INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES*

GEOFFREY S. CORN†

Thank you for the introduction and thank you for the opportunity to contribute to this event. It is nice to see all of you. I am used to doing Zoom classes, but it is a bit of a change to see so many people in uniform and so many people signed in right when they are supposed to be. When you are in academia, things work a little differently. I think this is a great event and I was excited to get the opportunity to participate. I wish I were there; I am not there because of some commitments I have here. It was no fault of the organizers who worked very hard to get me there. I want to thank them again and thank all of you for your attention.

What I want to talk about is an article[1] that I just finished with a friend, colleague, and alumna of the U.S. Army Judge Advocate General's Legal Center and School's Graduate Course, Lieutenant Colonel (Retired) Rachel VanLandingham, who was an Air Force officer and is now teaching law at Southwestern Law School in Los Angeles. About a year ago, we were together and I asked her a question: "Is it not odd that Congress has enumerated a war crimes code for our enemies, but it has not incorporated something similar into the punitive articles of the Uniform Code of Military Justice (UCMJ)?" That got us thinking about resurrecting an issue that has been periodically discussed: whether it is time for Congress to incorporate war crimes as enumerated offenses in the UCMJ to enable commanders to have a more feasible approach to holding our own Service members

---

* This is an edited transcript of remarks delivered on 19 November 2020 at "The International Military Tribunal at Nuremberg: Examining Its Legacy 75 Years Later," a symposium hosted by the National Security Law Department of The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. See The Judge Advoc. Gen.'s Legal Ctr. & Sch., *Nuremberg@75 Part 2 Impact on LOAC*, YOUTUBE (Nov. 20, 2020), https://youtu.be/GkkKnlFTcok?t=95, for a video recording of these remarks.

† Gary A. Kuiper Distinguished Professor of National Security at South Texas College of Law in Houston, Texas. Professor Corn teaches criminal law, criminal procedure, national security law, and the law of armed conflict and is a retired Lieutenant Colonel in the U.S. Army.

1 Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309 (2020).

accountable for battlefield misconduct or wartime misconduct when it actually violates the laws and customs of war.

The general topic of your symposium is the impact of the Nuremberg legacy on accountability. When I think about that question, I think the real impact of Nuremberg is that we should not have needed Nuremberg. We should not have had Nuremberg for two reasons. First, leaders in all armed forces should be fully committed to ensuring that their subordinates comply with the laws and customs of war. That is certainly a principal obligation that you bear as legal advisors in operations and legal advisors in training in order to facilitate the commander's capacity to implement that responsibility of command. When I think of the term "command responsibility," I do not instinctively gravitate towards the mode of criminal liability that it is understood to represent for most international and military lawyers. I think of the responsibility of commanders to make sure that we never get to a point where we need to do war crimes prosecutions.

I think the other aspect of the legacy of Nuremberg (i.e., that we should not need a tribunal like Nuremberg or any international tribunal) is that when there is misconduct within the ranks of the armed forces, the military is committed to holding its members accountable. The U.S. military, as you all know, has a seemingly unwavering commitment and an absolute commitment to ensuring effective accountability for wartime misconduct.[2] This is widely misunderstood, I think. There are many observers who assume that any time there is a report of an incident of wartime misconduct, it should result in a criminal trial and a conviction, but all of you know that that is an unrealistic expectation.

There are two bodies of law operating here that are not completely in sync: the law of armed conflict (or international humanitarian law) and international criminal law. Translating international humanitarian law into criminal responsibility is a complicated and challenging task. You could have many situations where a commander would conclude that there were mistakes made by subordinates and that those mistakes were inconsistent with the law of armed conflict, but based on the advice of legal advisors, the commander would conclude that the ability to satisfy the burden of proof in a criminal prosecution is just not feasible. This is a challenge for

[2] U.S. DEP'T OF DEF., DIR. 2311.01, DOD LAW OF WAR PROGRAM (2 July 2020).

all international and domestic criminal tribunals that want to punish individuals for violating the rules of war, so to speak.

I was in a conference yesterday with the American Society for International Law, where we were talking about this, and we had some experts on international criminal law who made the point that, in some ways, when you try to translate a battlefield regulatory norm into a norm of criminal responsibility, it is like putting a square peg into a round hole—it is not easy because the standards are different,[3] and we need to understand that.

Part of the solution for that for the U.S. military, as you all know and I believe, has been a longstanding tradition that when we have Service members who engage in misconduct that would amount to a violation of the law of war, we charge it under the punitive articles of the UCMJ as a crime derived from the common law-type crimes in the code (e.g., murder, assault, mayhem, arson, larceny). I was in the Graduate Course in 1996 doing the seminars that you all are doing, and this is what we talked about: If I am a military prosecutor, why do I want to go through the headache of having to deal with jurisdictional questions and vagaries of international law to prosecute a Service member when it is so much easier to simply allege a violation of the punitive articles that currently exist?

As some of you may know, the option of charging a war crime has always been a part of the UCMJ.[4] As a matter of fact, it predates the UCMJ. It was incorporated into the Articles of War, I think in 1916 for both the Army and the Navy.[5] Article 18, UCMJ, vests a general court-martial with jurisdiction over two categories of offenses. First, offenses in violation of the punitive articles,[6] but only individuals subject to Article 2, UCMJ, are subject to that jurisdiction. The second clause of Article 18, UCMJ, also vests a general court-martial with jurisdiction over any person who violates

---

[3] *See generally* Geoffrey S. Corn, *Ensuring Experience Remains the Life of the Law: Incorporating Military Realities into the Process of War Crimes Accountability*, *in* 2014 GLOB. CMTY.: Y.B. INT'L L. & JURIS. 189 (discussing the prosecution of international humanitarian law violations).

[4] UCMJ art. 18(a) (1950); *see generally* Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

[5] Aldykiewicz & Corn, *supra* note 4, at 94–95.

[6] UCMJ art. 18(a) (1950).

the law of war and is subject to trial by military tribunal.[7] Theoretically, prosecutors have always had the potential to allege a violation of the laws and customs of war but, to my knowledge, we have never done that for Service members who commit violations of the law of war in a situation where we could, in fact, allege and prove a war crime per se.

The question becomes, "Why tinker with that?" I think the answer turns on changes in the international perception of what right looks like when you are dealing with misconduct that would qualify as a war crime. It comes from the fact that there is increasing scrutiny by international tribunals (e.g., the International Criminal Court) over accountability for war crimes, and it comes from the basic change in the way our own military thinks about the role of legitimacy as an enabler to operational and strategic success.

I think that the situation has changed. I started my career as an intelligence officer, and my job was to do the intelligence preparation of the battlefield. If we were doing the intelligence preparation of the battlefield on how to prosecute a war crime in 1996, I think it made sense that these were rare events and we were not a military that was involved in a constant state of combat operations. When you had the odd incident of battlefield misconduct that would qualify as a war crime, it was okay to use the punitive articles. There was not going to be a lot of attention on it, and the internal accountability would be credible and effective. That is not the situation anymore. The intelligence preparation of the battlefield has changed, and one of the most significant changes, in my mind, is the role of legitimacy as recognized in our own joint operational doctrine. As most of you know, Joint Publication 3-0 lists legitimacy as a key principle of effective joint operations.[8] How is legitimacy defined? Legitimacy is defined as the actual and perceived commitment to law, morality, and ethics by the force.[9] It is more than just the actual commitment—it is the perception of commitment.

I do not know if any of you had the opportunity to watch BBC yesterday, but if you had watched it, the lead story was the report that was released by the Australian armed forces about the war crimes in which their special

---

[7] *Id.*

[8] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS I-2 (17 Jan. 2017) (C1, 22 Oct. 2018).

[9] *Id.* at A-4 ("Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.").

operators appear to have engaged in Afghanistan.[10] The Chief of the Australian Defence Force gave a presentation where he acknowledged that, based on an extensive inquiry and investigation, there is strong evidence that there were a number of unlawful killings and abuse of detainees committed by Australian forces.[11] This is worldwide news. The world is watching.

One of the questions he was asked was, "What is Australia going to do about it? Are there going to be criminal investigations and prosecutions?" There is this long, convoluted process of how you have to go through the military investigators, then it has to be referred to a special prosecutor, and then it moves into a civilian court. I am watching that saying, "If that happens in our forces, the process is much more efficient because it belongs to the commander, who plays the role as the convening authority." Then I was wondering, and I think we all should wonder if we were confronted with something similar, "How is the perception of legitimacy going to be influenced by the inability or the practice of not charging an actual war crime?" Or, better yet, "If our convening authority-commander is concerned about legitimacy in response to misconduct, should the commander have a more feasible mechanism to allege an actual war crime in lieu of a common law offense?" Our view in this article is that the answer is yes.

There is another development here that I think did not exist when I was in your place in 1996. That is that Congress has done it—Congress has enumerated a war crimes code.[12] Ironically, they have done it for our enemies, but not our own forces. That really is what has us scratching our heads. The Military Commissions Act of 2006,[13] as amended in 2009[14] in response to the opinion of *Hamdan v. Rumsfeld*,[15] enumerated the crimes that were within the jurisdiction of this military commission, the American war crimes tribunal.[16] Why did Congress do that? Congress did that, to my

---

[10] *Australian 'War Crimes:' Elite Troops Killed Afghan Civilians, Report Finds*, BBC NEWS (Nov. 19, 2020), https://www.bbc.com/news/world-australia-54996581.
[11] Alexandra Koch, Rohini Kurup & Tia Sewell, *Understanding the Australian Inquiry into ADF War Crimes in Afghanistan* (Nov. 25, 2020, 12:23 PM), https://www.lawfareblog.com/understanding-australian-inquiry-adf-war-crimes-afghanistan.
[12] 10 U.S.C. §§ 950p–950t.
[13] Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948a–950t).
[14] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (2009).
[15] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[16] 10 U.S.C. §§ 950p–950t.

knowledge, on the advice of the Judge Advocates General, who said the vagaries of the existing practice of charging war crimes under a general article, so to speak—under Article 21, UCMJ, that vests the President with the discretion to convene a military commission to punish captured personnel for violating the laws of customs and war—is going to create more litigation and uncertainty. What we need is for Congress to be very clear on what crimes it believes are applicable to our captured enemies because they violated international law, as the United States understands it, before they were captured.

The punitive articles to the Military Commissions Act are an enumeration of war crimes that, ostensibly, Congress and the executive believe are valid. My question is, "Why not simply adopt the same approach for the UCMJ?" If we did that, if we added to the punitive articles of the UCMJ the provisions of the Military Commissions Act's punitive articles, it would create a much more logical alignment between battlefield misconduct—the type of crimes that were at the focal point of the Nuremberg tribunal—and the capacity or ability of a legal advisor to advise a commander acting as a convening authority that, in this case, we should charge the actual war crime.

The core of our article's proposal is that Congress should enumerate war crimes for the punitive articles relatively analogous to the enumeration in the Military Commissions Act.[17] The thesis of the paper is that it is perplexing and counterproductive for the perception of legitimacy that the United States would not enumerate a war crimes code for its own forces when it has done so for its captured enemy forces.[18] One of the challenging aspects of developing this thesis in the article was whether we would do a whole cloth migration of the punitive articles in the Military Commissions Act into the UCMJ, and we do not think that that is the right approach for two reasons. First, there are some offenses in the Military Commissions Act that remain controversial in terms of their international law pedigree. If in your course you are studying war crimes, if you have read the *Al Bahlul* circuit court en banc opinion,[19] you see a relatively fractured opinion. The key opinion in that ultimate decision was then-Judge Kavanaugh, who referred to the validity of Congress including in the Military Commissions

[17] Corn & VanLandingham, *supra* note 1, at 344–45.
[18] *Id.* at 311–17.
[19] Al Bahlul v. United States, 767 F.3d 1, 27 (D.C. Cir. 2014) (en banc), *aff'd per curiam on reh'g en banc*, 840 F.3d 757 (D.C. Cir. 2016).

Act jurisdiction war crimes that are consistent with what he called the American common law of war.

In other words, they do not have to be war crimes recognized by the international community. As long as there is a tradition in American practice of alleging these crimes, then it is valid for Congress to incorporate them into the Military Commissions Act's jurisdiction. The crimes that were most controversial were conspiracy to violate the laws and customs of war,[20] and the most controversial provision is "material support to terrorism."[21] Is material support to terrorism really a war crime? I think most international criminal law experts would say no, but Congress has said yes for the military commission. I do not think that it makes any sense to incorporate that into a war crimes code for our own forces, because if we were to determine that one of our Soldiers engaged in material support to terrorism, then the proper offense would be aiding the enemy under the existing punitive articles,[22] assuming the terrorist is an enemy group.

Even if the terrorist was not an enemy group, there was actually a court-martial tried at Fort Lewis when I was in my last assignment as a Regional Defense Counsel, *United States v. Specialist Ryan D. Anderson*.[23] Specialist Anderson was a National Guard Soldier who was caught up in a sting trying to give what he believed were undercover agents for al Qaeda information on how to disable and steal an M-1 Abrams tank after he deployed to Iraq.[24] He was tried for a violation of Article 134, UCMJ, in the crafted offense of aiding al Qaeda.[25] The reason that they did not charge him with aiding the enemy was because it was not clear that the evidence could establish conclusively that al Qaeda qualified as "the enemy" for purposes of the definition of the crime in the UCMJ because Congress had never actually used the term "al Qaeda" in the 2001 Authorization for the Use of Military Force.[26] Was al Qaeda technically an enemy within the meaning of the offense? There was debate over that, so they crafted a violation: aiding al

---

[20] *Rumsfeld*, 548 U.S. 557; Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012), *overruled by Al Bahlul*, 767 F.3d at 11.
[21] *Al Bahlul*, 767 F.3d at 38.
[22] UCMJ art. 103b (2016).
[23] United States v. Anderson, 68 M.J. 378 (C.A.A.F. 2010), *aff'g* No. Army 20040897, 2008 CCA LEXIS 671 (A. Ct. Crim. App. Jan. 31, 2008).
[24] *Id.* at 381.
[25] *Id.* at 384 & n.4.
[26] *See* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Qaeda, a terrorist organization engaged in hostilities against the United States.

We do not need to include material support to terrorism, or terrorism for that matter, in the punitive articles that we would incorporate into the UCMJ. Conspiracy, I think, is a different beast. I actually think that there is validity in treating conspiracy to violate the law of war as a war crime per se—that it is more than just a mode of liability. I think it opens up an important discussion on the validity of alleging inchoate versions of substantive war crimes. I think it is an area that is undertheorized and I think it is an important area, and here is why. When we think of war crimes, our instinct is to gravitate towards result crimes (e.g., you attacked civilians, you murdered a prisoner) that are defined by the pernicious result. But, in fact, effective accountability often requires accountability for conduct crimes. You can have a situation where a commander launches an indiscriminate attack but, thankfully, it does not have the harmful effect on the civilian population. Think of Hamas in a conflict with Israel, where they are firing rockets indiscriminately. Either Israel will let them fall in an empty field or the Patriot missile system will rapidly identify that they are heading for a population center and, thankfully, be able to take them down before they cause any harm. There is no unlawful result from that attack, but certainly as a conduct offense, it is worthy of condemnation.

I think another one where that is interesting is perfidy. If you have not studied perfidy, you will learn that to establish the offense of perfidy under international criminal law, you have to prove that the perfidious conduct resulted in death, injury, or capture to the enemy.[27] Is that really why we condemn perfidy? Do we condemn perfidy because of the result it produces, or do we condemn perfidy because the conduct dilutes our confidence in respect for the laws and customs of war and therefore endangers a civilian population? For example, take an enemy soldier who is fighting in a civilian uniform. What if he does not hurt anybody? Does that mean he should be immune from sanction? In my view, there should be more attention focused on the application of inchoate versions of law of war violations—conspiracy and attempt, specifically—so that we have a better mechanism or a better ability to sanction conduct offenses as opposed to just result offenses. I

[27] INT'L CRIM. CT., ELEMENTS OF CRIMES 24 (2011) (enumerating in article 8(2)(b)(xi) the war crime of treacherously killing or wounding).

think conspiracy and the attempt provision as it exists in the Military Commissions Act should be incorporated into the punitive articles.

There are some other aspects that I think the migration of most of the war crimes in the punitive articles of the Military Commissions Act into the UCMJ would provide an opportunity to consider. One is closing the command responsibility gap. This is long overdue. This is not a new idea. Again, another one of my Judge Advocate General's Legal Center and School faculty colleagues, who is now a law professor, Vic Hansen of the New England School of Law, wrote about this some time ago.[28]

Under the punitive articles, if we are not charging a war crime and we have a commander who should have known that his subordinates were going to commit war crimes, we do not charge a *Yamashita* "should have known" theory of command responsibility.[29] The best we are going to do is dereliction of duty.[30] Why? Because if we are charging a punitive article violation, the modes of liability are established by the aiding and abetting provisions, and the aiding and abetting provisions require proof of a shared criminal intent.[31] A commander's reckless failure to properly deal with a situation of a brewing war crimes incident would not satisfy that aiding and abetting mode of liability.[32]

This was what happened after My Lai, when Captain Ernest Medina, the company commander of the unit that committed the atrocity, was

---

[28] Victor Hansen, *What's Good for the Goose is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L.R. 335 (2006).

[29] *In re* Yamashita, 327 U.S. 1, 15–16 (1946).

[30] *See, e.g.*, OFF. OF THE JUDGE ADVOC. GEN., U.S. DEP'T OF ARMY, TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT tbl.1 (2017) (citing dereliction of duty in articulating the "elements of proof" to establish a law of war violation, including in the context of command responsibility); *see also* Lieutenant Colonel James T. Hill, *Command Prosecutorial Authority and the Uniform Code of Military Justice—A Redoubt Against Impunity and a National Security Imperative*, 228 MIL. L. REV. 473, 482–89 (2020) (discussing the theory of command responsibility through dereliction of duty).

[31] UCMJ art. 77(1) (1950).

[32] Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 175–76 (2000).

acquitted by his general court-martial.[33] Why was he acquitted? Because he was charged as an aider and abettor, and the evidence was insufficient to establish that he shared the criminal intent.[34] He was really responsible under the doctrine of command responsibility.

Could we charge a commander with the substantive crimes of a subordinate based on the international law doctrine of command responsibility? I think we could do that through the mechanism of the second clause of Article 18, UCMJ, but I believe that needs to be incorporated into the punitive articles of the UCMJ. And if you look at the responsibility provision of the Military Commissions Act, it is, in fact, incorporated there.[35] If you look at modes of liability in the Military Commissions Act, Congress incorporated the *Yamashita* theory of command responsibility.[36] We think that this is an opportunity to address that shortfall.

Another thing we address in the article is our belief that it would be credible for Congress to codify a mistake of law defense for battlefield misconduct.[37] You all know that mistake of law is rarely a viable defense. I was involved in the court-martial of a U.S. Army captain named Rogelio Maynulet, who killed a wounded detainee in Iraq and was charged with assault with intent to commit murder.[38] I am not sure why they charged the assault, but probably the convening authority was trying to limit his liability. He was a good officer who got in a firefight; there was a mortally wounded enemy and the medic said there was nothing he could do for him and that he was going to die.[39] It was all being recorded by an unmanned aerial vehicle, and Captain Maynulet said, "Step away" or something like that, and he shot him in the head and killed him. When Maynulet explained

---

[33] Because Captain Medina was acquitted, no record of trial exists. But see Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972), for the perspective and insight of the military judge who presided over Captain Medina's general court-martial.
[34] Smidt, *supra* note 32.
[35] 10 U.S.C. § 950q ("[A] superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.").
[36] *Id.*
[37] Corn & VanLandingham, *supra* note 1.
[38] United States v. Maynulet, 68 M.J. 374, 375 (C.A.A.F. 2010).
[39] *Id.*

why he did it, he talked about a briefing he received from a judge advocate before they went to Iraq.[40]

I was helping the civilian defense counsel. We got the PowerPoint briefing and there was one slide that said, "unnecessary suffering" and then under it, all it said was, "do the right thing." That was his understanding of what "unnecessary suffering" meant.[41] The judge denied him a mistake of law instruction because the judge said that the crime that he was charged with does not require knowledge that the killing is unlawful,[42] which is true. That is normally why you deny a mistake of law instruction.[43]

We do not think that mistake of law should be a purely subjective defense. What we are suggesting is that in the complexity of battlefield operations, a defendant should have the opportunity to at least plead an honest and objectively reasonable misunderstanding of his or her legal obligation as it related to that alleged act of misconduct. I think it would rarely be successful and, in fact, I think if Captain Maynulet had received that instruction, the court-martial may have still convicted him. But it seems odd to me that a Soldier, Marine, or Airman could receive a legal briefing, and that legal briefing for whatever reason may have been misleading or even erroneous, yet that fact could not factor into the assessment of a criminal, culpable state of mind if the Service member is then subjected to a criminal prosecution. I think it is worth thinking about if Congress were to do this.

The last piece of this that is really interesting is getting rid of the amended Article 2(13), UCMJ. I do not know if any of you have looked at that. It kind of popped into the UCMJ, and I have been unable to figure out where it came from. I was with Lieutenant General Charles Pede a couple of years ago at a conference, and I asked if he knew about this. My recollection is that he said, "I do not think we had anything to do with adding that provision." Remember what Article 2, UCMJ, does, which is subject individuals to the punitive articles of the UCMJ—all of them, to include

---

[40] *Id.* at 375.
[41] *Id.* at 375–76.
[42] *Id.* at 376.
[43] *See generally* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (29 Feb. 2020).

dereliction of duty, absence without leave, disobedience to an officer, et cetera.

Included now in the list of individuals subject to Article 2, UCMJ, jurisdiction are "[i]ndividuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War . . . who violate the law of war."[44] That makes absolutely no sense. What has Congress done? In Article 2(13), UCMJ, Congress has subjected our enemy to our military code before the enemy is ever captured. Once the enemy is captured, there is an existing provision of Article 2, UCMJ, that subjects a prisoner of war to court-martial jurisdiction[45] for good reason. Article 2(13), UCMJ, captures violations of the law of war,[46] but the law of war is not encompassed in Article 2, UCMJ, jurisdiction. It is completely confusing.

I think what happened was that somebody in Congress, or some staffer, wanted to foreclose the opportunity of using a general court-martial as a criminal tribunal for unprivileged belligerents to ensure that unprivileged belligerent trials would remain in Guantanamo. What does it purport to do? It purports to say that the only individuals we capture who we could court-martial have to qualify for status under Article 4 of the Third Geneva Convention,[47] but it is incoherent. It makes no sense. If Congress wants to limit the forum that is available for unprivileged belligerents alleged to have committed war crimes to the military commission, they should do that in Article 18, UCMJ. They should say in Article 18, UCMJ, that a general court-martial has jurisdiction to prosecute any person who violates the law of war except individuals who do not qualify as prisoners of war under Article 4 of the Third Geneva Convention.

I think that one of the benefits of including war crimes in the punitive articles is that it would actually make it more likely that if we did capture an enemy who we believe violated the law of war before capture that we would use a general court-martial to prosecute that individual instead of creating a new tribunal to do it, which we have done so far. Why? Because it would be so much easier. You would just look at the UCMJ. You would have the war crimes incorporated in the UCMJ, the general court-martial would

---

[44] UCMJ art. 2(13) (2009).
[45] *Id.* art. 2(9) (1950).
[46] *Id.* art. 2(13) (2009).
[47] *Id.*

have jurisdiction under Article 18, UCMJ, and it would be a more feasible and, in my view, a more credible approach. It would subject the enemy to the same process that we use for our own personnel. Ultimately, I think, to advance our collective interest in enhancing the perception of legitimacy when we are dealing with misconduct in war, both by our own forces and by our captured opponents, it would be logical to give commanders the ability to look to the punitive articles of the UCMJ and charge those offenses for trial by general court-martial.

I will finish with a quote from President Eisenhower during his first inaugural address. He said, "Whatever America hopes to bring to pass in the world must first come to pass in the heart of America."[48] If we want legitimacy and accountability to be fully embraced, I think that it is time for our Congress and our Armed Forces to fully embrace it by adopting a war crimes code in the punitive articles.

[48] *Quotes*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBR., https://www.eisenhowerlibrary.gov/eisenhowers/quotes (Apr. 19, 2021).