is unjustified (and unnecessary) to tarnish the punitive articles of the UCMJ with this offense of doubtful validity. It is also ironic, as there are so many other war crimes that merit inclusion in the punitive articles that continue to be omitted—the very focal point of this Article.

CONCLUSION

Currently the United States utilizes disparate military criminal offenses, as well as different processes, to prosecute different categories of alleged war criminals. Furthermore, the United States fails to prosecute American service members for actual war crimes, only prosecuting those committed by its enemies. Additionally, the American public, led in the wrong direction by President Trump and others, currently misunderstands how compliance with the laws and customs of war absolutely depends on accountability for its violations—on criminal punishment of our men and women in uniform who commit war crimes.

By creating greater symmetry and enhancing war crimes accountability in U.S. military law through this Article's proposals, the U.S. military will possess a more credible and comprehensive legal regime to fully discharge its responsibility to ensure prevention and punishment of war crimes. Such greater legal clarity will hopefully also have an educational effect on our society's appreciation of the need for accountability. Our proposed reforms will, if enacted, encourage greater faith in the fairness of the American military justice system by

323. *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2014) (*en banc*), *aff'd per curiam on reh'g en banc*, 840 F.3d 757 (D.C. Cir. 2016).

incorporating most of the MCA's enumerated war crimes into the UCMJ, adding appropriate defenses, providing command responsibility liability, and restoring general court-martial jurisdiction over all captured enemy belligerents. These measures will not only enhance professionalism and effectiveness of the U.S. military itself; they will also buttress legitimacy of U.S. military operations worldwide.

Such necessary remedial steps have long been needed, and they must be coupled with renewed public support to utilize such mechanisms in order to close the current American accountability war crimes deficit. This renewed support will hopefully be prompted by improved understanding of the critical necessity of compliance with the LOAC, as established in this Article. Its measures will further just and fair accountability, and they will help secure the many benefits that fidelity to the law bestows.

RECENT CASES

EIGHTH AMENDMENT — MANDATORY MINIMUM SENTENCES — D.C. CIRCUIT HOLDS IT CRUEL AND UNUSUAL TO IMPOSE MANDATORY THIRTY-YEAR SENTENCE ON MILITARY CONTRACTORS FOR GUN CHARGE. — *United States v. Slatten*, 865 F.3d 767 (D.C. Cir. 2017) (per curiam), *reh'g and reh'g en banc denied*, No. 15-3078 (D.C. Cir. Nov. 6, 2017).

Because they are not tailored to individual defendants' culpability, mandatory minimum sentences are ripe targets for Eighth Amendment challenges.¹ Section 924(c)² prescribes a mandatory minimum sentence of thirty years for using a machine gun in the commission of a violent crime.³ Recently, in *United States v. Slatten*,⁴ the D.C. Circuit held that sentence to be cruel and unusual as applied to military contractors who were convicted of manslaughter after a shooting in Iraq resulted in several civilian deaths.⁵ This decision is in tension with Supreme Court precedent in two ways. First, it is unusual to overturn a long prison sentence on Eighth Amendment grounds at all. And second, the court reviewed the proportionality of the thirty-year § 924(c) sentence separately from the one-day sentence imposed for defendants' other crimes, which contrasts with the "sentencing package" approach recently endorsed by the Supreme Court. The court could have diminished these tensions while achieving the same result by granting defendants' categorical, rather than as-applied, Eighth Amendment challenge.

Nicholas Slatten, Paul Slough, Evan Liberty, and Dustin Heard were part of the "Raven 23" team of Blackwater military contractors in Iraq.⁶ On September 16, 2007, the Raven 23 shift leader directed the team to "lock down" Nisur Square, contrary to orders to lead the team elsewhere.⁷ There, the team encountered a car that they believed might

¹ In *Miller v. Alabama*, 567 U.S. 460 (2012), "two strands of precedent reflecting . . . concern with proportionate punishment" came together: first, categorical mismatches between a class of defendants (frequently juveniles) and sentencing practices; and second, prohibitions on mandatory capital punishment. *Id.* at 470. The Court held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* The opinion could also be seen to represent a broader concern on the Court about mandatory sentences in general. *See id.* at 476 ("[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.").

² 18 U.S.C. § 924(c) (2012).

³ *Id.* § 924(c)(1)(B)(ii).

⁴ 865 F.3d 767 (D.C. Cir. 2017) (per curiam), *reh'g and reh'g en banc denied*, No. 15-3078 (D.C. Cir. Nov. 6, 2017).

⁵ *Id.* at 811.

⁶ *Id.* at 776–77.

⁷ *Id.* at 777.

have been carrying a bomb.⁸ Chaos ensued, with heavy gunfire and Iraqi citizens running for cover.⁹ During the incident, at least thirty-one Iraqi civilians were killed or injured.¹⁰

At trial, Slough, Liberty, and Heard were found guilty of various manslaughter charges and, under § 924(c), of “using and discharging a firearm in relation to a crime of violence.”¹¹ When the firearm is a machine gun, as it was here, § 924(c) imposes a mandatory minimum sentence of thirty years.¹² The defendants were sentenced to one additional day for all other charges.¹³ Slatten was charged with, and found guilty of, first-degree murder.¹⁴

The D.C. Circuit affirmed in part, vacated in part, and remanded for sentencing. In a per curiam opinion, the court ruled on several jurisdictional, procedural, and substantive issues.¹⁵ On jurisdiction, the court found that prosecution was authorized under the “‘deliberately expansive’ language”¹⁶ of the Military Extraterritorial Jurisdiction Act¹⁷ (MEJA).¹⁸ Venue in the District of Columbia was proper.¹⁹

Applying two “‘highly deferential’ standard[s],”²⁰ the circuit court next affirmed the district court’s ruling that defendants were not entitled to a new trial because of contradictory evidence²¹ and ruled against all but one of Liberty and Slatten’s challenges to the sufficiency of the evidence supporting their convictions.²²

⁸ *Id.*

⁹ *Id.* at 776–77.

¹⁰ *Id.* at 776.

¹¹ *Id.* at 778.

¹² 18 U.S.C. § 924(c)(1)(B)(ii) (2012); *Slatten*, 865 F.3d at 778.

¹³ *Slatten*, 865 F.3d at 778.

¹⁴ *Id.* Slatten was initially indicted for the same manslaughter and gun charges as the other three defendants, but he successfully moved to dismiss those charges as time-barred, and the government subsequently sought and obtained an indictment for first-degree murder. *Id.*

¹⁵ *Id.* at 777. The panel consisted of Judges Henderson, Rogers, and Brown. *Id.* at 776. Each judge also wrote separately. *Id.*

¹⁶ *Id.* at 783 (quoting *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992)).

¹⁷ 18 U.S.C. §§ 3261–3267.

¹⁸ *Slatten*, 865 F.3d at 778. MEJA corrects a “jurisdictional gap,” *id.* at 779 (quoting H.R. REP. NO. 106-778, at 5 (2000)), by allowing domestic prosecution for crimes committed overseas by civilians supporting American military missions (who are not subject to courts-martial). *Id.* at 778–79.

¹⁹ *Id.* at 789. Venue was proper because another member of the Raven 23 team, who qualified as a joint offender, was initially arrested in D.C. *Id.* at 786; *see* 18 U.S.C. § 3238.

²⁰ *Slatten*, 865 F.3d at 792 (quoting *United States v. Williams*, 836 F.3d 1, 6 (D.C. Cir. 2016)) (sufficiency of the evidence); *see id.* at 790 (motion for new trial).

²¹ *Id.* at 789–92. Defendants moved for a new trial because of contradictions between a prosecution witness’s trial testimony and his Victim Impact Statement (VIS). *Id.* at 789. The appellate court found that defendants did not meet the “high bar,” *id.* at 791 (quoting *United States v. Celis*, 608 F.3d 818, 848 (D.C. Cir. 2010)), of proving that the “VIS would probably result in an acquittal at a new trial,” *id.* (citing *Thompson v. United States*, 188 F.2d 652, 653 (D.C. Cir. 1951)).

²² *Id.* at 792. The circuit court vacated one of Liberty’s counts of attempted manslaughter,

The court then considered two challenges specific to Slatten. First, it held that he was not the victim of vindictive prosecution, because there were no lesser charges available and there was no evidence of actual vindictiveness.²³ Second, it remanded Slatten's case for a new, separate trial so that he could introduce exculpatory evidence that he was unable to present in the joint trial.²⁴

Finally, the court considered Slough, Liberty, and Heard's Eighth Amendment claim that the thirty-year sentences under § 924(c) were cruel and unusual. The defendants challenged their sentences in two ways: first, that the sentences were disproportionate as applied to their individual circumstances and, second, that a thirty-year sentence is categorically disproportionate when applied to any defendant who discharges a government-issued weapon in a war zone.²⁵ The court granted the defendants' as-applied challenge and remanded for individualized sentencing.²⁶ Because the court ruled in favor of defendants on their as-applied claim, it declined to rule on their categorical claim.²⁷

The court first noted that it "should be exceedingly rare"²⁸ to rule in favor of an as-applied challenge to a mandatory sentence of imprisonment, because of deference to the legislature and because, while those sentences "may be cruel, . . . they are not unusual."²⁹ However, this case was an exception on both counts: the legislature intended the statute to apply to drug deals, not military combat, and the facts of the case were indeed unusual.³⁰ Therefore, the court proceeded to weigh the gravity of the offense against the severity of the sentence, while considering "all of the circumstances of the case."³¹

As to the gravity of the offense, the court found that several circumstances limited defendants' culpability. The court took care to distinguish between defendants' decision to shoot, which resulted in the manslaughter charges, and culpability under § 924(c) for their choice of

finding it to "be based on mere speculation." *Id.* at 795. On all other counts, the court found that, while they "may have poked holes in some of the evidence," Liberty and Slatten did not "show[] that *no* reasonable factfinder could find [them] guilty." *Id.* (Liberty); *see id.* at 796 (Slatten).

²³ *Id.* at 800–01.

²⁴ *Id.* at 801. Slatten had moved to sever his trial because he wished to introduce a codefendant's statements that he, not Slatten, fired the first shots. *Id.* The trial court denied this motion, finding that the evidence would be inadmissible hearsay. *Id.* The circuit court held that the evidence was in fact admissible under the residual hearsay exception, FED. R. EVID. 807, and thus that the motion to sever should have been granted. *Slatten*, 865 F.3d at 801.

²⁵ *Slatten*, 865 F.3d at 811.

²⁶ *Id.* at 820.

²⁷ *Id.* at 820 n.14.

²⁸ *Id.* at 812 (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam)).

²⁹ *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)).

³⁰ *Id.* at 812–13.

³¹ *Id.* at 811 (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)).

weapon.³² The defendants were required to carry machine guns as part of their employment providing security for the Department of State, and they were ordered to go to Nisur Square.³³ This diminished culpability for the gun charge did not match the severity of the thirty-year sentence. Except for death or life imprisonment, thirty years is the harshest mandatory federal sentence that can be imposed on first-time offenders.³⁴ The mismatch between the gravity of defendants' crimes and the severity of their sentences led to an "inference of gross disproportionality."³⁵

The next step was comparing the sentences at issue to those received by other offenders who committed the same crime.³⁶ This proved to be a challenge, because *Slatten* was the first instance of government contractors being found guilty of violating § 924(c) for using weapons in a war zone.³⁷ The court used § 924(c) violations by law enforcement personnel with government-issued firearms as a point of comparison and found that the statute is almost exclusively applied when an officer intentionally uses a weapon to commit a crime outside the scope of their duties.³⁸ According to the court, military contractors, who work in war zones and use lethal force as a central part of their jobs, should be granted more leeway than law enforcement officers, who work in the community and should use lethal force only as a last resort.³⁹ Broadening the scope of its comparison beyond § 924(c), the court found that similarly harsh sentences were usually imposed on first-time offenders only when their crimes were intentional and serious.⁴⁰

The court also found that none of the traditional justifications for punishment weighed in favor of such a harsh and indiscriminate sentence.⁴¹ Defendants did not "pose a danger to society," ruling out incapacitation and rehabilitation.⁴² Since this sentence was "grossly disproportionate," it did not fulfill the retribution justification, which relies on personal culpability.⁴³ Finally, the district and circuit courts agreed that "there was no need to deter the defendants individually," given their lack of criminal history.⁴⁴ Any general deterrent effect would actually be

³² *Id.* at 812, 814, 820. The court found that, had defendants' perception of the car-bomb threat been correct, their choice of weapon would have been appropriate. *Id.* at 813–14.

³³ *Id.* at 813. The court also noted that defendants had no criminal record. *Id.* at 814–15.

³⁴ *Id.* at 815. Furthermore, since each defendant was charged with different counts of manslaughter, the court found it "troubling" that they received identical sentences. *Id.*

³⁵ *Id.* (quoting *Graham*, 560 U.S. at 60).

³⁶ *Id.* at 816 (quoting *Graham*, 560 U.S. at 60).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 817.

⁴⁰ *Id.* at 818.

⁴¹ *Id.*

⁴² *Id.* at 819.

⁴³ *Id.*

⁴⁴ *Id.* (citing Transcript of Sentencing Hearing at 153, United States v. Slough, No. 08-360

harmful, because it would lead to hesitation in dangerous, fast-moving situations.⁴⁵

Judge Rogers dissented from the court's ruling on the mandatory minimum sentence.⁴⁶ Noting that each defendant was convicted of killing more than five people and attempting to kill more than ten more,⁴⁷ and that, putting § 924(c) aside, each defendant faced a maximum sentence of more than 100 years for these manslaughter convictions,⁴⁸ Judge Rogers disagreed with the court's ruling that the thirty-year sentences were disproportionate.⁴⁹ She argued that the court evaluated the mandatory thirty-year sentences as "freestanding," when it should have considered the full "sentencing packages" of thirty years and one day for the § 924(c) and manslaughter convictions combined.⁵⁰ In that light, "the result [was] not disproportionate to the defendants' crimes, let alone grossly, *unconstitutionally* disproportionate."⁵¹

Judge Rogers's dissent is more consistent with Eighth Amendment precedent than is the court's per curiam opinion. It is highly unusual to overturn a term-of-years sentence on proportionality grounds. By separating out the § 924(c) sentence, the court was able to highlight the facts that reduced the defendants' culpability and dismiss those that increased culpability. But that approach was itself unusual and in tension with the Supreme Court's recent decision in *Dean v. United States*.⁵² The court could have avoided these difficulties by overturning the mandatory thirty-year sentence on categorical, rather than as-applied, grounds.

Term-of-years sentences are almost never struck down under the Eighth Amendment.⁵³ Although the *Slatten* court acknowledged that such rulings "should be exceedingly rare,"⁵⁴ it still underplayed the

(D.D.C. Apr. 13, 2015), ECF No. 793).

⁴⁵ *Id.* at 819–20.

⁴⁶ *Id.* at 823–24 (Rogers, J., concurring in the judgment in part and dissenting in part). Judge Rogers also concurred with respect to Slatten's motion to sever, arguing that the codefendant's statement was inculpatory, rather than exculpatory, and therefore should have been admitted without resorting to the residual hearsay exception. *Id.* at 829. The other judges on the panel also each filed separate opinions. Judge Henderson concurred with respect to Slatten's vindictive prosecution claim, noting that the government needed to reindict Slatten only due to an earlier, mistaken ruling by the D.C. Circuit. *Id.* at 820, 823 (Henderson, J., concurring in part). Judge Brown dissented from the court's "unnecessarily broad[]" interpretation of MEJA. *Id.* at 832 (Brown, J., concurring in part and dissenting in part).

⁴⁷ *Id.* at 830 (Rogers, J., concurring in the judgment in part and dissenting in part).

⁴⁸ *Id.* at 830–31.

⁴⁹ *Id.* at 831.

⁵⁰ *Id.*

⁵¹ *Id.* at 832.

⁵² 137 S. Ct. 1170 (2017).

⁵³ Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1159–61 (2009).

⁵⁴ 865 F.3d at 812 (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam)).

weight of precedent on this point. In the last century, the Supreme Court has ruled only once that a sentence violated the Eighth Amendment because it was excessively long, in *Solem v. Helm*.⁵⁵ In that case, the defendant was sentenced under a recidivist statute to life without parole for a nonviolent crime (specifically, issuing a no-account check for \$100),⁵⁶ a stark contrast to both the length of sentence and the gravity of the offense in *Slatten*. Since *Solem*, the Court has upheld a mandatory sentence of life without parole for a first-time offender convicted of drug possession in *Harmelin v. Michigan*.⁵⁷ The Court has repeatedly rejected challenges to sentences that are comparable to or lengthier than those in *Slatten* for less serious, nonviolent crimes.⁵⁸

The *Slatten* court overcame this precedent by insisting it was analyzing the proportionality of the sentences only with regard to the weapons charge under § 924(c), and not with regard to the manslaughter charges.⁵⁹ As the preceding examples show, had the court not cabined its analysis to the weapons charge, but also considered the manslaughter convictions, it would have been hard-pressed to find thirty-year sentences disproportionate.⁶⁰ Compared to other sentences that have been upheld, thirty years for multiple counts of manslaughter does not seem grossly disproportionate. Even within the § 924(c) context, the court's decision is outside the norm: never before has a court of appeals overturned a § 924(c) mandatory minimum sentence under the Eighth Amendment.⁶¹

⁵⁵ 463 U.S. 277 (1983); see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 579 (2005).

⁵⁶ *Solem*, 463 U.S. at 281–82.

⁵⁷ 501 U.S. 957 (1991); see Frase, *supra* note 55, at 581.

⁵⁸ See *Lockyer v. Andrade*, 538 U.S. 63, 66, 77 (2003) (upholding a twenty-five years to life sentence for a triggering offense of stealing \$68.84 worth of videotapes); *Ewing v. California*, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting) (noting that the triggering offense for a twenty-five years to life sentence was theft of golf clubs worth \$1197); *Rummel v. Estelle*, 445 U.S. 263, 265–66 (1980) (upholding a mandatory life sentence under a three-strikes law for “obtaining \$120.75 by false pretenses,” *id.* at 266); Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 443–44 (2017) (collecting cases). These harsh sentences for seemingly trivial crimes were imposed as a consequence of mandatory minimum three-strikes laws. See *id.* While the *Slatten* defendants, as first-time offenders, may be distinguishable from some of these extreme examples of harsh mandatory minimum sentences, *Harmelin* demonstrates that the Court has also upheld harsh mandatory sentences for first-time offenders.

⁵⁹ 865 F.3d at 812, 814, 820 (per curiam) (“[W]e believe it is important to distinguish between the predicate crimes of violence for which Slough, Heard and Liberty were convicted and the conviction under Section 924(c)” *Id.* at 812.).

⁶⁰ See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 117 (1993) (concluding that the Court is particularly unwilling to interfere with mandatory sentences for violent crimes, which “directly threaten the physical safety of others”).

⁶¹ Government's Motion for an Extension of Time to File an En Banc Petition & to Exceed the Word Limit at 4, *Slatten*, 865 F.3d 767 (No. 15-3078(L)).

Because it limited the proportionality analysis to § 924(c), the court was able to cherry-pick the facts it considered. By focusing on the weapons charge, the court emphasized that defendants used government-issued firearms, which they were required to carry.⁶² This circumstance significantly mitigated the defendants' culpability both in itself and by drawing out the defendants' unique role as military contractors operating in a war zone.⁶³ On the other hand, the court repeatedly acknowledged that defendants were culpable for the deaths and injuries of dozens of victims,⁶⁴ a fact that was found by the jury and would usually weigh heavily in favor of the proportionality of a lengthy sentence.⁶⁵ But the court did not consider those severe consequences of defendants' actions because they were attributed to the manslaughter charges and thus deemed irrelevant to the § 924(c) violation.

As Judge Rogers noted in her dissent, the *Slatten* court's proportionality analysis is difficult to reconcile with the logic of *Dean*.⁶⁶ In that case, the Supreme Court held that sentencing courts could consider § 924(c)'s harsh mandatory sentence in their deliberations as to additional discretionary sentences.⁶⁷ In these "sentencing package cases,"⁶⁸ judges can impose lenient sentences for predicate crimes when they believe that the mandatory § 924(c) sentence adequately accounts for a defendant's total culpability, even if the discretionary sentence would be inappropriate standing on its own, such as a one-day sentence for a violent crime.⁶⁹ This was likely the district court's approach in *Slatten*.⁷⁰

⁶² *Slatten*, 865 F.3d at 813, 818.

⁶³ See *id.* at 817. However, the court did not consider the malleability of the distinction between a "community" and a "war zone." From the perspective of Iraqis, Nisur Square is part of their community. See, e.g., James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), <https://nyti.ms/2oAjOy9> [<https://perma.cc/2KAL-FBM2>] (describing Iraqis passing through Nisur Square on family errands or on their way to work when the shooting began).

⁶⁴ *Slatten*, 865 F.3d at 814 ("We emphasize [defendants] are still culpable for their decision to fire at all, as encompassed by their manslaughter and attempted manslaughter convictions . . ."); *id.* at 818 ("[W]e by no means intend to minimize the carnage attributable to Slough, Heard and Liberty's actions. Their poor judgments resulted in the deaths of many innocent people. What happened in Nisur Square defies civilized description."); *id.* at 820 ("We again emphasize these defendants can and should be held accountable for the death and destruction they unleashed on the innocent Iraqi civilians who were harmed by their actions.").

⁶⁵ Frase, *supra* note 55, at 580.

⁶⁶ *Slatten*, 865 F.3d at 831 (Rogers, J., concurring in the judgment in part and dissenting in part).

⁶⁷ *Dean v. United States*, 137 S. Ct. 1170, 1178 (2017).

⁶⁸ *Id.* at 1176 (quoting *Greenlaw v. United States*, 554 U.S. 237, 253 (2008)); see also *Slatten*, 865 F.3d at 832 (Rogers, J., concurring in the judgment in part and dissenting in part) ("The district court judge made an individualized assessment of an appropriate sentencing package for each of these defendants . . .").

⁶⁹ *Dean*, 137 S. Ct. at 1176.

⁷⁰ See 865 F.3d at 831 (Rogers, J., concurring in the judgment in part and dissenting in part) (noting that the district court judge was "'very satisfied' with the thirty-year sentences" (quoting Transcript of Sentencing Hearing, *supra* note 44, at 154)).

The circuit court turned the *Dean* holding on its head. Under *Dean*, sentencing judges may consider lengthy § 924(c) mandatory sentences and account for them with lenience in their discretionary sentences.⁷¹ But in *Slatten*, the circuit court refused to consider the lenience of the discretionary sentences in its proportionality analysis of the mandatory § 924(c) sentences. It reviewed the mandatory sentences “on their own — and not as part of a combined package.”⁷²

The defendants themselves presented the court with another option: the court could have held that § 924(c)’s mandatory thirty-year sentence is *categorically* disproportionate for defendants using government-issued weapons in a war zone.⁷³ Although the court declined to address this argument,⁷⁴ it in some ways fits better with the majority’s reasoning. At each step of the Eighth Amendment analysis, the court emphasized the defendants’ status as military contractors using government-issued weapons in a war zone.⁷⁵ A categorical Eighth Amendment holding would have also been in line with the majority’s instinct to address the § 924(c) penalty separately, rather than as part of a sentencing package. If the holding were to apply to all war-zone cases, these particular defendants’ manslaughter convictions would be irrelevant to the Eighth Amendment analysis. Within that framework, the tension between *Slatten* and *Dean* fades away. Just as the court wished, the defendants could individually “be held accountable for the death and destruction they unleashed” under their convictions for manslaughter, without “the sledgehammer of a mandatory 30-year sentence” under § 924(c).⁷⁶

In *Slatten*, the D.C. Circuit made several unusual moves to overturn the § 924(c) mandatory minimum sentences. Courts rarely even review non-death penalty sentences for proportionality. Those that are reviewed are almost always upheld, even when the crimes are less serious and the sentences are harsher than those in *Slatten*. And finally, the court considered the proportionality of the thirty-year § 924(c) sentence separately from the one-day sentence for the remainder of the defendants’ crimes, creating tension with *Dean*, where the Supreme Court explicitly endorsed the “sentencing package” approach. A better way to achieve the same result would have been to sustain defendants’ categorical Eighth Amendment challenge.

⁷¹ *Dean*, 137 S. Ct. at 1176.

⁷² *Id.* at 1175.

⁷³ *Slatten*, 865 F.3d at 811; cf. Noah A. Kuschel, Note, *Exempting Police from 18 U.S.C. § 924(c)*, 51 WM. & MARY L. REV. 1609, 1612 (2010) (proposing that police officers be exempted from § 924(c) when they are authorized to carry the firearm and are performing official duties).

⁷⁴ *Slatten*, 865 F.3d at 820 n.14.

⁷⁵ For example, the court embarked on the proportionality analysis only because the military nature of the case rendered it unusual and outside the scope of the legislature’s intent for § 924(c). *Id.* at 812–13. That defendants used government-issued weapons and were operating in a war zone diminished their culpability. *Id.* at 813–14. The court also highlighted that defendants were military contractors when comparing their sentences to others of a similar nature. *Id.* at 816–17.

⁷⁶ *Id.* at 820.



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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, in accordance with Assembly resolution [74/138](#) and Human Rights Council resolution [42/9](#).

* [A/75/150](#).



Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

The evolving forms, trends and manifestations of mercenaries and mercenary-related activities

Summary

In the present report, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination examines the evolution of the use of mercenaries and related actors in the light of the considerable changes in the nature of contemporary armed conflicts, and the challenges this creates for the implementation of the relevant international and regional legal frameworks pertaining to mercenaries. The Working Group enumerates a broad range of actors and activities that may be considered mercenary-related and notes that special consideration should be paid to the specific context and conditions in which these actors operate.

In the report, the Working Group highlights the impact of current and emerging manifestations of mercenaries and related actors on the enjoyment of human rights. In some cases, these actors have allegedly committed violations of international humanitarian law and human rights abuses. In other cases, their use has contributed to the intensification and prolongation of hostilities and therefore to the human suffering borne by the civilian population. Their activities may also undermine the right of peoples to self-determination, including in non-conflict settings.

The Working Group sheds light on the pervasive secrecy and opacity surrounding mercenary and mercenary-related activities, which is particularly stark when such actors are employed as an instrument to remotely influence armed conflicts, while their patrons, including States, deny involvement and seek to avoid legal responsibilities. These dimensions represent a major obstacle to holding the perpetrators of violations and abuses accountable and providing victims with effective remedies, thus enabling perpetrators and those directing their actions to operate with impunity.

The report concludes with a call for urgent attention by States and other stakeholders to the new forms and manifestations of mercenary-related activities and sets out recommendations to stimulate thinking and discussion on ways to counter mercenary and mercenary-related activities more effectively.

During the preparation of the present report, the Working Group was composed of Chris Kwaja (Chair), Jelena Aparac, Lilian Bobea, SORCHA MacLeod and Saeed Mokbil.

I. Introduction

1. The rapid development and deployment of new technologies, the proliferation and fragmentation of non-State armed groups and the influence exerted by third parties have contributed to considerable changes in the nature of armed conflict, including its increasingly asymmetric nature.¹ Unlike broader research and analysis into the evolving nature of warfare and related human rights and humanitarian challenges, there are considerable gaps with regard to understanding the ways mercenaries and mercenary-related actors have adapted to contemporary conflict realities, the manner in which they are used, how they interact with other actors and the human rights risks and impacts arising from their involvement in conflicts.

2. Mercenarism continues to threaten international peace and security, as well as respect for international human rights law and international humanitarian law, in the most serious ways. The right of peoples to self-determination in particular is affected. Since early 2019, the effects of mercenary and mercenary-related activities have again gained prominence in debates within the Security Council. Concerns have been raised regarding mercenaries as a source of insecurity and destabilization in Africa, with a particular focus on the Central African subregion, during a discussion initiated by Equatorial Guinea;² their use in the conflict in Libya and the related failure to respect the related arms embargo;³ and their alleged involvement in the protracted crisis in the Bolivarian Republic of Venezuela.⁴

3. In the light of these developments, the Working Group considers the present report both timely and important. It sheds light on disturbing current and emerging manifestations and trends of mercenary and mercenary-related activities. Beginning with methodological considerations, the Working Group examines the difficulties in applying the relevant international legal frameworks. It then analyses challenges raised by the two main contexts in which mercenaries operate: first, situations of armed conflict, and second, situations comprising violent acts that aim to undermine the right to self-determination. International human rights law and international humanitarian law perspectives are addressed. In doing so, the Working Group broadens the focus from mercenaries *sensu stricto* to mercenary-related actors and more usefully captures the complexity and diversity of actors engaging in activities related to mercenarism, which have a negative impact on human rights and the protection of civilians. The report ends with the Working Group's conclusions and recommendations.

II. Methodology

4. The present report builds on previous work undertaken by the Working Group, including studies on the phenomenon of foreign fighters and their linkages with mercenarism.⁵ It relies on extensive desk research and contributions received from relevant stakeholders on the basis of a call for submissions issued by the Working

¹ See S/2019/373 and S/2020/366, and International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions* (Geneva, 2019).

² Meeting convened by Equatorial Guinea during its presidency of the Security Council in February 2019; see also S/2019/97.

³ See <https://news.un.org/en/story/2020/02/1057311>.

⁴ See www.un.org/press/en/2020/sc14193.doc.htm.

⁵ See A/70/330 and A/71/318.

Group in January 2020.⁶ In April 2020, the Working Group convened an expert virtual consultation on the evolving forms, trends and manifestations of mercenaries and mercenary-related activities to feed into the report. The Working Group thanks all those who contributed to the preparation of the report by submitting information and participating in the expert consultation.

5. The inherent lack of transparency surrounding the recruitment, financing and use of mercenaries and related actors, and the difficulties in distinguishing such actors from the multitude of State and armed non-State actors involved in contemporary conflicts and other applicable contexts, represented key research challenges. The term “armed non-State actors” covers a broad range of actors, including armed opposition groups, insurgents, rebels, terrorists and militias. At the same time, this opacity is one of the main concerns prompting the Working Group to shine a light on the phenomenon. The Working Group is conscious that gaps in information remain, particularly with regard to some regions. Mindful that the contexts in which mercenaries operate have an impact on women, children, and other groups in differentiated and disproportionate ways, the Working Group sought to highlight particular examples where possible.

III. International law and mercenary activities

A. International and regional legal instruments related to mercenaries

6. The international legal framework on mercenary activities reflects the specific historical context in which it was developed: namely a period characterized by decolonization, post-colonial wars and interventions in the internal affairs of newly independent States, especially in Africa. It is therefore rooted in fundamental principles that underpin the Charter of the United Nations, such as self-determination, territorial integrity and non-intervention. Two international legal instruments and one regional instrument define, regulate and/or prohibit mercenary activities.

7. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 does not prohibit mercenarism, but it does define mercenaries and denies them the right to combatant or prisoner-of-war status.⁷ This rule has been recognized as having customary status under international humanitarian law.⁸ The Protocol applies to international armed conflicts, including self-determination struggles (art. 1 (4)), but not to non-international armed conflicts, which comprise the majority of modern conflicts. Given its quasi-universal applicability, with 174 States parties, article 47 is a key source of law in situations of international armed conflict.

8. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries applies beyond the context of international armed conflicts. While only 36 States have ratified it since its adoption in 1989, it nevertheless criminalizes: (a) “any person who recruits, uses, finances or trains mercenaries”; (b) direct participation “in hostilities or in a concerted act of violence” aimed at “overthrowing a Government or otherwise undermining the constitutional order of a

⁶ See <https://ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CallsubmissionsTheevolvingforms.aspx>.

⁷ This provision is effectively inconsequential, as mercenaries would be in any case excluded from the combatant status by article 43, which confers that status to members of armed forces of a party to the conflict.

⁸ See rule No. 108 in Jean-Marie Henckaerts, Louise Doswald-Beck and others, *Customary International Humanitarian Law*, vol. I, *Rules*, ICRC study (Cambridge, United Kingdom, Cambridge University Press, 2009).

State; or undermining the territorial integrity of a State”; and (c) any person who attempts or assists in committing these offences (see arts. 1–4). It creates obligations for State parties to, *inter alia*, criminalize these offences, mutually cooperate to implement the Convention and either initiate proceedings against suspects present on their territory or extradite them to another State with valid jurisdiction.

9. No specific body at the international level is tasked to monitor, oversee and guide the implementation of the International Convention. The International Court of Justice has, thus far, not had the opportunity to rule on a case concerning its application. At the time of writing, no international court has criminal jurisdiction over mercenary-related crimes. As of 2018, the International Criminal Court can, however, hear cases against individuals, including Heads of State or high-ranking officials, concerning the crime of aggression, whereby, according to article 8 bis (g) of the Rome Statute, “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State” may in some cases constitute an act of aggression.⁹ The Court therefore does not have jurisdiction to investigate and prosecute mercenary activities *per se*, and can only intervene if States use mercenaries to wage aggressive war. Nevertheless, it can investigate and prosecute individuals involved in mercenary activities for committing or assisting in the commission of international crimes, as long as the conditions for exercising jurisdiction are fulfilled.

10. At the regional level, only the Organization of African Unity Convention for the elimination of mercenarism in Africa specifically tackles this issue and requires States to prohibit and punish mercenary-related activities. The “crime of mercenarism” covers an extended list of acts that can be attributed to individuals, groups, State representatives and States themselves (art. 1 (2)). Furthermore, States must make mercenary-related offences “punishable by the severest penalties under its laws, including capital punishment” (art. 7). Of the 55 member States of the African Union, 32 are parties to this regional Convention.

11. The proposed African Court of Justice and Human Rights could potentially become the first tribunal with international criminal jurisdiction over mercenary crimes. Article 28H, introduced by the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, is broadly similar to both the international and regional conventions but it expands the scope of mercenary offences to include “assisting a government to maintain power” and “assisting a group of persons to obtain power”. The establishment of the Court, however, remains uncertain given the limited number of ratifications of both the Statute and its amending Protocol, therefore leaving the implementation of this important provision in doubt.¹⁰

12. The above-mentioned instruments share a largely similar definition of a mercenary that contains several cumulative criteria that each have to be fulfilled in order for the definition to apply. These are: an individual who is specially recruited to fight in an armed conflict, mainly motivated by private gain, who is not a national of a party to the conflict or a resident of a territory controlled by a party to the conflict and is neither a member of the armed forces of a party to the conflict nor a member of the armed forces of a third State sent on official duty.

⁹ The International Law Commission originally included the crime of “recruiting, use, financing and training of mercenaries” in its draft Code of Crimes against the Peace and Security of Mankind (1991), but it was not retained in the 1995 draft that formed the basis of the initial drafting of the Rome Statute.

¹⁰ See <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> and <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

13. Three differences can, however, be observed. First, while the definitions in Protocol I and the Organization of African Unity Convention require an individual to take a direct part in hostilities, the International Convention does not. Nevertheless, the International Convention still criminalizes mercenaries who participate directly in hostilities (art. 3 (1)). Second, the Organization of African Unity Convention requires a promise of material compensation but, unlike the two other instruments, not one that is significantly higher than what would be paid to combatants of similar ranks and functions. Most importantly, while all three instruments apply in situations of armed conflict, only the International Convention and the Organization of African Unity Convention specifically cover other contexts threatening the right to self-determination, such as overthrowing a Government or undermining the territorial integrity of a State. This is particularly critical, as those contexts can apply to a broad spectrum of situations that do not meet the threshold of armed conflict.

14. The definition of a mercenary in international law has been the subject of much analysis reflecting on its overly restrictive nature.¹¹ The Working Group recognizes that the scope of the definition is problematic and the criteria difficult to meet, especially with regard to contemporary forms of mercenary-related activities,¹² as avoiding the mercenary classification merely involves evading one of the qualifying criteria described above. This can be easily achieved by, for example, enrolling (even temporarily) in the formal armed forces or receiving wages similar to those of regular soldiers, at least on paper. In addition, the view of a mercenary as a “foreigner” does not encompass the complexities of the concept of nationality. In some contexts, nationality has little resonance among local populations where ethnic and religious affiliations may prevail as, for example, noted during the Working Group’s visit to Chad.¹³ In other situations, States have reportedly offered nationality to those they recruited.

15. Some of the criteria raise particular challenges. The definition requires mercenaries to be driven mainly by private and material gain. The reality, however, is seldom that simple. Concurrent and overlapping motivations may explain why certain individuals engage in mercenary-related activities, which can include (but are not limited to) material gain, ideological and political factors, a belief in protecting national interests or a lack of other employment opportunities, but may also include coercion or extortion. Proving that private gain rather than other motivational factors is the main reason for an individual to become a mercenary is legally problematic. Moreover, receipt of material compensation can be difficult to prove, as it will normally be subject to confidential agreements.

16. The type of activities compatible with the definition of a mercenary, particularly in terms of what constitutes fighting in an armed conflict and direct participation in hostilities, raises another difficulty. Some actors resent and challenge any characterization of their activities as mercenary, arguing that they do not engage in offensive combat but rather in defensive services. That said, there is extensive guidance with regard to what may constitute direct participation in hostilities, including conduct that does not require physical presence at the theatre of operations, such as collecting and providing information of direct and immediate use in combat operations.¹⁴ The Working Group has noted before the challenges in distinguishing between the offensive and defensive use of force in situations of armed conflict,

¹¹ See Katherine Fallah, “Corporate actors: the legal status of mercenaries in armed conflict”, *International Review of the Red Cross*, vol. 88, No. 863 (September 2006).

¹² A/71/318, paras. 5 and 10.

¹³ A/HRC/42/42/Add.1, paras. 36 and 37.

¹⁴ See www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf; national military manuals often provide further guidance.

where defending a legitimate military objective, such as providing security for a military base, may amount to direct participation in hostilities.¹⁵

17. Finally, with the exception of the Organization of African Unity Convention, the existing framework focuses on the individual, while neglecting the specific role of those organizing and directing mercenary activities. This poses a particular challenge when these individuals operate within a corporate structure, owing to the limited mechanisms for enforcing corporate responsibility, especially criminal liability.

B. Implementation challenges

18. Ultimately, the international legal framework on mercenaries reflects what States were willing and able to agree on in the given context and the difficulties they had reaching agreement about a term more often than not used as a politically charged and derogatory label rather than as a legal concept. Moreover, the criminalization of mercenary activities is strongly linked to concerns over the right to self-determination,¹⁶ reflecting the leading role of States from the global South, particularly Africa, in developing this framework.

19. The low level of ratifications of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries shows the reluctance of some States to ratify an instrument that criminalizes mercenary activities and applies to individuals who do not necessarily take direct part in hostilities. For example, none of the permanent members of the Security Council are parties to the International Convention. Moreover, the derogative connotations associated with the term “mercenary” may also be a factor in rendering implementation difficult, as States may not wish to be seen as either directly using or harbouring mercenaries in the territories under their jurisdiction, thus leaving potential mercenary activities unaddressed. The ardent opposition to being described as a mercenary and/or supporting mercenaries further reflects that the categorization remains as pejorative as in the past,¹⁷ and is widely used in the public domain to express disapproval of a broad spectrum of actors that do not necessarily fit the criteria of the legal definitions described above.

20. Despite their limitations, the three legal instruments have merit in that they outline a legal definition of a mercenary, although one admittedly fraught with difficulties in its practical application. Interestingly, a number of States that are not party to the International Convention, such as the Russian Federation or France, have criminalized participation in mercenary activities in their national laws, in line with many of the criteria outlined in the international instruments.¹⁸ Other States have adopted specific legislation more or less directly addressing mercenary and mercenary-related activities, including explicit prohibition of mercenary activities (South Africa)¹⁹ or proscribing services related to direct participation in hostilities (Switzerland).²⁰ A study of the national legislations of 60 States from around the world, undertaken by the Working Group between 2012 and 2017, showed an overall

¹⁵ See A/HRC/36/47.

¹⁶ Christopher Kinsey and Hin-Yan Liu, “Challenging the strength of the anti-mercenary norm”, *Journal of Global Security Studies*, vol. 3, No. 1 (2018), p. 99.

¹⁷ Sarah Percy, “The unimplemented norm: anti-mercenary law and the problems of institutionalization”, in *Implementation and World Politics: How International Norms Change Practice*, Alexander Betts and Phil Orchard, eds. (Oxford, Oxford University Press, 2014).

¹⁸ See Article 359 of the Criminal Code of the Russian Federation and article 436-1 of the French Criminal Code. For more examples of how mercenarism is addressed in national legislations and military manuals see https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule108.

¹⁹ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006.

²⁰ Federal Act on Private Security Services Provided Abroad of 27 September 2013.

lack of rules with regard to the direct participation of private military and security personnel in hostilities, a scenario that in some cases could fall within the mercenary definition. This gap also increases the risk of human rights abuses.²¹

21. Information and statistics on national prosecutions of mercenary-related offences are not readily available. Data-gathering is further hindered by the different national practices described above. During its country visits, the Working Group has noted that persons suspected of mercenary-related activities may often be prosecuted for a number of offences, such as participation in a criminal organization, participation in a terrorist organization and terrorist acts, the organization of illegal paramilitary groups or joining foreign armed groups and armies.²² In the Russian Federation, for example, there were 11 cases of mercenary crimes between 2017 and 2019, all related to the participation of Russian nationals in the armed conflict in Ukraine. In some of these cases, mercenarism was prosecuted jointly with other crimes such as incitement of hatred or enmity.²³ Further information shared with the Working Group also shows that different types of offences are used to prosecute those involved in mercenary-related activities.²⁴

IV. Mercenary-related activities in contemporary armed conflicts and contexts threatening the right to self-determination

22. Characterizing new trends and manifestations of mercenaries requires a careful analysis of the contexts in which these actors operate. As noted above, the international legal framework recognizes that mercenaries operate in two scenarios: armed conflicts and “concerted act[s] of violence aimed at: overthrowing a Government or otherwise undermining the constitutional order of a State; or undermining the territorial integrity of a State”.²⁵ Both scenarios entail significant threats to the protection of human rights and, in the case of armed conflicts, to the protection of civilians as provided for by international humanitarian law. Mercenary activities have evolved in parallel with the considerable changes in the nature of the conduct of war since the international legal framework on mercenaries was developed.

A. Demand for mercenary-related activities in contemporary armed conflicts

23. Armed conflicts have become increasingly complex and marked by the involvement of a multitude of actors, including mercenaries and related actors. Several elements are of particular relevance: the substantial increase of non-international armed conflicts; the proliferation of armed non-State actors; the involvement of third States in supporting the parties to a conflict, which creates related challenges with regard to the attribution of responsibility; and disproportionate differences in the methods and means of warfare used by parties to a conflict.

²¹ See [A/HRC/36/47](#).

²² See [A/HRC/45/9/Add.1](#), [A/HRC/42/42/Add.2](#) and [A/HRC/33/43/Add.3](#)

²³ See submission by the Russian Federation.

²⁴ See submission by the Ukrainian Helsinki Human Rights Union.

²⁵ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 1 (2) (a).

Increase in non-international armed conflicts

24. The international legal framework on mercenaries was developed at a time when inter-State conflicts were predominant, implying that mercenaries were perceived as auxiliaries of States. Protocol I is applicable only to such conflicts. The specificities and challenges related to mercenary activities in non-international armed conflicts were therefore not sufficiently considered.

25. Most recent and current armed conflicts are, however, of a non-international character, usually involving a State against an armed non-State actor or two or more armed non-State actors against each other.²⁶ Mercenaries can be engaged by both types of belligerents, which increases their prospective client base. Armed non-State actors must observe applicable rules of international humanitarian law. In comparison with States, however, international human rights law places fewer clearly defined obligations on armed non-State actors,²⁷ leading to the possibility of less strict requirements being placed on privately engaged mercenaries under their service.

Proliferation of armed non-State actors

26. Contemporary armed conflicts are also marked by a proliferation of armed non-State actors that vary widely in size, structure, capabilities and the ability to exercise de facto control over territory. These groups evolve during a conflict, fragmenting and reconstituting themselves with different and sometimes overlapping objectives, hierarchies and allegiances.

27. This proliferation and diversity of armed non-State actors make it even more challenging to determine the facts and to ascribe their respective obligations under international human rights law and international humanitarian law, leading to uncertainty with regard to the scope of applicable protections and challenges when attributing responsibility. Adding mercenaries and related actors to this context further clouds the picture, as their recruitment, financing and integration within the chains of command of a non-State client will usually remain opaque.

28. The Working Group received information on cases in which mercenaries and related actors provided support to armed non-State actors with the objective of strengthening military capacities and capabilities. That said, significant information gaps make it difficult to establish who is responsible for their recruitment and payment and under what chains of commands these actors operate.

29. In one case brought to the attention of the Working Group, the use of well-trained and skilled Russian private military personnel in support of the Libyan National Army, engaged in a conflict against the Government of Libya, reportedly resulted in more precise offensive operations. While this could have arguably decreased harm to the civilian population, abuses against civilians by the private military personnel were also reported, including an allegation of extrajudicial killings.²⁸ The involvement of the private military personnel further contributed to the

²⁶ See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusan Tadić*, Case No. IT-94-I-I, 1995.

²⁷ See A/HRC/38/44 (English only), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session38/Pages/ListReports.aspx>. It should also be recalled that attributing certain human rights obligations to armed non-State actors does not invalidate State responsibilities, as the latter remains under an obligation to take all appropriate diplomatic, economic, judicial and other measures to protect the human rights of the population living in the part of its territory that is outside its control.

²⁸ References are made throughout the present report to allegation letters sent by the special procedures of the Human Rights Council. All such communications are available at <https://spcommreports.ohchr.org/TmSearch/Results>. In the present case, see JAL RUS 1/2020, JAL LBY 1/2020 and JAL OTH 42/2020.

intensification and prolongation of the conflict at a tragic cost to the civilian population. Moreover, the opacity surrounding the conditions under which the personnel were deployed, including applicable command and control mechanisms, obscured the attribution of responsibility and enabled such actors to operate with apparent impunity.²⁹

30. Furthermore, with regard to Libya, the engagement of fighters from Sudanese armed groups is another pertinent example. Seemingly not integrated within the command and control structure of Libyan factions, they have been described as coordinating and engaging in joint military operations with their Libyan patrons, while their alignment with particular factions is “usually based on convenience, and they have occasionally switched sides”.³⁰

31. In other cases, the risk of violations of international humanitarian law and human rights abuses are heightened if well-trained contractors are engaged to strengthen the military capacities and capabilities of armed non-State actors that manifestly defy human rights, such as groups driven by extremist ideologies.³¹ Their activities can, for example, include training in military tactics and weapons maintenance and use.

Involvement of third parties in situations of armed conflict

32. To some extent, the proliferation of armed non-State actors can be linked to another key aspect of contemporary armed conflicts, namely the increasing involvement of third parties seeking to influence a conflict. This may include a State or a coalition of States, or missions deployed by international and regional organizations,³² with each of these scenarios entailing specific legal implications. In some circumstances, the intervening actor may become party to a conflict and therefore subject to related obligations under international humanitarian law, for example if the support consists of military operations aimed at influencing the conduct of hostilities to the detriment of the other party.³³ This can take different forms, such as support in planning and coordinating military operations or the provision of intelligence for immediate use in the conduct of hostilities.

33. A third-party intervention can also include the provision of mercenary and mercenary-related personnel to one party to a conflict for the purpose of directly participating in hostilities to weaken the military capacities of the other party. Examples shared with the Working Group from recent armed conflicts indicate that this form of intervention is increasingly being used, particularly by States.

34. Furthermore, this form of support increases the factual and legal complexity in determining whether the intervening State can be classified as a party to the conflict, and therefore in classifying the conflict itself and identifying applicable rules of international humanitarian law. Providing support through an intermediary creates distance between the intervening State and the supported party, and may therefore obscure the actual role and responsibilities of the former. Reports shared with the Working Group suggest that, in some cases, this is done precisely with the ominous objective of providing “plausible deniability” of direct involvement in a conflict. Intervening States have deployed mercenaries and related actors to support an ally, while refuting knowledge or authority over those deployed in an attempt to evade

²⁹ Ibid.

³⁰ S/2020/36, para. 169.

³¹ See, for example, <https://jamestown.org/program/malhama-tactical-threatens-put-china-crosshairs/>.

³² Tristan Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict”, *International Review of the Red Cross*, vol. 97, No. 900 (2014).

³³ Ibid., p. 1,231.

international responsibility for the conduct of the auxiliaries, including in relation to alleged human rights abuses and violations of international humanitarian law. States also use these actors to hide the real human and financial costs of intervening in a conflict and thus mitigate negative domestic political consequences.

35. One example illustrating these challenges are the operations of the so-called “Wagner Group”, reportedly led by former personnel of the Russian armed forces. Difficulties already arise in defining this entity, which has been variously described as a private military company, a paramilitary group or semi-State security forces, highlighting the legal ambiguity regarding its formal registration and corporate identity.³⁴ This lack of transparency leads to major difficulties in identifying laws and regulations applicable to the Wagner Group, or even outright denials of its existence, thereby creating even more challenges to determining its clients and contracts. Moreover, the Working Group received allegations that, in 2018, several journalists researching the group and its activities in different parts of the world died under suspicious circumstances, raising serious concerns about the dangers and difficulties in investigating and reporting on the Wagner Group and contravening the rights to freedom of expression and to information.³⁵

36. In itself, such ambiguity over the registration and regulation of private actors that offer combat and combat support services internationally could amount to violations of the positive obligations of States to protect against reasonably foreseen threats to human rights, including the right to life.³⁶ Opaque contracting arrangements through companies registered in offshore corporate havens that have loose regulatory frameworks enable companies and their clients, including States, to generate profits from private combat activities while evading regulation and legal accountability. Such arrangements also obscure ownership structures, particularly if State officials have stakes in these companies. Reportedly, in some cases, private combat services contracted by a State and provided through offshore companies have been presented as maritime security to create the appearance of the legal use of force in the context of anti-piracy operations.³⁷ Such practices contravene the positive State obligations to prevent human rights violations and abuses and the requirement for private businesses to exercise human rights due diligence.

37. Furthermore, the secrecy and opacity surrounding relationships between States and mercenary and mercenary-related actors frustrates the attribution of responsibility for abuses and therefore the provision of accountability and effective remedy. Attributing responsibility to States will depend on proving that sufficient control or direction was exercised by the State over hired mercenaries and related actors,³⁸ which inherently raises significant practical challenges.

38. Increasingly, the Security Council has included the provision of “armed mercenary personnel” in arms embargoes, particularly concerning the situations in

³⁴ Candace Rondeaux, *Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors in Russian Proxy Warfare*, Arizona State University Center on the Future of War (November 2019); Kimberley Marten, “Russia’s use of semi-state security forces: the case of the Wagner Group”, *Post-Soviet Affairs*, vol. 35, No. 3 (2019); Sergey Sukhankin, “Russian PMCs in the Syrian civil war: from Slavonic corps to Wagner Group and beyond”, December 2019, available at <https://jamestown.org/program/russian-pmc-in-the-syrian-civil-war-from-slavonic-corps-to-wagner-group-and-beyond/>.

³⁵ See JAL RUS 23/2018 and JAL RUS 10/2018.

³⁶ Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 21.

³⁷ Candace Rondeaux, *Decoding the Wagner Group*.

³⁸ See the Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, particularly arts. 5 and 8.

South Sudan,³⁹ the Central African Republic⁴⁰ and Libya,⁴¹ as well as through a targeted arms embargo on designated individuals and entities in Yemen.⁴² In this way, the embargoes broaden the scope of restrictions beyond military materiel to also include human actors and emphasize a third party's responsibility not to intervene in the conflict through the provision of "armed mercenary personnel".⁴³ Moreover, the embargoes do not define "armed mercenary personnel", leaving the scope of the term open to interpretation. The Working Group takes the view that the term can be interpreted to cover a large area of activities beyond the restrictive definition in the international legal framework, as the embargoes include "technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel".⁴⁴

Asymmetry between parties to a conflict, and military capabilities and strategies

39. The prevalence of intra-State conflicts, the multitude and diversity of armed non-State actors and support provided to parties to a conflict by external powers all reflect the significant differences among belligerents engaged in contemporary armed conflicts, including their legal status, their military capabilities and the resources available to them. The term "asymmetric warfare" has been used to describe such situations, in which a largely superior military power, most commonly a State, opposes a weaker party, usually a non-State actor.⁴⁵ To counteract this imbalance, the weaker actor adapts its strategies, for example by avoiding direct confrontations and operating through decentralized structures. In turn, the stronger party adjusts its own strategies, for instance through counter-insurgency operations or the use of advanced technology to minimize physical danger to its personnel while weakening the military resources of its adversary.

40. Use of mercenary and mercenary-related activities represents one of the tools available to parties to the conflict to redress differences and develop strategies in asymmetric confrontations. As mentioned above, mercenary-related actors have provided support to armed non-State actors to build military skills, for example when planning operations or using and maintaining weapons and other equipment, as well as to supplement military resources and act as a force multiplier. States may also rely on mercenaries and related actors to complement limited personnel and a lack of specialist skill sets, for example, while at the same time limiting public scrutiny and accountability mechanisms that would usually be exercised over State security services.

41. In particular, new technologies have been leveraged to gain strategic and tactical advantages in asymmetric warfare. For example, commercial technology has been used by armed non-State actors to great military effect, including using drones for surveillance and to drop explosives.⁴⁶ States have also significantly bolstered technological capabilities to respond and engage in asymmetric confrontation. This

³⁹ See Security Council resolution [2428 \(2018\)](#).

⁴⁰ See Security Council resolution [2127 \(2013\)](#).

⁴¹ See Security Council resolution [1970 \(2011\)](#) and subsequent resolutions on the same topic.

⁴² See Security Council resolution [2216 \(2015\)](#).

⁴³ Hin-Yan Liu, "Mercenaries in Libya: ramifications of the treatment of 'armed mercenary personnel' under the arms embargo for private military company contractors", *Journal of Conflict and Security Law*, vol. 16, No. 2 (2011).

⁴⁴ Security Council resolution [1970 \(2011\)](#), para. 9.

⁴⁵ Toni Pfanner, "Asymmetrical warfare from the perspective of humanitarian law and humanitarian action", *International Review of the Red Cross*, vol. 87, No. 857 (March 2005).

⁴⁶ Ash Rossiter, "Drone usage by militant groups: exploring variation in adoption", *Defense & Security Analysis*, vol. 34, No. 2 (2018).

has benefited private actors, who profit from developing, maintaining and operating new technology, for example in the areas of information technologies, cyber capabilities and complex high-tech weapons systems.

42. Cyberwarfare has been recognized as a method of warfare that can not only infiltrate, disrupt, damage or even destroy military or civilian objects, but can also cause serious human harm. Similar to conventional warfare, it must comply with international humanitarian law.⁴⁷ This is all the more relevant as strategic capabilities increasingly depend on infrastructure and technology.

43. Moreover, in some States, private contractors provide significant support in maintaining and operating drones used in hostilities, although this does not necessarily mean making decisions to capture or kill.⁴⁸ Private actors have also been involved in inventing and producing autonomous systems for which they may be responsible in terms of maintenance and operation during the conduct of hostilities.⁴⁹ These trends entail significant challenges to the respect for international human rights law and international humanitarian law, as new combat technologies fragment and diffuse decision-making with regard to operating weapons systems, and therefore complicate the process of attributing responsibility for violations and abuses.

B. Mercenary-related activities undermining the right to self-determination

44. In addition to armed conflicts, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the Organization of African Unity Convention for the elimination of mercenarism in Africa encompass mercenary activity that engages in concerted acts of violence to undermine the right to self-determination. The right to self-determination is a key principle of the United Nations, in accordance with Article 1 (2) of its Charter, and as reinforced by resolutions of the General Assembly and the Human Rights Council. It is also a fundamental principle of international human rights law, found in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as a collective right entailing an external dimension, namely freedom from foreign domination, and an internal aspect providing a people the right to freely pursue its political, economic, social and cultural development. Mercenary activities are also specifically mentioned in instruments related to non-intervention and respect for territorial integrity, such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁵⁰

45. Nevertheless, determining which context does indeed undermine the right to self-determination is not always straightforward and is often eminently political. Contrary to the well-established rules applicable to armed conflicts, the right to self-determination and its scope and content have been subject to much less interpretation

⁴⁷ ICRC, “International humanitarian law and cyber operations during armed conflicts”, position paper, November 2019.

⁴⁸ Andreas Krieg, *Defining Remote Warfare: The Rise of the Private Military and Security Industry* (London, Oxford Research Group Remote Warfare Programme, March 2018).

⁴⁹ Laura Dickinson, “Drones, automated weapons, and private military contractors: challenges to domestic and international legal regimes governing armed conflict”, in *New Technologies for Human Rights Law and Practice*, Molly Land and Jay Aronson, eds. (Cambridge, United Kingdom, Cambridge University Press, 2018).

⁵⁰ See General Assembly resolution 2625 (XXV).

and clarification.⁵¹ Whereas States are required to promote the realization of the right to self-determination, any action taken towards this objective must be consistent with other obligations under international law, in particular non-interference in the internal affairs of other States.⁵² At times, this creates a tension between legitimate support for the right to self-determination and internal interference, a distinction often viewed through a political and ideological lens, for example with regard to supporting insurgent groups that claim to seek political and cultural autonomy or independence in a context of repression and persecution.

46. Campaigns of violence that aim at undermining the right to self-determination can take many forms and can be instigated by another State or by private actors. Generally, third-party interventions consisting of supporting or initiating acts of violence and conducted for the purpose of advancing foreign policy or private interests run contrary to the right to self-determination and its corollary principles of non-intervention and respect for territorial integrity. If used for such objectives, the deployment of mercenaries and related actors to overthrow a government or to remotely influence an armed conflict contravenes the right to self-determination. The observation that this “lowers the thresholds ... to go to war as the costs for intervention are relatively low, both financially and politically”⁵³ is a source of concern in this respect.

47. The availability of mercenary and mercenary-related services creates the ability, for those who can afford it, to supplement lacking military capacity and to pursue policies and interests through aggressive means. As a result, the ability to intervene in an internal armed conflict or carry out aggressive acts against another State becomes available to the highest bidder, thereby threatening the right to self-determination. Moreover, by using mercenary and mercenary-related services, those responsible for such acts can hide or deny their involvement.

48. The heavy reliance on foreign combatants in some contemporary armed conflicts contributes to their escalation and prolongation, thus thwarting the prospects for a stable environment and peaceful resolution that would enable the local population to exercise the right to freely pursue its political, economic, social and cultural development. This is evident in the conflict in Libya, where mercenaries from different countries have at times significantly influenced the conduct of hostilities. Strikingly, Syrian mercenaries have reportedly been deployed on both sides of the Libyan conflict, thus exporting and continuing the conflict in the Syrian Arab Republic outside its borders.⁵⁴ Moreover, continuing to fight in another conflict in exchange for private gain undermines prospects for the reintegration of these fighters into civilian life.

49. Mercenaries and related actors can themselves have a direct interest in prolonging a conflict and fostering instability. In the Central African Republic, for example, the exploitation and trafficking of rich natural resources drew mercenaries and related actors, which took advantage of the security vacuum in the country. Their presence, alongside multiple armed groups, resulted in serious threats to the territorial

⁵¹ Matthew Saul, “The normative status of self-determination in international law: a formula for uncertainty in the scope and content of the right?”, *Human Rights Law Review*, vol. 11, No. 4 (2011).

⁵² Human Rights Committee, general comment No. 12 (1984) on the right to self-determination, para. 6.

⁵³ Andreas Krieg and Jean-Marc Rickli, *Surrogate Warfare: The Transformation of War in the Twenty-First Century* (Washington, D.C., Georgetown University Press, 2019), p. 152.

⁵⁴ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25970&LangID=E.

integrity of the country and acted as a barrier to the exercise of the right to self-determination.⁵⁵

V. Mercenary-related actors and activities and their contemporary manifestations

50. It is clear that a range of mercenaries and related actors continue to influence the course of contemporary armed conflicts and to undermine the right to self-determination. While many of these actors may fall short of the strict definition of a mercenary under the applicable international legal framework, they nevertheless share many of the characteristics of mercenaries and engender similar risks and impacts. The Working Group therefore seeks to examine a broad range of mercenary-related actors and activities in order to stimulate a discussion on how to better frame and address them.

51. This builds on previous analyses by the Working Group that identified foreign fighters as mercenary-related actors on the basis of linkages with mercenaries, including similarities and differences in their respective definitions. At the time, the Working Group recalled the commonly accepted meaning of the term mercenary as being “primarily focused on the professional services of persons paid to intervene in an armed conflict in a country other than their own” and recalled that “mercenaries are necessarily non-nationals”.⁵⁶

52. The Working Group wishes to stress that the categories below should not be taken to designate mercenary-related actors in general, but rather that each possible case from among these categories needs to be assessed in the light of its specific context and circumstances. Given the complexity and multitude of actors involved in contemporary conflicts, it should also be noted that some actors may engage in different activities simultaneously, or seamlessly move from one activity to another.

53. The Working Group recognizes that among these different categories there are individuals who live in particularly vulnerable security and socioeconomic situations and who may be subject to coercion, exploitation or abuse when carrying out mercenary-related activities. For example, in one case brought to the Working Group’s attention, a group of men from one of the least developed countries was allegedly recruited on the understanding that they would work as private security guards in a country that had one of the highest incomes per capita. On arrival, however, the men were reportedly given military training and told they would be deployed to conflict zones to undertake unspecified security tasks.

54. Children may be at particular risk of recruitment into mercenary-related activities,⁵⁷ and the Working Group received allegations of human rights violations in this connection. Specifically, Syrian boys, under the age of 18 and living in extremely vulnerable socioeconomic situations, were recruited through factions affiliated with the opposition Syrian National Army and deployed through Turkey to take part in the conflict in Libya.⁵⁸ There are, therefore, cases where those viewed as engaging in mercenary-related activities may in fact be victims of exploitation, trafficking or child recruitment. It is therefore important to carefully consider the root causes and contextual factors leading individuals to become involved in mercenary-related activities.

⁵⁵ See [A/HRC/36/47/Add.1](#).

⁵⁶ See [A/70/330](#), paras. 10 and 87.

⁵⁷ See [A/HRC/39/49](#).

⁵⁸ See JAL TUR 7/2020 and JAL LBY 1/2020.

A. Fighters affiliated with armed non-State groups operating abroad

55. Armed non-State groups and their fighters can engage in mercenary-related activities when they “export” their military resources and skills to the territory of another State in the pursuit of private gain. In such situations, commonalities with mercenaries include intervening as an external actor in an armed conflict and motivated, to a significant extent, by material and financial gain. However, several concurrent motivations may be at play for an armed group to move into the territory of another State and, in some cases, the group may be able to do so independently, instead of being “specially recruited” by another actor, as would be the case with mercenaries. This is particularly relevant in regions with porous borders and gaps in the rule of law and security. Moreover, in some contexts, it is difficult to qualify armed non-State groups and their fighters as “foreign” owing to the close cross-border links between communities, for example in the Sahel region of West Africa.

56. In some instances, armed non-State groups and their fighters may become involved in mercenary activities if they are faced with military setbacks in their territory of origin. This may also be the case if they do not perceive or do not have incentives to engage in a peace process, owing to the likelihood of facing prosecution or a lack of opportunity to either reintegrate into society or integrate into the regular armed forces, for example. Fighters may continue offering their skills to those willing to pay, making military capacity and capability a commodity subject to the rules of demand and supply. In addition, engaging in mercenary and other illicit activities in another State may constitute a tool to gain resources and maintain military capabilities. One such example is the alleged involvement of Sudanese armed groups from Darfur in mercenary and smuggling activities in Libya. These groups have reportedly received money, arms and equipment in exchange for military support offered to both sides of the conflict in Libya, and some have allegedly been involved in the trafficking of migrants, including the kidnapping of migrants for ransom.⁵⁹

57. The conflict in Libya has also attracted fighters from armed non-State groups from farther afield. Since December 2019, thousands of fighters affiliated with the Syrian National Army, which encompasses a number of Syrian armed opposition factions, were reportedly deployed through Turkey to take part in hostilities in Libya alongside factions supporting the Libyan Government of National Accord. The fighters were allegedly motivated by significantly higher wages than they would have received in the Syrian Arab Republic, financial compensation to relatives in case of serious injury or death and the prospect of obtaining Turkish passports.⁶⁰

B. Personnel of armed non-State actors operating domestically

58. Similar to armed non-State groups operating abroad, a diverse range of armed non-State actors who are active domestically may attract recruits using the prospect of private gain. This category includes armed non-State actors, such as militias, paramilitary groups, organized criminal groups and vigilantes. In some cases, a number of similarities to mercenaries may be observed, such as financial motivation, distinction from State security forces and direct participation in hostilities or in activities that undermine the right to self-determination. For instance, these actors may control parts of a State’s territory through violence, intimidation and extortion, thus subverting the existing constitutional order and violating the right of peoples to self-determination. The situation in the Arco Minero del Orinoco region in the

⁵⁹ See [S/2020/36](#).

⁶⁰ See submissions by Maat for Peace, Development and Human Rights, by R. Ali and by Syrians for Truth and Justice.

Bolivarian Republic of Venezuela represents a stark example of organized criminal groups controlling a territory to extract natural resources while reportedly committing human rights abuses, including against indigenous peoples.⁶¹

59. Unlike mercenaries, however, these groups are domestic actors that may be driven by a number of overlapping motivations, such as control over territory or ethnic or religious affiliation. Some of their personnel may not be specially recruited to take part in hostilities or violent actions that threaten the right to self-determination but are rather engaged on a more general and long-term basis. Given the broad nature of this category, many of these actors may not qualify as conducting mercenary-related activities. Therefore, each case merits careful contextual and factual assessment to explore possible links to mercenarism.

60. In many cases, this set of actors operates outside international as well as domestic law. There are, however, situations in which such groups may be given some form of legal recognition and/or where a strict separation from State security forces is difficult to determine, for example when paramilitary groups operate in support of a national Government (or some parts of the Government). In several countries, such paramilitary groups have reportedly been involved in serious violations of international human rights law and international humanitarian law.⁶²

61. In other cases, armed non-State actors may seek to establish legal entities, for example in the form of private security providers, in an effort to legitimize some of their activities and conceal the involvement of warlords and militia leaders. This issue was raised during the Working Group's visit to Somalia⁶³ and in a congressional investigation by the United States of America into private security subcontracting.⁶⁴ By transforming themselves into business entities, armed groups and militias may also seek to maintain their interests and power after the end of an armed conflict.

C. Foreign fighters

62. Foreign nationals may join armed non-State actors for a number of reasons, including private gain. In this case, significant similarities exist between foreign fighters and mercenaries, including the role of intervening as an external actor in an armed conflict. Nevertheless, different motivations may be in play, as many foreign fighters are also driven by ideological, political or religious beliefs. The Working Group examined the phenomenon of foreign fighters during visits to Tunisia, Belgium, Ukraine, European Union institutions, the Central African Republic, Chad and Austria.⁶⁵ Concerning the situation in Ukraine, the Working Group found that the substantial presence of foreign fighters and mercenaries contributed to the exacerbation of the conflict in the eastern part of the country.⁶⁶ A deeper analysis of this phenomenon can be found in previous reports by the Working Group.⁶⁷

⁶¹ See A/HRC/44/54 (English and Spanish only). Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Pages/ListReports.aspx>.

⁶² Adam Day, *Hybrid Conflict, Hybrid Peace: How Militias and Paramilitary Groups Shape Post-conflict Transitions* (New York, United Nations University, 2020).

⁶³ See A/HRC/24/45/Add.2.

⁶⁴ See <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Warlord.pdf>.

⁶⁵ See A/HRC/33/43/Add.1, A/HRC/33/43/Add.2, A/HRC/33/43/Add.3, A/HRC/33/43/Add.4, A/HRC/36/47/Add.1, A/HRC/42/42/Add.1 and A/HRC/42/42/Add.2.

⁶⁶ See A/HRC/33/43/Add.3.

⁶⁷ See A/70/330 and A/71/318.

D. Foreign nationals contracted into State security services

63. Many States recruit foreign nationals into their regular armed forces and security services and some have extensively relied on foreign nationals to build their military capacities and capabilities. In some cases, foreign personnel have reportedly been motivated to enrol into the security services of another country by the promise of comparatively high wages as well as by the prospect of receiving another nationality. However, such personnel more often appear to be recruited into State security structures on a long-term basis, rather than recruited to take part in a specific armed conflict or other context applicable to mercenary activities. Being a member of a State security service is another key difference compared with being a mercenary. Therefore, specific cases require attentive assessment to determine whether they can be considered a mercenary-related activity.

64. Some contexts, however, raise legitimate questions as to whether foreign personnel employed by State security services may be engaged in mercenary-related activities. In an armed conflict setting, for example, the recruitment of foreign soldiers at comparatively high wages to provide either specialized services, such as operating new military equipment, or to strengthen combat capacities on the ground, meets many of the criteria of the definition of a mercenary. In a different scenario brought to the Working Group's attention, foreigners were reportedly heavily recruited into a State's regular security services and used by the State to take part in violations against members of a particular religious group, while also helping to modify the State's demographic structure to the detriment of that group, which is a practice that could contravene the right to self-determination.

E. Private military and security companies and their personnel

65. The nature of the relationship between mercenaries and private military and security companies has been a point of division among policymakers, scholars, civil society and the private military and security industry itself. The Working Group defines private military and security companies as corporate entities that provide, on a compensatory basis, military and/or security services by physical persons and/or legal entities.⁶⁸ The industry provides a broad spectrum of services ranging from static security to direct combat functions, the latter of which is believed to be a minor part of the sector. This observation is frequently made, including by industry representatives themselves, to dissociate private military and security companies from mercenaries.

66. Although this observation rightly puts the emphasis on the types of services provided, the distinction between offensive and defensive or support services is not always that straightforward.⁶⁹ Moreover, some State armies would arguably not be capable of undertaking the current extent of military operations worldwide without wide-ranging support from private contractors.⁷⁰ Most of these support services are, nevertheless, in the areas of logistics, security and protection, training, interpretation and general technological support, rather than direct combat functions.⁷¹

67. Some private military and security companies argue that they should be distinguished from mercenaries on the basis that they are integrated into formal armed forces. One private military contractor recently described this way of operating to the media, saying that "private" personnel become part of the hiring State's armed forces

⁶⁸ For the full definition, see [A/HRC/15/25](#), annex, art. 2.

⁶⁹ See submission by S. MacFate; see also para. 16 of the present document.

⁷⁰ See submission by C. Kinsey and H. Olsen.

⁷¹ See submissions by O. Swed and D. Burland and by U. Petersohn.

for the duration of their contract.⁷² Given the challenges in collecting information about State contracting of private military providers, it is difficult to say whether this is a common practice. At the same time, the full integration of private personnel into State armed forces unequivocally establishes State responsibility over their conduct.

68. In some instances, where particular private military services involve direct participation in hostilities, these would amount to mercenary activities in line with the international legal framework, as also recognized by the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.⁷³ For example, it is alleged that mercenaries and foreign private military contractors were used to carry out targeted attacks during the armed conflict in Yemen.⁷⁴ In other cases, private military and security services could be described as a mercenary-related activity if clear linkages with the characteristics of mercenarism could be made.

69. Some private military and security companies have sought to obscure their legal personality and ownership by registering in States that have weak regulatory frameworks or by creating shell companies to obscure ownership and management structures. For companies operating in situations of armed conflict and contexts of widespread violence and weak rule of law, this raises questions about the legality of their operations, including their possible involvement in mercenary and mercenary-related activities. The significant differences and gaps in the national regulations of private military and security companies in different countries⁷⁵ allow ample scope for companies that seek to hide their operations to take advantage of these disparities. In addition, such practices may undermine achievements in raising standards within some parts of the private military and security industry, for example through initiatives such as the International Code of Conduct Association.⁷⁶

70. Adequate regulation, monitoring and enforcement are paramount in the light of persistent concerns over the lack of accountability for human rights violations and abuses by private military and security companies and their personnel, especially when operating transnationally. In some cases, victims remain without an effective remedy decades after the alleged violations and abuses occurred. For example, a company run and staffed by British nationals but registered offshore was allegedly involved in human rights violations and abuses during the armed conflict in Sri Lanka between 1984 and 1988. At the time of writing, no investigations appear to have been conducted into the role of the company and its personnel in either the United Kingdom of Great Britain and Northern Ireland or Sri Lanka, leaving victims without effective remedies, and persons associated with the company continue to be active in providing private military and security services.⁷⁷

F. Cyber mercenaries

71. The distinctions between offensive and defensive services and between transparency and ambiguity over legal status can also be applied to military and security services provided in cyberspace. Private actors can be engaged by States and

⁷² See www.aljazeera.com/programmes/talktojazeera/2019/12/eeben-barlow-world-private-military-contractors-191229164548897.html.

⁷³ See www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies, p. 40.

⁷⁴ See A/HRC/42/CRP.1, paras. 270–272 (Arabic and English only), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Pages/ListReports.aspx>; and S/2018/192, paras. 27 and 142.

⁷⁵ See A/HRC/36/47.

⁷⁶ See submission by J. Jezdimirovic Ranito and C.T. Mayer.

⁷⁷ See JAL GBR 4/2020, JAL LKA 3/2020 and JAL OTH 46/2020.

non-State actors not only to protect their own networks and infrastructure but also to carry out cyber operations to weaken the military capacities and capabilities of enemy armed forces, or to undermine the integrity of another State's territory. As such, individuals carrying out cyberattacks can be considered as undertaking a mercenary-related activity, or even a mercenary activity if all the qualifying criteria are met.

72. Studies suggest that States as well as non-State actors have started using hackers as proxies to project cyberpower, given the relatively low costs of such operations compared with conventional warfare and the possibility of hiding behind an attacker whose identity is very difficult to uncover. Therefore, attributing responsibility to the cyberattacker and their client is extremely challenging and raises significant concerns, owing to the potential of cyber operations to seriously undermine human rights. The possibility that cyber proxies may move across borders and thus escape regulatory control and accountability mechanisms is another cause for concern.⁷⁸

73. The development of offensive cyber capabilities requires appropriate policy and regulatory responses from States in order to ensure that they conform to international human rights standards and international humanitarian law principles. Two groups have recently been established by the General Assembly to discuss broader issues of security in the information and communications technology field and could potentially provide guidance in this respect: the Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security,⁷⁹ and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.⁸⁰

VI. Conclusions and recommendations

74. In recent years, a broad spectrum of activities has developed that, to a greater or lesser extent, share key characteristics of mercenarism. These activities have grown in parallel with changes marking contemporary armed conflicts, notably the rise of non-international armed conflicts, a proliferation of armed non-State actors, the involvement of third parties and asymmetric warfare that increasingly relies on new technologies. Taking into account this evolution and the corresponding consequences for the enjoyment of human rights, the Working Group examined the challenges of focusing solely on activities that meet the definition of a mercenary under the applicable international legal framework, and took a broader approach by examining a variety of actors that fit under a more adaptable concept of mercenary-related activities.

75. The diverse, opaque and profitable market for private combat and combat support services threatens human rights, the protection of civilians and peace and stability in general. In situations examined by the Working Group, the involvement of mercenaries and related actors frequently led to the intensification and prolongation of conflicts and thus contributed to the human suffering borne by the civilian population and undermined their right to self-determination. In some cases, these activities also resulted in human rights abuses, including violations of the right to life, the recruitment of children under the age of 18 to take part in armed conflict, the violation of the right to an

⁷⁸ Tim Maurer, *Cyber Mercenaries: The State, Hackers, and Power* (Cambridge, United Kingdom, Cambridge University Press, 2018).

⁷⁹ See General Assembly resolution [73/27](#).

⁸⁰ See General Assembly resolution [73/266](#).

effective remedy and the violation of the right to freedom of expression, as well as violations of international humanitarian law.

76. Outsourcing the conduct of military operations to non-State actors, including to provide mercenary and mercenary-related activities, does not relieve States of their obligations under international law. It is therefore of particular concern that contemporary mercenary-related actors, characterized by opacity and ambiguity with regard to their identity, internal organization, the types of services they provide and their clients, provide an essential way for a number of States to influence the course of armed conflicts while denying doing so. This has led to a situation in which some States, either by commission or omission, obscure their involvement in an armed conflict, thus evading related responsibilities under international humanitarian and human rights laws, including for violations and abuses committed by their auxiliaries.

77. The new and evolving manifestations of mercenary-related activities therefore call for urgent attention from States and other relevant stakeholders. The present report provides elements to support discussions among States on ways to counter mercenary and related activities more effectively, with a view to respecting, protecting and fulfilling the right of peoples to self-determination, protecting civilians in situations of armed conflict and safeguarding the principles of non-intervention and territorial integrity. These discussions should be grounded in the international legal framework pertaining to mercenaries, notwithstanding its shortcomings, and in the broader framework of international humanitarian and human rights laws.

Recommendations

78. To prevent and mitigate the negative human rights impacts caused by mercenary activities, States should refrain from recruiting, using, financing and training mercenaries and should prohibit such conduct in domestic law, in line with the offences contained in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

79. States should not outsource activities that constitute direct participation in hostilities and should further prohibit the provision of for-profit services constituting direct participation in hostilities by private individuals and companies that are either registered or have their principal place of management in their territories. This prohibition should apply not only domestically but also with regard to exporting such services abroad, and should have commensurate monitoring and control mechanisms in place.

80. States should ensure transparency with regard to the contracting of military support services and make public information about the nature of services, procurement procedures, the terms of contracts and the names of services providers in a sufficiently detailed and timely manner. They should not invoke national security concerns as a general reason to restrict access to such information; rather, limitations on access to information must meet the test of legality, necessity and proportionality, in line with the right to freedom of expression.

81. States must investigate, prosecute and sanction alleged violations of international humanitarian law and human rights abuses by mercenaries and related actors and provide effective remedies to victims. Investigations, prosecutions and trials must respect and guarantee the right to a fair trial and due process of law.

82. In this context, due consideration must be given to the root causes behind mercenary and mercenary-related activities and the vulnerable situations in which some of the individuals involved may find themselves. Children recruited to take part in mercenary-related activities and victims of trafficking and of contemporary forms of slavery, including forced labour, should be treated primarily as victims and offered specific protections in line with international law.

83. At the international level, States should initiate dialogue on the new and evolving forms of mercenary and mercenary-related activities, the risks they pose to international humanitarian and human rights laws and ways to address and counter them more effectively. Any such dialogue should include international and regional organizations, civil society and experts, and consider existing tools and initiatives (see paras. 86–88 below).

84. Building on the inclusion of armed mercenary personnel in arms embargoes, the Security Council should assess the implementation of that provision and the challenges observed thus far, and draw lessons to clarify and strengthen its application.

85. States should reinvigorate discussions with the open-ended intergovernmental working group to elaborate the content of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies,⁸¹ and strive towards tangible progress in this respect. In particular, States should use this process to define the scope of permissible private military and security services and lay down the basis for registration and licensing regimes and monitoring, oversight and accountability mechanisms, taking into account the transnational character of many of these services. As a complementary step, States should also actively support international voluntary initiatives aimed at private military and security companies, such as the Montreux Document and the International Code of Conduct.

86. Discussions within the Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security should address human rights concerns arising from the involvement of mercenaries and related actors in developing and using offensive cyber capabilities.

87. With regard to mercenary-related activities associated with armed non-State actors, States should agree on and support international processes to identify, assess and further develop mechanisms to more clearly and formally recognize the international human rights obligations of armed non-State actors, including criteria to determine the latter's capacity to hold human rights obligations.

⁸¹ See Human Rights Council resolution [36/11](#).