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Overcoming the Unfortunate Legacy of Haditha, the Stryker Brigade “Kill Team”, and Pantano: Establishing More Effective War Crimes Accountability by the United States

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“To extend freedom, democracy, and the rule of law, we must remain true to the Law of War, to include our international law obligations.”

“The possibility that warriors can be disciplined and restrained distinguishes them from mere murderers.”

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2 DAVID LUBAN, ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1038 (2010).
INTRODUCTION

U.S. Marine Corps Lieutenant Ilario Pantano led his infantry platoon on patrol in Iraq near the flashpoint city of Fallujah on April 15, 2004, when they headed to investigate a suspected insurgent compound in the town of Mahmudiyah. As the platoon approached, the marines saw a vehicle occupied by two civilian Iraqi men begin to depart from the compound. After Pantano ordered his platoon to stop the vehicle and detain the two men, his marines complied and handcuffed them. Shortly thereafter, members of the platoon conducted a thorough search of the vehicle and found no weapons. Meanwhile, the platoon searched the compound and found three AK-47 rifles, ten AK-47 magazines, and what were later generically described as materials used in making improvised explosive devises (IEDs). Upon learning that his marines had discovered weapons possibly used by insurgents, Pantano isolated himself, two members of his platoon, and the two Iraqi civilians away from the rest of the marines. Pantano ordered the two platoon members to look away from the vehicle after removing the handcuffs from the two Iraqis and ordered the Iraqis back to their vehicle to search it again. While the two platoon members were looking away, Pantano suddenly opened fire on the Iraqis with his M16A4 assault rifle. After firing thirty rounds into the two Iraqis he removed the empty magazine and inserted another thirty round magazine into his rifle and continued firing until it was empty. Pantano then fashioned a placard which he placed near the bodies that read “No better friend, no worse enemy.”

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3 Steve Fishman, *Hell’s Kitchen*, N. Y. MAG., at 5 (May 21, 2005), http://nymag.com/nymetro/news/people/features/11774/. The author filed a FOIA request to obtain the original Article 32 report, which was initially denied. An appeal was then lodged, which resulted in the request being granted. However, nearly a year has passed since the appeal was granted, but the Naval Criminal Investigative Service has yet to provide the report.
4 Id. at 1, 6.
5 Id. at 6.
6 Id.
8 Id. The two platoon members were Sgt. Daniel Coburn and Navy Corpsman George Gobles (a medical person assigned to the platoon). Id. at 1.
9 Id. at 6.
10 Id. at 1.
11 Id. Later, during an interview with New York Magazine Pantano stated: “I believed that by firing the number of rounds that I did, I was sending a message.” Id. at 6.
12 Id. “No better friend, no worse enemy” was a slogan popularized in the Marine Corps by Pantano’s commanding general, Lt. General James Mattis. It is generally ascribed to the Roman dictator Sulla who used it as his personal epitaph.
Several weeks after the incident, one of the two platoon members who was ordered to face away during the killings reported the incident to authorities, and Pantano’s commanding officer initiated an investigation by the Naval Criminal Investigative Service (NCIS). The investigation amassed evidence from a wide variety of sources that clearly indicated that the killings by Pantano were not justified. Based on the NCIS investigation, Pantano was charged with two counts of premeditated murder and desecration of bodies. Pantano’s commanding officer referred the case to an Article 32 investigation. In the military justice system an Article 32 is a hearing, roughly analogous to the preliminary hearing used in many state jurisdictions, to determine whether there is probable cause to initiate a criminal prosecution. In order to justify the filing of formal charges the prosecution only needed to establish “reasonable grounds” to believe that Pantano committed the offenses charged. This reasonable grounds standard is equivalent to probable cause in civilian jurisdictions and is the lowest possible burden of proof for the government in any criminal proceeding. At the Article 32 hearing, the prosecution produced evidence that Pantano violated the Geneva Conventions by committing what is known as a grave breach, i.e., a serious violation of the law of war, by willfully killing the two unarmed Iraqi civilians. Pantano claimed that just prior to firing sixty rounds into the men they were talking to each other and moved toward him, which prompted him to open fire because he feared for his life. Notwithstanding Pantano’s highly improbable claim of self-defense, at the Article 32 hearing the military prosecutors presented compelling evidence that the killing of these two unarmed Iraqi civilians was nothing short of premeditated murder, not subject to any mitigation or justification.

Given that that the burden of proof in an Article 32 investigation to establish a basis for proceeding with a full criminal prosecution is so low, there was little doubt after the hearing that Pantano should face a general court-martial for the killing and desecration of the bodies of the two unarmed Iraqi civilians. However, despite the strong evidence produced at the Article 32 investigation, the investigating officer (IO) recommended that Pantano should only face non-judicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) for firing the high

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13 Id.
15 Id.
18 Fishman, supra note 3, at 6.
19 A general court-martial is the highest level court-martial by the military, roughly analogous to a felony criminal court. A general court-martial may impose any permissible sentence under the UCMJ, up to and including death. See MCM, supra note 16, R.C.M 1003.
number of rounds into the bodies and leaving the placard, but recommended no action be taken concerning the deaths of the two unarmed Iraqis. At an Article 15 NJP, a hearing normally conducted by the commanding general in the case of officers, Pantano would face only reprimand, arrest in quarters for not more than thirty days, restriction to limits for not more than sixty days, and forfeiture of not more than one-half month’s pay per month for two months. Any sanction imposed would not be considered a conviction under federal law, but simply an administrative proceeding. By contrast, if charges were referred to a general court-martial for disposition, Pantano would potentially face the death penalty or life imprisonment without the possibility of parole, forfeiture of all pay and allowances, and a dismissal from the service.

Since an Article 32 IO’s recommendation is only advisory and does not bind the general court-martial convening authority, the commanding general of the 2nd Marine Division, General Richard Huck, still had the option of referring the case to a general court-martial notwithstanding the IO’s recommendation. On May 26, 2005, General Huck dismissed all charges against Pantano and elected not to proceed with any punitive proceedings of any kind against him, not even NJP. (As will be discussed later in this article, General Huck also played a major role in the alleged cover up and handling of the Haditha massacre, an event that greatly jeopardized the future of U.S.-Iraq relations and led to a minimization of the U.S. presence in Iraq.)

Shortly after this announcement, Pantano was allowed to resign from the service and received an honorable discharge from the Marine Corps. He went on to write a self-congratulatory memoir detailing his actions in Iraq entitled “Warlord: No Better Friend, No Worse Enemy,” and received significant media exposure on such venues as The Daily Show.

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22 See MCM, supra note 16, Part V(1)(g).
23 10 U.S.C. §§ 855-858B, 918. Moreover, the conviction would be considered a felony by most jurisdictions.
25 DeSantis, supra note 14.
27 The book was re-released in late 2011 with under the new title “Warlord: Broken by War, Saved by Grace.”
and Hannity while promoting his book. In 2010 he won the Republican nomination for a U.S. Congressional seat for the Seventh Congressional District of North Carolina, but ultimately lost in the General Election to the Democratic incumbent. This year he has revived his campaign for the House and is once again seeking the nomination for North Carolina’s Seventh Congressional District.

The wars in Afghanistan and Iraq have taken a tremendous toll on American service members who have made incredible sacrifices on behalf of their country. Unfortunately, the type of conduct for which Pantano has thus far escaped criminal liability has been all too common over the past ten years. 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.

In this article, I will argue that the current U.S approach to handling war crimes in the age of terrorism is fundamentally flawed and has repeatedly produced unjust outcomes, particularly in a series of high profile cases that have greatly damaged the position of the U.S. in the international community. By failing to hold U.S. service members properly accountable for their atrocities, the U.S. has lost the respect of the international community and greatly increased the likelihood that U.S. personnel who serve in conflicts in the future will be subjected to severe mistreatment at the hands of our enemies.

This article will proceed in three parts. Part I describes the current international war crimes regime and explains how the U.S. meets its treaty obligations under the Geneva Conventions through the Uniform Code of Military Justice and the War Crimes Act of 1996. Part II will identify and analyze the most serious issues of war crimes accountability currently facing the U.S. Finally, in Part III I will offer recommendations for addressing these problems, including the creation of a War Crimes Review Commission, and also address likely objections to my proposals.

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31See infra Appendix 1.
I. CURRENT WAR CRIMES REGIME AND THE UNITED STATES’ IMPLEMENTATION

A. Overview of the International War Crimes Regime and U.S. Domestic Implementation

All civilized nations are subject to a set of rules for the conduct of warfare. There are two main bodies of law relating to war, *jus ad bellum* and *jus in bello*. The first of these, *jus ad bellum*, is a Latin phrase meaning “the right to wage war” and is a body of international law that seeks to determine under what conditions a nation may lawfully resort to war. This article will not address this area of the law, but instead will focus on *jus in bello*, another Latin phrase that translates roughly to “the law of the battlefield.”

There are currently three different formulations used to describe the law of the battlefield: the Law of War (LOW), International Humanitarian Law (IHL), and the Law of Armed Conflict (LOAC). Although the term “Law of War” is the oldest and probably the most simple and straightforward way of describing the legal regime of *jus in bello*, this term appears to have fallen into disfavor. In these enlightened times nations rarely fight wars anymore, but they quite often get involved in “conflicts.” Some observers, like British General Rupert Smith, have gone so far as to declare, “War no longer exists . . . . [W]ar as battle in a field between men and machinery, war as a massive deciding event in a dispute in international affairs: such war no longer exists.” Therefore, the more modern terms IHL and LOAC are used much more often today when commentators discuss *jus in bello*. The term LOAC seems to be preferred by military practitioners while IHL is preferred by academics writing in this field.

For simplicity in this article, I will use the term IHL to refer to *jus in bello*, as it seems to be fitting of the wide range of situations to which this body of law applies and is keeping with the evolving convention.

The modern conception of IHL is based upon three main sets of international treaties—the 1907 Hague Convention IV, the 1949 Geneva

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33 Id.
34 Id. at 26. Confusingly, there is also International Human Rights Law which deals with the enforcement of international human rights conventions and is considered a discrete body of law apart from IHL/LOAC by most authorities. See id. at 24–26.
36 SOLIS, supra note 32, at 23.
The 1907 Hague Conventions are limited in that they deal mainly with the means and methods of the conduct of warfare, e.g., what type of weapons may be used. The 1949 Conventions are wider ranging and deal with a vast array of issues ranging from the treatment of the sick, wounded, and prisoners of war on the battlefield to specific regulations such as prisoner entitlements to living space, recreation, and personal comfort supplies. More than twenty years after the Geneva Conventions were signed, a series of conferences in Geneva sponsored by the International Committee of the Red Cross (ICRC) were held from 1971–77 and culminated in the creation of Protocols I and II Additional. In addition to the involvement of the traditional western powers, the ICRC also invited certain national liberation movements to fully participate in these discussions. Even though these movements did not have a formal vote, their positions heavily influenced states sympathetic to their goals and led to inclusion of provisions that were opposed by the traditional western powers. As a result, while every nation in the world is a party to the four 1949 Geneva Conventions, not all have adopted Additional Protocols I and II. The U.S. remains one of the countries that have not ratified Protocols I and II, but it has acknowledged that many of the provisions of these Protocols have attained the status of customary international law by virtue of the principle of opinio juris.

The major impact of these conventions on the common soldier is that they outline the limits of lawful battlefield conduct and define an important list of violations called “grave breaches” that merit special

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40 SOLIS, supra note 32, at 120.
41 Id.
42 Id.
43 171 States are a party to Additional Protocol I and 166 States are a party to Additional Protocol II. Int’l COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES 6 (as of Feb. 16, 2012), available at http://www.icrc.org/ihl.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf.
44 See id.
45 See SOLIS, supra note 32, at 134–35. Opinio juris is essentially when a state believes that international law (rather than a moral obligation) mandates it to act in a certain way that is believed to be the customary practice. See BLACK’S LAW DICTIONARY 1201 (9th ed. 2009).
attention by nations who are party to the Conventions. By ratifying the Geneva Conventions, the U.S. committed itself to searching out, and either prosecuting or extraditing, those who have committed "grave breaches."46 "Grave breaches" include willful killing, torture or inhumane treatment, biological experiments, willfully causing great suffering or serious bodily injury or health, taking of hostages, unjustified and extensive destruction of property, compelling a prisoner of war (POW) to serve in the armed forces of his enemy, and willfully depriving a POW of his rights to a fair and regular trial.47

States ratifying the treaties were bound under the Conventions to "enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches."48 Therefore, after ratification it was incumbent upon each state party to effectively implement the war crime prosecution provisions of the Conventions through the mechanisms of its domestic law, a situation which led to varying approaches to implementation. After ratification, the U.S. could have enacted a specific criminal statute in the U.S. Code to proscribe the grave breaches and articulate punishments for the violations of the law of war. However, the U.S. did not pursue this path. The signing of the Geneva Conventions coincided with the adoption of the UCMJ, a comprehensive criminal code that applies to each branch of the armed services as well as the Coast Guard. The UCMJ was passed by Congress in 1950 and became effective on May 31, 1951,49 less than two years after the U.S. signed the Geneva Conventions in 1949. When the Conventions were ratified by the U.S. in 1955 the Senate Foreign Relations Committee determined that existing federal law, i.e., the newly-

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48 See sources cited supra note 46.

minted UCMJ, provided a sufficient legal framework to achieve compliance with obligations to prosecute war crimes under the Conventions. Therefore, no additional legislation was passed. This approach by the U.S. was consistent with that of most high contracting parties—compliance with the common Articles’ domestic legislation requirement through their own military justice systems was the norm rather than the exception.

During the period from 1955 to 1996 the UCMJ was the sole source of U.S. domestic law for carrying out the mandates of the Geneva Conventions. In 1996, Representative Walter Jones of North Carolina introduced a bill that eventually became the War Crimes Act of 1996. His purpose in introducing the bill was to “give the United States the legal authority to try and prosecute the perpetrators of war crimes against American citizens.” The version of the Act that was eventually passed, by overwhelming majorities in Congress, included three main provisions: it criminalized only “grave breaches” the Geneva Conventions, applied to conduct both inside and outside the United States, and applied when either the victim or the perpetrator was a member of the Armed Forces or a U.S. national. The original version also specified life imprisonment or death as penalties if death results to the victim.

Since its original enactment the War Crimes Act has been amended twice. The first time was one year after passage in 1997 when the language was changed from criminalizing only grave breaches of the Geneva Conventions to covering the much broader category of “war crimes.” The Act also defined what could be considered war crimes. As a result, the Act covered not only the very limited category of “grave breaches”, but also criminalized violations of the 1907 Hague Convention IV, violations of common Article 3 of the 1949 Geneva Conventions, as well as willful killing or serious injury to civilians in violation of the 1996 Protocol on Landmines (to be triggered by the U.S. ratifying this Convention).

The most recent amendment came in the wake of the U.S. Supreme Court decision in *Hamdan v. Rumsfeld*. In *Hamdan* the Court declared that common Article 3 of the Geneva Conventions applied to the conflict with al-Qaeda. Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and

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51 SOLIS, supra note 32, at 86.
55 Id.
56 Id.
57 Id.
59 Id. at 628–35.
cruel, humiliating, or degrading treatment. The Bush administration had long asserted that Article 3 did not apply to this conflict because “the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’” In addition, the Bush administration had authorized the use of “enhanced interrogation techniques” that many had declared were actually torture. The decision in Hamdan now posed questions about the criminal liability of U.S. military or intelligence personal who had engaged in “enhanced interrogation techniques.” Since the Court declared that common Article 3 applied to the conflict with al-Qaeda some worried that those agents who used waterboarding and other “enhanced interrogation techniques” might now be prosecuted under 18 U.S.C. § 2441 for war crimes. To prevent such prosecutions from occurring, Congress moved quickly to amend the statute. As amended by the Military Commissions Act of 2006, the War Crimes Act now criminalizes only specified common Article 3 violations labeled as “grave breaches.” Before these amendments any violation of common Article 3 constituted a criminal offense. As of the date of this article more than fifteen years have elapsed since passage of the War Crimes Act, but there has yet to be a single prosecution under this statute. I will explore the possible reasons for this later in this article.

In addition to the Geneva Convention regime, the Rome Statute established the International Criminal Court (ICC) in 2002 as a permanent international tribunal to address war crimes, genocide, crimes against humanity, and crimes of aggression. The statute has been ratified by 119 countries that are now party to its jurisdiction. Although initially signing the Rome Statute, the U.S. subsequently backed away from the ICC and

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61 See Hamdan, 548 U.S. at 630.


has now “unsigned” the treaty, thereby refusing to subject its nationals to ICC jurisdiction.\textsuperscript{66} While the Bush Administration took a hard-line stand against ICC membership, the Obama administration has recently begun a process of re-engagement with the ICC.\textsuperscript{67} However, there is substantial objection to U.S. membership in the ICC and the Rome Statute is unlikely to be ratified by the U.S. in the near future.

B. How War Crimes are Investigated and Prosecuted by the U.S. Military

Although no war crimes or grave breaches are enumerated in the UCMJ, Article 18 does provide that “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.”\textsuperscript{68} Criminal offenses, including those which may be considered violations of the laws of war, are set forth in Articles 77 through 134 of the UCMJ.\textsuperscript{69} These are the so-called “punitive articles” which proscribe a wide variety of crimes, both uniquely military offenses as well as others that are very akin to their common and civil cousins. Examples of uniquely military offenses include Absence Without Leave under Article 86\textsuperscript{70} and Disrespect Toward Superior Commission Officer under Article 89.\textsuperscript{71} Examples of traditional common law crimes that have been imported into the UCMJ include Murder under Article 118,\textsuperscript{72} Robbery under Article 122,\textsuperscript{73} and Rape under Article 120.\textsuperscript{74} Because no specific

\textsuperscript{69} Id. §§ 877–934.
\textsuperscript{70} Article 86, Absence Without Leave. “Any member of the armed forces who, without authority— (1) fails to go to his appointed place of duty at the time prescribed; (2) goes from that place; or (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct.” Id. § 886.
\textsuperscript{71} Id. § 889
\textsuperscript{72} Article 118, Murder. “Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—” (1) has a premeditated design to kill; (2) intends to kill or inflict great bodily harm; (3) is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life; or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.” Id. § 918.
\textsuperscript{73} Article 122, Robbery. “Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.” Id. § 922.
war crimes are enumerated under the UCMJ, the practice that evolved after U.S. ratification of the Conventions is to charge the individual with the enumerated punitive article that is most analogous to the war crime that is alleged to have been committed. Thus, service members like Pantano who are accused of willful killing, a grave breach under the Conventions, are charged with murder under Article 118. However, there is an inherent weakness in this system. Because no separate set of specific war crimes are enumerated in the UCMJ, typically no distinction is made in charging between a willful killing in violation of the Geneva Conventions and the murder of a fellow soldier in the barracks—even though the former is a war crime while the latter is not.

Article 134 of the UCMJ allows military prosecutors to assimilate other federal statutes, or even create charges that are neither crimes under the UCMJ nor federal law, so long as the crimes are non-capital. Although it is possible for military prosecutors to draft “novel specifications” under Article 134 to accurately tailor the charges to the actual circumstances of a war crime, instead of charging the generic analogous offense, this practice has not been adopted by the military.

In general, war crimes prosecutions are handled like any other of the thousands of criminal prosecutions by the military every year. After an investigation by the services’ criminal investigative agencies (such as NCIS, USACIDC, or AFOSI), an Article 32 investigation is undertaken. If the convening authority determines that reasonable grounds exist that the offense charged was committed it refers the charges to a general court-martial. The court-martial is composed of officers or enlisted men selected by the commander and functions much like a jury. The accused is entitled to appointed military defense counsel regardless of their financial situation and if convicted has the right to appeal, potentially all the way up to the U.S. Supreme Court.

C. How War Crimes Prosecutions are Conducted by the Department of Justice

The Department of Justice (DOJ) is the sole agency outside the U.S. military responsible for the investigation and prosecution of war crimes.

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74 Id. § 920.
75 Id. § 934. Under Article 134, novel specifications may be drafted for “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.” Id.
76 See id. § 832; see also MCM, supra note 16, R.C.M 405.
77 MCM, supra note 16, R.C.M 405(j).
78 Id. at R.C.M. 503.
79 See 10 U.S.C. §§ 827, 866–67A.
Under the cognizance of the DOJ, the US Attorneys’ Offices (USAOs) are the principle prosecutors of violations of federal law, such as the War Crimes Act. While a USAO typically prosecutes a federal criminal case, the DOJ has set up various agencies that specialize in areas of substantive federal law, which help develop, enforce, and supervise the application of federal laws related to those areas of specialty. The DOJ agency that is responsible for actions involving the War Crimes Act is the Human Rights and Special Prosecution Section (HRSP), which is a part of the DOJ Criminal Division.

The DOJ summarizes the mission of the HRSP as “Ensuring Accountability for Human Rights Violations and Extraterritorial Violent Crime.” Specifically, “Where U.S. federal jurisdiction exists, HRSP seeks to prosecute human rights violators under the federal criminal statutes proscribing torture, war crimes, genocide, and recruitment or use of child soldiers.” Additionally, the HRSP prosecutes cases involving “crimes of violence committed abroad, particularly crimes that fall under MEJA,” by coordinating and participating in “investigations and prosecutions of individuals employed by or supporting United States military forces overseas who commit murder, sex crimes, and other federal felony offenses.” (It was one of the DOJ sections [DSS], that was

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84 Id.
85 Id. MEJA is the Military Extraterritorial Jurisdiction Act, which establishes federal jurisdiction over offenses committed outside the U.S. by persons employed or accompanying the Armed Forces. See 18 U.S.C. 3261.

Generally, war crimes prosecutions by a USAO would be pursued in similar manner to the thousands of other federal criminal cases prosecuted each year. However, “[m]atters involving . . . war crimes (18 U.S.C. § 2441) . . . raise issues of national and international concern. Successful prosecution of these matters requires both careful coordination within the [DOJ] and between the Department and senior officials in the foreign affairs and military communities.”\footnote{USAM, supra note 82, at § 9-2.139(A). The Criminal Division, and specifically the HRSP, is the DOJ unit responsible for this coordination. \textit{Id.} However, if the war crime also involves international terrorism then the coordination is assigned to the Counterterrorism Section of the National Security Division. \textit{Id.}} Therefore, when a USAO opens any war crimes matter it is required to notify the HRSP and provide an overview of the investigation, preferably in advance of any action.\footnote{\textit{Id.} at § 9-2.139(C).} Further, if a USAO is aware another USAO or the HRSP has already opened a related matter it must consult with that entity before proceeding in a manner that might affect the related matter.\footnote{\textit{Id.} at § 9-2.139(D).}

The USAO collaboration with the DOJ continues throughout the entire investigation and prosecution of a war crime. Specifically, the USAO must notify the HRSP of significant developments such as filing of warrants, surveillance, declining to file charges, dismissal of charges, plea agreements, and results of trials, sentencing and appeals.\footnote{\textit{Id.}} USAOs are also encouraged to consult with the HRSP on investigative tactics and strategies, discovery, and use of witnesses.\footnote{\textit{Id.}} The sharing of information between the agencies is a two-way street, which requires that the HRSP share any information it receives that is relevant to a war crimes matter pending in a USAO.\footnote{\textit{Id.}}

In addition to required consultation with HRSP regarding the development of war crimes prosecutions, “\textit{Prior, express approval of the Assistant Attorney General (AAG) of the Criminal Division (or his or her designee) is required for [filing most court documents in a] war crimes . . . matter}.”\footnote{\textit{Id.} at 9-2.139(E).} This prior approval is sought by first going to the HRSP, which requires copies of all proposed documents as well as a prosecution
memorandum. Additionally, “[a]ttorneys are encouraged to seek informal guidance from HRSP throughout the investigation and well before a final indictment and prosecution memorandum are submitted for review” and are also required to allow the HRSP and the AAG sufficient time to permit review, revisions, and discussion of the matter.

II. CURRENT PROBLEMS WITH HOW THE UNITED STATES ADDRESSES WAR CRIMES AND THE CAUSES OF THESE PROBLEMS

Much of the progress achieved in IHL through the Hague and Geneva Conventions is in jeopardy of being another casualty in the so-called War on Terror. The record of the U.S. in adhering to aspirations of the Geneva Conventions for war crimes accountability since 9/11 is not impressive. In addition to situations like that of Pantano, where individuals got off “scot-free,” many others have been charged and convicted of what might be viewed as relatively minor crimes (e.g., dereliction of duty, simple assault, making false statements) in spite of the serious nature of the underlying conduct. In addition, a significant number of service members have been acquitted of all charges, or had the charges dismissed before trial. While there have undoubtedly been cases where service members were wrongfully accused, it is surprising how many accusations have failed to result in any type of conviction. Some of these failings were likely due to lack of evidence (there was often a problem of getting cooperation from fellow service members involved in the incidents), but, there were multiple cases in which there appeared to be hard evidence (such as photographs) but no punishment was ever imposed.

Further, the majority of those found to have committed offenses that fit the definition of war crimes seemed to get off with fairly light sentences such as reduction in rank, reprimand, minimal period of confinement, or discharge from service. Although it is difficult to quantify these outcomes due to the disparate nature of the underlying allegations, the overall impression is that the U.S. has been less than aggressive in seeking to hold its own personnel accountable. Two high-profile cases have been

95 Id. The USAM emphasizes that “[a] well-written, carefully organized prosecution memorandum is the greatest guarantee that a prosecution will be authorized quickly and efficiently.” Id.

96 Id. However, the USAM does provide that in the case of exigent circumstances that the USAO may take immediate action, but “must promptly notify HRSP of any action taken and of the exigent circumstances that precluded obtaining prior approval.” Id. at 9-2.139(G). After that notification the AAG will confer with the USAO on the course of action to be taken.

97 See infra Appendix 1.

98 See infra Appendix 1.


100 See infra Appendix 1.
painful examples of the U.S. military’s failure to maintain a culture that respects IHL principles and holds those accountable who violate them.

In 2010, a group of soldiers from the U.S. Army’s 5th Stryker Brigade who called themselves a “Kill Team” were exposed by a Rolling Stone magazine article. The article discussed a series of premeditated and calculated murders of Afghan civilians by the Kill Team. They allegedly carried out the crimes between January and May 2010 by using guns and grenades to make it appear they were under attack in order to justify killing civilians. The apparent bloodlust and total lack of respect for human life of the group involved in these atrocities is particularly striking. For example, one of the eventual defendants, Private First Class Andrew Holmes, admitted that he shot fifteen-year-old Afghan farmer Gul Mudin as the boy stood in a poppy field. After killing the boy, Holmes posed in pictures standing over the dead body, and then another soldier cut off one of the boy’s fingers and gave it to Holmes as a “trophy,” which friends say Holmes was proud of and carried around in a zip-lock bag. Holmes was just recently sentenced to only seven years in prison. Holme’s case was only one of many involving an ongoing conspiracy by members of the Kill Team to kill for sport. The ability of such a conspiracy to exist within a military command structure for a lengthy period of time raised questions that triggered an Army investigation into the matter.

The Army’s investigation revealed that the Kill Team’s commanding officer, Colonel Harry Tunnell, had made statements and created conditions where such a Kill Team could come into existence. Investigators were extremely critical of Tunnell’s leadership, and he was ultimately censured for his actions while in command. The attitude of senior leaders like Tunnell and others has shown a lack of respect for the life of Afghans and Iraqis, and is not limited to U.S. Army forces.

101 Boal, supra note 99.
103 Boal, supra note 99, at 1.
104 Id. at 2.
107 See id.
An even more compelling and heartrending example is the Haditha tragedy where U.S. Marines killed twenty-four unarmed Iraqi civilians, including three women, seven small children, and a disabled elderly man.\(^\text{108}\) On November 19, 2005, marines from 3rd Battalion, 1st Marines were traveling in a convoy along a resupply route near Haditha, Iraq.\(^\text{109}\) Without warning, a large IED suddenly exploded directly beneath a Humvee in the convoy, which was occupied by Lance Corporals Terrazas and Crossan and Private First Class Guzman.\(^\text{110}\) Terrazas, who was driving, was killed instantly while the other two marines were thrown from the vehicle.\(^\text{111}\) Immediately thereafter, Staff Sergeant Wuterich, a squad leader who had been traveling in the convoy, ordered five Iraqi men, a taxi driver and four teenagers, out of a vehicle and shot them dead in the street.\(^\text{112}\) Within minutes, the platoon commander Lieutenant Kallop arrived at the scene of the accident and reported receiving small arms fire from a nearby house.\(^\text{113}\) In response, he ordered the marines to “take the house.”\(^\text{114}\) The marines entered this house and three other adjacent ones.\(^\text{115}\) In the ensuing mayhem, twenty-four unarmed Iraqi civilians were killed by the marines.\(^\text{116}\)

From the very beginning, the case was handled shabbily by the marines’ chain of command. The marine battalion commander did not order an investigation into the incident,\(^\text{117}\) and an initial military press release the next day reported that a bomb blast killed fifteen people and that the marines returned fire, killing eight insurgents.\(^\text{118}\) The incident went uninvestigated for almost four months until a Time Magazine reporter broke the story after being shown video of the dead bodies by an Iraqi.\(^\text{119}\) When General Richard Huck, the marines’ commanding general, was initially confronted with the Time Magazine report in January 2006 he dismissed the allegations as “insurgent propaganda” and made no effort to inquire further notwithstanding the fact that gruesome photographs


\(^{110}\) Broder, supra note 108.

\(^{111}\) Id.

\(^{112}\) Id.


\(^{114}\) Id.

\(^{115}\) See McGirk, supra note 108, at 2.

\(^{116}\) Broder, supra note 108.


were circulating that showed women and children had been killed in their beds in Haditha.\footnote{120 Paul von Zielbauer, \textit{Propaganda Fear Cited in Account of Iraqi Killings}, \textit{N. Y. Times}, May 6, 2007, http://www.nytimes.com/2007/05/06/world/middleeast/06haditha.html?pagewanted=all.}

A full investigation was finally launched in March 2006 by U.S. Army General Chiarelli, the second highest-ranking U.S. commander in Iraq.\footnote{121 \textit{See Press Statement, Col. Stewart Navarre, Haditha, Iraq Investigation (Dec. 21, 2006), available at http://www.marines.mil/unit/marforcent/Haditha\%20Documents/2006/Haditha\%20Press\%20Statement\%20061221.htm; Paul von Zielbauer, \textit{Propaganda Fear Cited in Account of Iraqi Killings}, \textit{N. Y. Times}, May 6, 2007, http://www.nytimes.com/2007/05/06/world/middleeast/06haditha.html?pagewanted=all.}} After reviewing the report of investigation filed by General Eldon A. Bargewell, General Chiarelli concluded that General Huck (this is the same General Huck who had dismissed the charges against Pantano) and two subordinate commanders had been negligent in investigating the Haditha incident by failing to follow up on inaccuracies and inconsistencies in the initial reporting of the incident.\footnote{122 Eric Schmitt \& David S. Cloud, \textit{General Faults Marine Response to Iraq Killings}, \textit{N. Y. Times}, July 8, 2006, http://www.nytimes.com/2006/07/08/world/middleeast/08haditha.html?pagewanted=1&hp&ex.} General Bargewell’s report itself was more pointed in that it indicated that officers may have willfully ignored reports of the civilian deaths to protect themselves and their units from blame.\footnote{123 Josh White, \textit{Report on Massacre Criticizes Marines, Signs of Misconduct Were Ignored}, U.S. General Says, \textit{WASH. Post}, April 21, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042002308_pf.html.} Bargewell found that nearly all Marines looked the other way when confronted with early reports that many civilians had been killed in Haditha.\footnote{124 \textit{Id.}} Some of General Bargewell’s other conclusions were troubling:

All levels of command tended to view civilian casualties, even in significant numbers, as routine and as the natural and intended result of insurgent tactics…Statements by the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to “get the job done” no matter what it takes.\footnote{125 \textit{Id.}}
The cases of General Huck and the two subordinate commanders were reviewed by General Mattis to consider whether criminal charges should be filed under the UCMJ. Predictably, Mattis determined that the officers did not violate the UCMJ, and no prosecution was ever commenced. General Mattis concluded only that “their actions or inactions demonstrated a lack of due diligence” and forwarded their cases to the Secretary of the Navy for administrative sanctions. General Huck and his two subordinates were censured by the Secretary of the Navy in September 2006.

Meanwhile, the marines involved in the incident claimed that they “cleared” the houses using standard procedures in accordance with the rules of engagement. Under these procedures, marines would throw fragmentary hand grenades and then spray the rooms in houses with machine gun fire before entering. Their accounts of the killings were predictably self-serving and at odds with other evidence made available to investigators. For example, a medical examination by a doctor at the local Haditha hospital the night of the killings revealed that no organs of the victims were slashed by shrapnel, as they would have been if killed by a roadside bomb, and that it appeared that the victims were shot in the head and chest from close range. Even NCIS investigators concluded that the manner in which the individuals were killed seemed more consistent with deliberate revenge killings than a situation where the marines were mistaken about whether they were armed insurgents or not.

Although charges were finally brought against eight marines in connection with the incident, the subsequent handling of the cases demonstrated that the Marine Corps chain of command did not take the allegations of war crimes seriously. Of the eight charged, only four marines were alleged to have been personally involved in the killings. The other four accused were commissioned officers in the chain of command who were charged for either failing to investigate (dereliction)

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127 See id.
128 See id.
129 Id.
130 See White, supra note 113.
131 Id.
135 See id.
or as participants in an attempted cover up. The ultimate disposition of the cases is somewhat shocking. Charges against six of the accused were dismissed before trial. Interestingly, in the six cases where charges were dismissed, the officer dismissing those charges was General James Mattis, whose “No better friend, no worse enemy” motto had been placed on a placard near the bodies of the two Iraqis killed by Pantano. Of the marines charged, only the case of Lieutenant Andrew Grayson went to a fully contested court-martial trial. Grayson, who was charged with obstruction of justice for ordering the destruction of photographs of the bodies, was acquitted of all charges by a marine court-martial panel.

The final case pending from the Haditha incident was recently resolved and was the only one that resulted in any type of conviction. Staff Sergeant Frank Wuterich, who was alleged to have personally shot many of the victims, was allowed to plead guilty to negligent dereliction of duty and received no jail time. He was subsequently discharged from the service with a General under Honorable Conditions discharge. This final outcome put an exclamation point on the fact that no one was truly held accountable by the military justice system for what appear to be egregious violations of IHL. The command climate that led to both the Stryker Brigade and Haditha incidents, and the ultimate disposition of those cases, is particularly instructive and will be explored more fully as I address causes of the lack of accountability for crimes committed by U.S. personnel. The evidence suggests that these cases are not anomalous aberrations.

136 See id.
138 See id.
139 See id.
One instinctively asks how Americans, who have traditionally been committed to the rule of law and notions of justice, can be involved or tolerate this state of affairs. There are several reasons why the U.S. has failed to live up to legal and moral obligations under the Geneva Conventions to actively prosecute war crimes: Failure of leadership from the highest levels of government, the negative incentives for investigation and prosecution that flow from the doctrine of command responsibility, the changing nature of warfare, significant logistical problems regarding prosecution of war crimes in U.S. federal district courts, lack of clear lines as to prosecutorial authority, reluctance to apply the Geneva Conventions to the conflict with al-Qaeda and other terrorist organizations, and lack of political will due to the potential lose-lose situations that evolve from those prosecutions.

The first of these reasons has been well-document by critics of the Bush and Obama Administrations’ policies in the War on Terror. In particular, 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.\(^\text{143}\) The “enhanced interrogation” program approved by the Administration for use by CIA and DoD interrogators is one of the most publicized features of this top-down attitude of disrespect to the conventions. Waterboarding, the most well-known and controversial of the approved enhanced interrogation techniques, was employed with the endorsement of top-level officials notwithstanding strong criticism by legal experts that waterboarding violated the U.N. Convention on Torture, which the U.S. ratified on October 21, 1994.\(^\text{144}\) Former Vice-President Dick Cheney remains an unrepentant supporter of this technique in service of “keeping America safe.”\(^\text{145}\) As if more were needed, the extensive and well-document abuses of detainees at the Abu Ghraib Prison in Iraq\(^\text{146}\) are compelling evidence of both leadership failure and complicity in systematic violations of the law of war.

Unfortunately, this attitude is not just confined to civilian political leadership. In the military model of war crimes prosecution, which I have identified as the primary method of accountability for U.S. war crimes, the

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144 There have been several memoranda dealing with official endorsement of enhanced interrogation techniques, which are collected George Washington University’s National Security Archive. *The Interrogation Documents: Debating U.S. Policy and Methods*, THE NATIONAL SECURITY ARCHIVE (July 13, 2004), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/.
military commander is put in the position of both leading and disciplining his troops. For non-war crimes prosecutions in the military justice system, the commander does not usually have significant conflicts of interest. It is in his or her best interest to foster good order and discipline in the ranks by quickly and efficiently punishing violators. However, in cases of war crimes the calculus is different. Since the commanders and their troops are geared toward battle with a common enemy, commanders are in the unenviable position of both ordering men to do battle with a wily and evasive enemy, and then holding them accountable for conduct that violates the laws of war. For some commanders, this seems to create a nearly insurmountable challenge because of the emotions that are triggered by combat.

In addition, the doctrine of command responsibility creates at best a significant tension, and at worst and irreconcilable conflict of interest, for commanders who are essentially the linchpin to any effective enforcement of the Geneva Conventions. While there may be questions surrounding when, or if, a commander should be responsible for crimes committed by his subordinates, the fear that they may also be held responsible for war crimes of their subordinates may influence their treatment of those accused of such crimes. Under IHL,

A commander, that is to say, anyone in a position of command whatever his rank might be, including a Head of State or the lowest non-commissioned officer, who issues an order to commit a war crime or a grave breach is equally guilty of the offense with the subordinate actually committing it. He is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it.

Thus, if a commander’s subordinates committed a war crime, which the commander ordered or should have prevented, the commander may “go easy” on that soldier to prevent drawing attention to the crime, which may then prompt a prosecution of himself.

Another possible reason is a significant change in the way wars are fought. When the Geneva Conventions were signed in 1949 warfare was

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148 Id. at 274 (emphasis omitted) (quoting Leslie C. Green, The Contemporary Law of Armed Conflict 303 (2d ed. 2000)).
much different. Although the world was in the midst of the great change in the post-Atomic era, the Conventions’ drafters were operating from a much different construct. Less than ten years before the conventions were signed nation-states were still declaring wars and uniformed armies lined up in battle array against each other. However, by the time the U.S. ratified the Conventions in 1955 the world was beginning to see profound differences in the way that future conflicts would be conducted. The changes included a move away from conflicts where large uniformed land armies opposed one another toward insurgencies and guerrilla warfare typified by the Communist Malayan Insurgency against British rule running from 1948–1960 and the French Indochina War pitting French colonial forces against Vietnamese communist insurgents. For the U.S., of course, the Vietnam War beginning with the Gulf of Tonkin Resolution in 1964 was another such a conflict. The short-lived 1991 Gulf War between the U.S. and Iraq is an anomaly in the history of warfare since 1955, and is the only example where a large land force of the U.S. engaged against another large land force in a “stand-up” battle. Since IHL was created with the WWII paradigm in mind, guerrilla wars and insurgencies have not fitted neatly into the framework envisioned by the drafters of the Conventions. Consequently, there seems to have been a trend toward declining respect for IHL since these insurgencies are mounted by non-state actors who are not party to the Conventions.

Unfortunately, the War on Terror has created conditions likely to cause a continuing decline of respect for IHL, since many argue that because “terrorists” do not follow the rules, then we should not either. In the bygone era when state actors were involved in the greatest part of waging war, professional militaries of the state had a fairly strong monopoly on the violence of war. Of course, there have always been non-state actors engaged in the business of inflicting death and mayhem, but by and large the mechanism of the state system limited violence in many respects. Under this regime, wars were fought by professional soldiers who were regularly trained in laws of war as set forth in the Geneva Conventions. This training, and reinforcement by the power of the government, greatly increased the likelihood that IHL would be followed.

However, the rise of international terrorist movements has altered the will of many government leaders, who are now more inclined to scoff at the law of war. For example, when considering the applicability of IHL to the War on Terror, future Attorney General Alberto Gonzales showed

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149 See SOLIS, supra note 32, at 119.
little respect for the continuing viability of the Geneva Conventions, calling certain provisions of them “quaint.”154 It is easy to see why many leaders are so dismissive of the Conventions, since experience has shown that those engaged in terrorism wage war in direct contravention of the principles of the Geneva Conventions—focusing on “soft” civilian targets rather than “hard” military ones.155 Moreover, since these organizations are non-state actors, they are not even eligible to become parties to the Conventions.156 Notwithstanding their ineligibility to join in the Conventions, they have evinced a clear pattern of behavior that is inimical to the spirit of the Conventions.

Many in the U.S. military internally justify the atrocities that I decry in this article on the grounds that when one is fighting a war against an opponent who does not follow IHL, then that should relieve U.S. forces of any obligation to obey the law of war. Although, this argument resonates with a sort of playground fairness, it is not the law by which the U.S. has chosen to bind itself. No matter how the terrorist forces conduct themselves, U.S. forces are still obliged to obey the law of war.157

Although these theories may help explain why military authorities have been remiss in prosecuting and deterring violations of IHL, they do not necessarily explain the failure of the DOJ to pursue any prosecutions under 18 U.S.C. § 2441. Even though war crimes committed by military members who were discharged before discovery of the crimes might give rise to a significant number of cases for prosecution under § 2441, the most obvious scenario where war crimes prosecutions might have arisen over the past ten years under this statute is in cases involving civilian employees of U.S. government contractors. Although high profile incidents in which employees of contractors like Blackwater killed significant numbers of Iraqi civilians, there have been no prosecutions by DOJ under § 2441. Given the number of these cases and the extensive media coverage they garnered, one might expect that some prosecutions under this statute might have been commenced. However, no such prosecutions have ever been initiated by DOJ under the statute.

There have been many reasons expressed regarding why there has been a lack of prosecution of war crimes under § 2441. The most common reason advanced by commentators is that there is a significant logistical problem regarding prosecution of war crimes in U.S. federal district courts. As mentioned earlier, prosecution of these crimes is handled primarily by USAOs and DOJ components, which are located in the U.S. On the other hand, most war crimes are likely to occur overseas where military personal and civilian contractors are operating in combat or security roles. Prosecutors undoubtedly face extreme difficulties building cases against offenders from thousands of miles away. This distance, and the likely fact that the event occurred in a war zone, makes it difficult for DOJ prosecutors to collect physical and forensic evidence to help build its case, and would require them to bring any witnesses, parties, or evidence to the U.S. for a trial.

Investigations of the incidents in Iraq involving the killing of Iraqi civilians by employees of Blackwater provide an example of the difficulties faced when conducting these long-distance investigations.

[Although there were] FBI personnel stationed in Iraq, their focus was counter-terrorism; the team that investigated the Nisour Square shooting [of seventeen Iraqi civilians by Blackwater security personnel] had to be deployed from the United States. Investigations would undoubtedly be hampered by such delays, as well as by unfamiliarity with local culture, security issues, and interagency disputes that could well arise.

Similarly, difficulty obtaining evidence, and immunity given by State Department officials in Iraq, led the DOJ to decline prosecution of Andrew J. Moonen, a Blackwater employee who allegedly killed a bodyguard of the Iraqi vice president in 2006. FBI agents traveled to Baghdad several times to interview witnesses and collect evidence, but the DOJ could not build a sufficient case against Moonen. Another example of widely reported acts that may have qualified for prosecution under § 2441 is the Abu Ghraib prisoner abuse scandal. “While both civilian contractors and military service-people were implicated in the abuse, only members of the military have been prosecuted for those crimes. Investigators and potential prosecutors of the civilian contractors cited problems with evidence collection, witness interviewing, and crime

158 For a discussion of a unique approach to this problem see Alan F. Williams, The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization, 44 U. MICH. J. L. REFORM 45 (2010).
160 Id.
162 Id.
scene investigation as impediments to mounting successful prosecutions.”

Another challenge related to bringing contractors who commit crimes to justice is the delegation of prosecutorial authority. Using prosecutions under the Military Extraterritorial Jurisdiction Act (MEJA) as an example (because MEJA can be used to prosecute a broader range of civilian crimes under federal civilian law committed aboard than § 2441), commentators have found the division of prosecutorial responsibilities between different governmental departments unclear. There are federal regulations suggesting that the DoD is responsible for initiating criminal investigations under MEJA, but that the DOJ will ultimately prosecute the offender. However, “[t]he point at which the Department of Justice takes responsibility for the investigation is unclear.” Some have suggested that this lack of clarification has impeded prompt investigation of contractor crimes, and may have “contributed to the failure to prosecute any civilian for crimes committed in Iraq.” While MEJA prosecutions are limited to civilians supporting the mission of the DoD, it may be that many crimes that could end up being prosecuted under § 2441 might begin as investigations or prosecutions under MEJA because it would seem that most civilians overseas who are in a position to commit war crimes would be there as a result of major operations by the DoD, such as wars or contingency operations. Thus, this confusion between different departments could also impede prosecutions under § 2441. Further, if there is confusion between the DoD and DOJ over contractors specifically covered by a statute meant to facilitate prosecution of civilians, it might be assumed that there is likely greater confusion between other agencies that employ civilians in war zones, such as the State Department or CIA, regarding prosecution of contractors not covered by a specific statute. These concerns may not be as compelling in prosecutions for war crimes brought against military personal (and other individuals subject to courts-

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167 Melson, supra note 165, at 316.
168 Jackson, supra note 163, at 267–68.
martial) because there are more detailed guidance directives in place that outline how the DoD and DOJ are expected to work together when the accused is subject to the UCMJ.\footnote{See generally U.S. Dep’t of Def., Directive num. 5525.7, Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes (Jan 22, 1985) (certified current as of Nov. 21, 2003), available at http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d55257p.pdf.}

Another explanation advanced for the lack of prosecutions under § 2441 is that there may be a “preference of the government to punish war crimes ‘only if they are committed by enemy nationals or by persons serving the interests of the enemy State.’”\footnote{Margaret Prystowsky, The Constitutionality of Court-Martialing Civilian Contractors in Iraq, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 45, 58 (2008) (quoting U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, The Law of Land Warfare at para. 507 (1956)).} Also, because war crimes are often committed in times and areas of combat or war the accused war criminals often assert self-defense claims, which might be persuasive because in war zones the population is regularly armed.\footnote{DonnaMarie McKinnon, Federal Civilian Criminal Prosecutions of Private Military Contractors: Inherent Legal Ethics Issues, 24 GEO. J. LEGAL ETHICS 695, 703 (2011).}

Further, since the War Crimes Act was passed in 1996, the U.S. has only been involved in two major arenas (Iraq and Afghanistan) that would provide the environment in which war crimes are likely to be committed.\footnote{There have been other operations which could yield “war crimes,” such as NATO bombings during the Kosovo War and even the recent campaign in Libya; however, those other operations did not place civilians or military members in the field to the extent of the operations in Iraq and Afghanistan.} As previously mentioned, during the early years of the operations in those forums the “Bush administration . . . maintained that the War Crimes Act does not address any of the cases of U.S. civilians [possibly committing war crimes] since the protections of the Third Geneva Convention do not apply to members of al-Qaeda or other terrorist organizations.”\footnote{Ryan P. Logan, The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq, 39 VAND. J. TRANSNAT’L L. 1605, 1624 (2006).} The administration even had the DOJ provide memoranda supporting its claim that the War Crimes Act did not apply to al-Qaeda or Taliban detainees.\footnote{See Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Jan. 22, 2002), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf. Copies of previous and subsequent memoranda, generally focused on interrogation of prisoners can be found at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/.} As previously explained, in Hamdan v. Rumsfeld the Supreme Court held that common Article 3 does apply to the War on Terrorism,\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006).} which implies that civilians and members of the Armed Forces could be prosecuted under § 2441 for war crimes committed in Iraq and Afghanistan against al-Qaeda and the Taliban. Even after Hamdan, it may be fair to assume that the DOJ would feel little
pressure to prosecute U.S. citizens under § 2441 for crimes committed in Iraq and Afghanistan because the executive branch for years argued against providing the Geneva Conventions’ protections to combatants found there.

Further, because the head of the DOJ Criminal Division, an AAG who works directly under the Deputy Attorney General, is required to expressly approve the initiation and advancement of prosecutions under § 2441, the decision to prosecute under that statute must be authorized by some of the top-level members of the DOJ.\(^\text{177}\) By requiring prosecutions under § 2441 to pass through such a high-level chain of authorization, it is evident that the government views § 2441 war crimes as matters of extreme significance. It is possible that these matters are of such importance because of the potential effects they may have—obviously for the immediate victims and perpetrators involved, but also in the international community. Considering the strong reaction to “war crimes” by the international community, public acknowledgment (in the form of criminal prosecution) that U.S. citizens have committed such crimes may lead to strained relations or outright resentment by other nations. Because of the significant consequences and fallout that is often attached to the commission of war crimes, the executive branch entrusts decisions regarding § 2441 prosecutions only to high-ranking DOJ officials.

The vetting of war crimes prosecutions by such high-ranking officials may in itself be another reason why § 2441 has not been used because “domestic criminal prosecution of fellow citizens requires political will, particularly in the United States system where the prosecutor is not independent of the Executive.”\(^\text{178}\) War crimes prosecutions are likely to generate publicity in the media and many political appointees may wish to distance themselves from potential lose-lose situations that evolve from those prosecutions. For example, an AAG that approves a war crimes prosecution may face a backlash or public disapproval for accusing a fellow American of such heinous crimes if the accused is eventually found innocent. On the other hand, even a successful prosecution of a war crime could produce some sense of betrayal by the executive branch of those actually involved on the ground in a war zone.\(^\text{179}\) These hypothetical

\(^{177}\) In fact, as a testament to the status of AAGs, the President of the United States appoints individuals to the position of AAG with the advice and consent of the Senate. 28 USC § 506 (2006).


\(^{179}\) The argument would could follow along the lines such as war is ugly, ugly stuff happens in war, and that we may be handicapping servicemen and contractors by establishing precedent, and creating a fear in their minds, that they may be prosecuted as a war criminal for decisions they make in the heat of the moment.
outcomes aside, just the fact that the branches of the military (and civilian contractors that support them and other government agencies) are located in the same branch of government as those who would be responsible for prosecuting them as war criminals may be enough to discourage the DOJ leadership from permitting prosecutions under § 2441. Executive branch leaders would likely want to avoid accusations that they promoted, condoned, or knew of war crimes being committed by their subordinates because of the negative publicity and potential liability that may follow them. This risk could be prevented by pressuring AAGs to decline to approve prosecutions under § 2441 in all but the exceptional case. Professor David Luban, a foremost authority in this area, summarized these concerns as follows:

The fundamental fact of life is that [18 U.S.C. § 2441] has never been used. Calling something a war crime is political dynamite. So, if you’re going to prosecute it at all, you will prosecute it as murder, manslaughter, assault – anything but a war crime. Passaro[, a CIA contractor prosecuted for beating an Iraqi detainee to death with a flashlight,] plainly could have been prosecuted for war crimes, but the charges against him were for assault and homicide – and, because the investigation was botched, he was convicted only of two misdemeanors and one felony assault charge; that, remember, is for beating a detainee to death.

Bottom line on war crimes prosecutions, in practice: fuggedaboudit. 180

Taking into account all of these considerations involved when prosecuting a crime under § 2441,

The complexity of the exercise[, including logistical problems of investigations, consultation with various DOJ components and other federal agencies, approval by DOJ leadership, possibility of straining international relations, and risk of domestic political consequences,] may explain why there has been no war crimes prosecution under the War Crimes Act of 1996, as amended, and why no U.S. attorney has sought to portray any prosecution in the federal courts as a war crimes prosecution. 181

III. RECOMMENDATIONS TO CORRECT THE PROBLEMS

A recurring theme in this article has been the importance of leadership from both political and military officials on war crimes issues. In order to protect U.S. service members from abuses like torture and maltreatment, it is critical that the U.S. enforce its obligations under the Geneva Conventions by investigating and prosecuting war crimes committed by those serving the U.S. Immediate steps should be taken by the President to restore the credibility of the U.S. in the international community on war crimes issues. An important first step that I recommend—and not merely a symbolic one—would be for the President to issue an Executive Order directing the Departments of Defense and Justice to review and enhance procedures for the investigation and prosecution of violations of the Geneva Conventions.

I recommend the President create a joint DoD and DOJ War Crimes Review Commission specifically empowered to review and initiate prosecution in those cases where credible evidence exists that war crimes have been committed and prosecution has never been commenced by appropriate DoD military authorities or the DOJ.

Establishing this Commission could likely be accomplished most efficiently and effectively by drawing upon already existing executive branch entities. Based on the expertise and mission of the DOJ HRSP Section discussed above, I believe that one or more members from the HRSP Section should be designated to serve on this Commission. I also recommend that members of a specially created group within DoD, the DoD Law of War Working Group, be designated to serve on this Commission.

In 2006, Deputy Secretary of Defense Gordon England issued Defense Directive 2311.01E which, among other things, created the DoD Law of War Working Group (DLOWWG). The Directive mandated that the DLOWWG include representatives from the DoD General Counsel’s Office, the General Counsel’s Office for each military department, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, and the Judge Advocate Generals for each of the armed services. Secretary England tasked the DLOWWG specifically with “develop[ing] and coordinat[ing] law of war initiatives and issues...[and] other law of

183 Id. at 5.1.4. I purposely omit reference to the fact that the U.S. Marine Corps does not have a Judge Advocate General Corps as do all the other armed service. Instead that role is served by two offices, the Counsel to the Commandant of the Marine Corps and the Staff Judge Advocate of the Marine Corps. The DoD Law of War Working Group includes representatives from those offices as well as the other representatives listed above. Id.
war matters as they arise.” Therefore, the background and expertise that the members of the DLOWWG bring to war crimes issues makes these representatives particularly well-suited to serving on the proposed Commission. Further, the integration of members of both DoD and DOJ on the Commission will serve to provide a comprehensive forum for the consideration and vetting of cases meriting prosecution.

The work of the Commission should be both prospective and retrospective. The prospective component of its work would include the review of all future “reportable incidents” of war crimes that result in a decision by the military commander to not prosecute. DoD Directive 2311.01E defines a “reportable incident” as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.” DoD has ordered that “[a]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual [must be] reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.” Mandating referral of all “reportable incidents” in which a military commander declines prosecution to the DoD/DOJ War Crimes Review Commission for independent review would likely serve as a way to significantly enhance internal U.S. accountability for war crimes.

Members of the Commission could provide a more neutral and detached review of cases than military commanders confronted with the conflicts of interest that were discussed in Part II. If the Commission were empowered to independently review these cases and determine whether credible evidence exists to initiate prosecutions, the process could serve as important check on the possible corrupting impact of the aforementioned conflicts of interest and the doctrine of command responsibility. Creating a mandatory Commission review of all cases in which prosecution is declined would also serve to encourage commanders to thoroughly investigate and prosecute IHL violations in the first instance. Knowing that their decisions on these matters are subject to an independent review would likely encourage commanders to thoroughly and critically evaluate incidents that may give rise to war crimes liability. Moreover, since commanders who do not investigate and prosecute appropriately could face personal criminal liability under the existing doctrine of command responsibility, a mandatory subsequent review by the Commission would likely deter commanders from sweeping incidents under the rug in an attempt to protect both their subordinates and themselves from possible criminal liability for war crimes violations.

The work of the Commission should also be retrospective. The Commission should be empowered to review all past “reportable incidents” where prosecution by military commanders has been declined.

184 Id.
185 Id. at 3.2.
186 Id. at 4.4.
Because of the unique provisions of the War Crimes Act, and military jurisdiction, this proposal would afford DOJ an opportunity to begin meaningful prosecutions of cases where prosecution may have been improperly declined by the military commanders. To understand how this works one must look at the peculiarities of military jurisdiction, the doctrine of double jeopardy, and the statute of limitations provisions of the U.S. Code.

All military members who may commit war crimes are subject to both military jurisdiction under the UCMJ and general federal criminal jurisdiction under 18 U.S.C. § 2441. Therefore, a decision by a military commander to decline prosecution under the UCMJ does not bar the DOJ from pursuing a case under the War Crimes Act even if the military member is still on active duty. Under the current Memorandum of Understanding, military commanders will have primary prosecutorial jurisdiction and DOJ will not normally prosecute these cases even though it does have concurrent jurisdiction with military authorities. Of course, once a military member is discharged from active duty, he or she is no longer subject to military criminal jurisdiction under the UCMJ; but § 2441 continues to provide jurisdiction for prosecution of those personnel who were discharged without ever being prosecuted for war crimes they committed while on active duty.

The only instance where a prosecution would be barred would be if the individual had already been subject to jeopardy under the UCMJ. Jeopardy attaches under the UCMJ upon the presentation of evidence in a court-martial proceeding. Therefore, in those cases where evidence has been presented or there has been a conviction under the UCMJ for the underlying conduct, the Double Jeopardy Clause of the U.S. Constitution bars subsequent prosecution by the DOJ. However, in any case where jeopardy has not attached under the UCMJ, the possibility of prosecution by the DOJ remains—subject, of course, to any applicable statute of limitations that may apply. It is important to remember in this context that an Article 32 investigation is not a trial; and thus, even if evidence were presented during an Article 32 investigation, jeopardy does not attach and the case may be later prosecuted by the DOJ notwithstanding a military commander’s decision to dismiss the charges after the Article 32.

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187 See USAM, supra note 82, at Title 9 Criminal Resource Manual 669.
189 See id. § 2441 (providing jurisdiction over members of Armed Forces or a U.S. national).
Any subsequent prosecution by the DOJ would have to be commenced before the applicable statute of limitations runs. Statutes of limitation are statutorily imposed time limits within which prosecution must be commenced. 192 18 U.S.C. § 2441 does not contain a statute of limitations in its text, and Title 18, Chapter 213, which lists the statutes of limitations applicable to various federal crimes under Title 18, does not list a specific limitation for §2441. 193 Thus, the general statutes of limitations applicable to all Title 18 crimes apply to §2441. For war crimes that do not result in the death of the victim (and thus, are not punishable by death), the general “catchall” non-capital federal statute of limitations of five years applies. 194 However, for war crimes that do result in death, there is no statute of limitations and a prosecution could be commenced by the DOJ up until the time of the defendant’s death. 195 Since most alleged war crimes will occur overseas, it is also important to consider the tolling provisions of 18 U.S.C. § 3292. Under this section, if the evidence of a war crime is in a foreign country and the government is seeking evidence to be turned over by a foreign court or authority, the statute of limitations can be suspended for up to three years. 196 Thus, this section extends the statute of limitations to eight years for those war crimes not resulting in death to a person, but has no effect on war crimes resulting in death since there is no statute of limitations for those offenses.

The Pantano case may be used as an example of how these considerations could affect a possible war crimes prosecution. Even though General Huck declined prosecution and Pantano was given an honorable discharge, he is still subject to prosecution by the DOJ under 18 U.S.C. § 2441 for several reasons. First, his conduct included the willful killing of two persons, so he is liable under § 2441(c)(1), which criminalizes willful killing as a grave breach of the Geneva Conventions. 197 The conduct occurred in Iraq, but § 2441 applies extraterritorially so Pantano is liable even though the conduct occurred overseas. 198 Finally, since death did occur, the statute of limitations has not run, meaning the DOJ retains jurisdiction under § 2441 and may still initiate a prosecution. 199 The same analysis would apply to the Haditha

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192 BLACK’S LAW DICTIONARY 1546 (9th ed. 2009).
194 Id. § 3282(a).
195 Id. § 3281.
196 Id. § 3292.
199 See id. § 3281.
Overcoming the Unfortunate Legacy of Haditha, the Stryker Brigade “Kill Team”, and Pantano: Establishing More Effective War Crimes Accountability by the United States

defendants who had their charges dismissed before trial by General Mattis, or in any other similar cases.

If this possibility seems far-fetched, the celebrated case of former Army Green Beret doctor Jeffrey MacDonald, whose story is told in the book Fatal Vision, is instructive. MacDonald was serving on active duty at Fort Bragg in 1970 when his pregnant wife and two daughters were brutally murdered. The evidence pointed to MacDonald as the killer, and he was initially charged by the Army for the murders. An Article 32 investigation was conducted, and the investigating officer ultimately recommended that the charges against MacDonald be dismissed. The Army dismissed the charges against MacDonald and, like Pantano, MacDonald was honorably discharged from the service. He was living happily as a civilian when four years later the DOJ initiated a prosecution of him after several years of lobbying by the family of his deceased wife. Eventually, after several appeals, MacDonald was tried and convicted of the murders in U.S. District Court in Raleigh, North Carolina in 1979. As a result of that conviction, MacDonald was sentenced to three consecutive life terms and remains in federal prison to this day. This case illustrates perfectly the non-binding nature of the military decision when federal criminal jurisdiction otherwise exists—and why Pantano should not rest too easy.

Critics of the proposal may argue that creating a Commission to “second-guess” military commanders’ decisions undermines the commander’s authority and is detrimental to the commander’s autonomy. Although there is some merit in this argument, I find it ultimately unpersuasive in light of the poor record by military authorities on these issues over the past ten years. In my opinion, the outcome of cases like Haditha, the Stryker Brigade Kill Team, and Pantano make the necessity for an independent review very apparent. If the evidence indicated that U.S. commanders were diligently investigating and pursuing charges in cases where credible evidence exists, then there would be no necessity for the creation of the Commission. Unfortunately, that is not the case.

Critics may also suggest that having the U.S. join the ICC would solve many of the problems raised in the article. Under the Rome Statute,

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200 JOE MCGINNIS, FATAL VISION (1983).
201 Id. at 20–24.
202 Id. at 185.
203 Id. at 188–209.
204 Id. at 209, 234.
205 Id. at 293–310.
206 See generally id. at 475–585
207 Id. at 585.
208 The Rome Statute is the treaty that established and governs the ICC. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, 3 I.L.M. 999, available
when a nation who is party to the Convention is “unwilling or unable” to investigate or prosecute war crimes the ICC has jurisdiction. The U.S. has long opposed joining the ICC for several reasons, chief among which seems to be concerns of politically motivated prosecutions being mounted against U.S. service members.

Over the past year and a half, the Obama Administration has initiated a policy of re-engagement in the ICC process that is a remarkable turnaround from the outright hostility with which the Bush Administration approached the ICC. Notwithstanding this reversal of course, it is unlikely that the U.S. will soon ratify the Rome Statute because significant questions remain as to its compatibility with the U.S. Constitution and whether there is sufficient due process in the ICC procedures.

I support the view of those who caution against U.S. participation in the ICC. The concerns presented by those who oppose U.S. acquiescence is persuasive, especially concerns that the ICC subjects U.S. service members to unnecessary risk of politically motivated prosecutions. However, this only reinforces the view that internal U.S. mechanisms for war crimes prosecutions need to be strengthened immediately.

Finally, it seems that any argument which suggests allowing the nations on whose soil the crimes are committed to have jurisdiction is also unpersuasive. In countries like Iraq and Afghanistan, where the rule of law is slowly being established, the criminal justice systems are not mature and subjecting U.S. personnel to their jurisdiction would be unwise for the foreseeable future.

CONCLUSION

In the years since 9/11 the U.S. has engaged in long wars in both Iraq and Afghanistan. During the course of those wars, many situations have occurred involving U.S. forces that have raised questions as to whether U.S. personnel have committed war crimes. The evidence suggests that the U.S. efforts to ensure internal accountability for war crimes has been anemic. In light of the importance to our own forces of international respect for the Geneva Conventions, the U.S. must take immediate steps to strengthen the process for investigation and prosecution of war crimes. Moreover, U.S. credibility in the international community on war crimes issue has been diminished and must be restored. This article recommends the creation of a joint DoD and DOJ War Crimes Review Commission to enhance future U.S. efforts in war crimes enforcement. In addition,
egregious cases like Haditha, Kill Team, and Pantano cry out for remediation and justice. The proposal in this article is not a cure-all, but simply a first step toward more just and comprehensive accountability for war crimes.
APPENDIX I. SAMPLE OF CASES WITH QUESTIONABLE HANDLING OF WAR CRIMES PROSECUTIONS BY THE UNITED STATES

The information in this appendix related to incidents reported on between 2001–2005 is from appendix 2 of an article written by Major Mynda G. Ohman.213 Incidents reported between late 2005–2011 were obtained from open source records, mainly newspaper articles.

Sergeant Selena M. Salcedo was tried on charges of assaulting an Afghan detainee, dereliction of duty, and lying to investigators.214 A former interrogator at Bagram, Afghanistan, Sergeant Salcedo is suspected of stepping on the detainee's bare foot, grabbing his beard, kicking him, and then ordering the detainee to remain chained to the ceiling.215 The detainee later died of heart failure caused by “blunt force injuries” to his lower legs.216 At trial Sergeant Salcedo pled guilty and received a sentence of a one-grade reduction in rank, $1000 fine, and a written reprimand.217

Sergeant First Class Tracy Perkins was court-martialed in January 2005 for forcing two Iraqis to jump from a bridge into the Tigris River in January 2004 and for the resulting death of one of the men.218 He was convicted of obstruction of justice, assault consummated by a battery, and two specifications of aggravated assault, but he was acquitted of involuntary manslaughter and making a false official statement.219 The sentence included six months of confinement and a one-grade reduction to the rank of staff sergeant.220 Lieutenant Colonel Nathan Sassaman received nonjudicial punishment for ordering the cover-up of the death.221

Major Jessica Voss, who headed the 66th Military Intelligence Unit, received a reprimand following the November 2003 death of an Iraqi general at the hands of U.S. soldiers under her supervision.222 Chief

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215 Id.
216 Id.
219 GI Sentenced to Six Months in Iraq Drowning Case, CHI. TRIB., Jan. 9, 2005, at 18.
221 Army Punishes Commanders in Drowning of Iraqi Civilian, ORLANDO SENTINEL, July 8, 2004, at A5.
Warrant Officer Lewis Welshofer Jr. was charged with murder and dereliction of duty relating to the suffocation of the Iraqi general.\textsuperscript{223} He was accused of sitting on the general's chest while the man was bound and covered in a sleeping bag.\textsuperscript{224} Chief Warrant Officer Welshofer was convicted on the lesser charge of negligent homicide and was sentenced to a reprimand, forfeiture of $6,000 in pay and restriction to Fort Carson or his place of worship for two months.\textsuperscript{225}

Corporal Dustin Berg faced charges of murder, false swearing, and wearing of an unauthorized award\textsuperscript{226} after Army officials reported that Corporal Berg had shot himself and killed a civilian member of the Iraqi police with whom he had been on patrol in November 2003.\textsuperscript{227} Corporal Berg received a Purple Heart for combat injuries that he may have sustained from that incident.\textsuperscript{228} Testimony at the preliminary hearing in February 2005 suggested that Corporal Berg shot himself in the abdomen with the Iraqi's weapon after he shot the Iraqi police officer.\textsuperscript{229} Under a plea agreement, Corporal Berg pled guilty in July 2005 to negligent homicide, self-injury, and making two false official statements.\textsuperscript{230} Although a military judge sentenced him to six years of confinement and bad-conduct discharge, the terms of the plea agreement limited his confinement to eighteen months.\textsuperscript{231}

Private First Class Edward L. Richmond Jr. was charged with shooting an Iraqi handcuffed arrestee in the head during a roundup of suspected insurgents on February 28, 2004.\textsuperscript{232} At trial Private First Class Richmond testified that he fired after he thought the man lunged at another soldier.

\textsuperscript{223} January 30 Election Won't Be Delayed, Bush Says, ST. PETERSBURG TIMES, Dec. 3, 2004, at 2A.
\textsuperscript{225} Id.
\textsuperscript{226} Jon Murray, Hoosier Faces Trial in Killing of Iraqi: Hearing Thursday Could Lead to Court-Martial for Guardsman Accused in Death of Citizen, INDIANAPOLIS STAR, Feb. 9, 2005, at 1A.
\textsuperscript{227} Michael Lindenberger, Guardsman Is Charged with Murder, Lying About Incident that Led to Award, COURIER-J. (Louisville, KY), Feb. 9, 2005, at 3B.
\textsuperscript{228} Id.
\textsuperscript{229} Terry Horne, Indiana Soldier to Be Tried in Death of Iraqi Policeman, INDIANAPOLIS STAR, Mar. 5, 2005, at 8A.
\textsuperscript{230} John Murray, Berg Pleads Guilty to Lesser Charge in Iraqi Killing: Indiana Guardsman Given up to 18 Months in Prison in Shooting of Iraqi Police Officer, INDIANAPOLIS STAR, July 26, 2005, at 5A.
\textsuperscript{231} Id.
\textsuperscript{232} Jason Chudy, GI Faces Court-Martial in Death of Suspected Insurgent, STARS & STRIPES, Aug. 1, 2004.
and said that he did not know the man's hands were secured. Convicted of voluntary manslaughter, the soldier was sentenced to three years of confinement and a dishonorable discharge.

Master Sergeant Trey Corrales was charged with murder after allegedly shooting an Iraqi during a nighttime raid in Kirkuk and planting an interpreter's rifle on the mortally wounded man. Allegedly, he ordered Specialist Christopher P. Shore to finish off the Iraqi that day, June 23, 2007. Soldiers offered damning testimony in an evidentiary hearing for Shore months before Corrales' trial. The hearing examiner said Corrales, a leader of that raid, "left no question through his actions that he intended to kill a 'bad guy' whether he was a combatant or not." Shore cut a plea bargain and testified against Corrales at trial. A jury of war veterans acquitted Corrales, and Shore was granted clemency after the verdict and remains in the Army.

A Marine was convicted of assault for throwing a lighted match at a detainee as the detainee used an alcohol-based hand sanitizer; the Iraqi suffered second-degree burns on his hands and the Marine was sentenced to confinement for ninety days.

Sergeant First Class Jorge L. Diaz was arraigned in February 2005 on charges of premeditated murder, maltreatment of a prisoner, assault, making a false official statement, and impeding an investigation. During a search operation in October 2004, Sergeant First Class Diaz punched and choked a blindfolded Iraqi teenaged detainee, pointed a pistol at his head, and forced him to hold a smoke grenade with the pin pulled. The next day, Sergeant First Class Diaz fatally shot an Iraqi who had his hands cuffed. He allegedly told a soldier to lie about the incident and falsely told an Army investigator that he fired at the Iraqi after the man had made a threatening move toward him. At trial, after hearing testimony from Sergeant First Class Diaz, the military judge found him guilty of

234 *Id.*
236 *Id.*
237 *Id.*
238 *Id.*
239 *Id.*
242 *Id.*
243 *Id.*
244 *Id.*
unpremeditated murder. He was also convicted of maltreating the Iraqi teen and impeding the investigation, but acquitted of the charge of making a false statement. The military judge imposed a sentence that included a dishonorable discharge, reduction to the rank of E-1, and eight years of confinement, which was reduced to seven years through a plea agreement.

Specialist Brent W. May, along with co-accused Sergeant Michael P. Williams, is accused of fatally shooting an Iraqi man in his home during house-to-house searches on August 28, 2004, and attempting to cover up the crime. After soldiers found a revolver and AK-47 in the man’s house, Sergeant Williams brought the Iraqi and Specialist May inside while the man’s family remained outside. After a brief exchange between the two soldiers, Staff Sergeant Williams allegedly told Specialist May, “You know what to do” to which SPC May replied by asking excitedly, “Can I shoot this one?” Specialist May shot the man twice in the head. Specialist May claimed that Sergeant Williams ordered him to shoot the Iraqi. At trial in May 2005, he was convicted of unpremeditated murder and sentenced to five years of confinement and a dishonorable discharge.

Sergeant Leonardo Trevino was charged with premeditated murder, attempted murder, solicitation to commit murder and three counts of obstruction of justice after he killed a badly wounded Al Qaeda operative in Muqdadiyah, Iraq. Prosecutors alleged that he killed the insurgent while the man was no longer a threat, while Trevino maintained that he thought the insurgent was reaching for a weapon when he fired the fatal shots. On April 30, 2008, a court-martial panel found him not guilty of all charges. The month before, Specialist John Torres, the Army medic accused of trying to suffocate the insurgent before Trevino’s final shots, 

245 Liewer, supra note 241.
246 Id.
247 Id.
249 Id.
250 Id.
251 Id.
254 Id.
255 Id.
was acquitted of attempted premeditated murder and dereliction of duty for failing to provide aid. In another trial in March of 2008, Corporal Justin Whiteman, accused of placing the pistol by the insurgent's body, was acquitted of accessory to attempted premeditated murder and with dereliction of duty.

Specialist Glendale C. Walls II was charged in early May 2005 with assault, maltreatment of a detainee, and failure to obey a lawful order. The charges stemmed from allegations of using abusive interrogation techniques at Bagram, Afghanistan. One of the detainees interrogated by Specialist Walls in December 2002 died a short time later at the detention facility. At trial in August 2005, Specialist Walls admitted to abusing the detainee and was sentenced to a reduction to E-1, two months of confinement, and a bad-conduct discharge.

Private First Class Willie Brand was also charged with offenses related to a December 10, 2002, death of a detainee at Bagram, Afghanistan. PFC Brand was charged with involuntary manslaughter, aggravated assault, simple assault, maiming, maltreatment, and making a false sworn statement. Following his conviction on the charges, the reservist was reduced to the lowest enlisted rank.

Lieutenant Colonel Allen B. West, the most senior American officer to be charged with direct prisoner abuse, faced potential charges of excessive use of force against an Iraqi in August 2003. Lieutenant Colonel West dragged an uncooperative detainee, who was an Iraqi policeman suspected of planning attacks against U.S. forces, outside to an area used for clearing weapons, gave the man a count to five to start cooperating, then fired two shots near the detainee's head. He also allowed soldiers from his unit to beat the detainee. Lieutenant Colonel West was relieved of his command and, after a pretrial hearing under

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256 Id.
257 Id.
258 Golden, supra note 214.
259 Id.
260 Id.
263 Nation in Brief, supra note 261.
267 Id.
Article 32 of the UCMJ, the commanding general disposed of the charges through nonjudicial punishment instead of referring them to trial by court-martial.269

Sergeant Jermaine Nelson pled guilty to two charges of dereliction of duty for his part in the execution-style slaying of several detainees during the November 2004 battle of Fallujah, Iraq.270 Nelson and two other Marines, Sergeant Jose Nazario and Sergeant Ryan Weemer, captured four men in a barricaded house containing weapons, and asked their platoon leader for guidance.271 Interpreting the response of “are they dead yet?” as a command to kill the captives, they shot them and moved on.272 Prosecutors dropped a charge of murder in exchange for the plea.273 In September 2009, Nelson was sentenced to 150 days suspended confinement and reduction in rank to lance corporal.274 Nazario was acquitted by a civilian jury in Federal District Court, and Weemer was found not guilty by a court-martial panel.275 Because the three refused to testify against each other, and the house and bodies were demolished during battle, the prosecution had little evidence other than Weemer’s statement years later during a Secret Service application interview.276

Lance Corporal Christian Hernandez faced charges of negligent homicide and assault after a fifty-two-year-old Ba’ath Party official died in June 2003 at Camp Whitehorse near Nasiriyah, Iraq.277 Charges were dropped without comment in April 2004.278 Major Clarke Paulus was also charged in the case. He was originally charged with negligent homicide of the official, who had been handcuffed, beaten, and left for hours in the sun despite experiencing difficulty in breathing and diarrhea.279 One of eight Marines facing charges in the detainee’s death,280 Major Paulus was acquitted of assault and battery but found guilty of dereliction of duty and of maltreatment of prisoners for not stopping the abuse by his

269 Report: West Will Not Face Court-Martial, supra note 266.
270 Marine gets loss of rank in shooting; Prison term suspended because of pretrial deal. SAN DIEGO UNION-TRIB., Oct. 1, 2009.
271 Id.
272 Id.
273 Id.
274 Id.
276 Id.
277 Rick Rogers, supra note 265.
278 Id.
280 Gibson, supra note 240.
subordinates. He was punished with dismissal from the Marine Corps, which is the officer's equivalent of a dishonorable discharge.

Specialist Brian E. Cammack was charged with assault and other crimes related to the abuse and death of two detainees at Bagram, Afghanistan. On May 20, 2005, SPC Cammack pleaded guilty to assault and two specifications of making a false official statement and agreed to testify in related cases in exchange for a dismissal of the charge of maltreating detainees. He was sentenced to three months of confinement, reduction to E-1, and a bad-conduct discharge.

Lance Corporal Delano Holmes was charged with murder after stabbing to death an Iraqi Army soldier with whom he was standing a night watch during an escalating scuffle that began when Holmes knocked away the Iraqi’s lit cigarette to avoid attracting sniper fire. In December 2007, a court-martial panel found Holmes guilty of negligent homicide and providing a false official statement to investigators, and sentenced him to a bad conduct discharge but no confinement.

Captain Carl Bjork was charged with murder after an Iraqi police chief, Ibrahim Hamid Jaza, committed a revenge killing of two men, and claimed he had been ordered to kill them by his training officer, Captain Bjork. In May 2010, a court-martial panel in Iraq acquitted Bjork of murder but convicted him of two counts of negligence in those deaths, plus reckless endangerment for setting a booby trap of a weapons cache, and sentenced him to a reprimand and the loss of one-third of his salary for one year.

A U.S. Marine Corps Court of Inquiry investigated allegations that as many as nineteen Afghan civilians died when a unit of Marines special operations troops opened fire after a car bomb targeted their convoy in


\[282\] Golden, supra note 214. Specialist Cammack was likely charged in connection with the death of one of the Afghan detainees at Bagram. See id.


\[284\] Id.

\[285\] Critics at war with military justice: Some say serious charges are too easily filed; others say sentences given by fellow GIs are too lenient. CHI. TRIB., Jan. 20, 2008.

\[286\] Id.

\[287\] GI given reprimand in deaths: Evergreen man loses pay but avoids prison over trainees' slaying of two Iraqis. DENVER POST, May 13, 2010.

\[288\] Id.
March 2007 in Nangahar Province, Afghanistan. Citing witness accounts, Afghanistan's Independent Human Rights Commission concluded the Marines fired indiscriminately at vehicles and pedestrians in six different locations on a ten-mile stretch of road. But nearly a dozen Marines, who told the court they heard gunfire after the bombing, called the unit's fire a disciplined response to a well-planned ambush. After reviewing the Court's findings, Lieutenant General Samuel Helland, the commander of U.S. Marine Corps Forces, Central Command, decided not to bring charges against Major Fred C. Galvin and Captain Vincent J. Noble.

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291 Id.
292 Id.
293 Id.