Charging War Crimes: A Primer for the Practitioner

Major Martin N. White[*]

Introduction

This primer provides the practitioner with a framework for determining the proper method for charging an American servicemember accused of committing war crimes. Compared to charging traditional offenses, charging war crimes offers more options and potential pitfalls to the trial counsel drafting the charge sheet. Using a hypothetical situation involving a Soldier who commits several acts of misconduct while deployed, this primer outlines the advantages and disadvantages of charging war crimes as an enumerated offense under the Uniform Code of Military Justice (UCMJ)[1]—as conduct prejudicial to the good order and discipline of the armed forces under clause 1 of Article 134,[2] as a service discrediting act under clause 2 of Article 134,[3] or as a violation of a federal law by assimilation under Article 134, UCMJ.[4] This primer discusses why, in drafting a charge sheet, the prosecutor should begin with offenses enumerated in the UCMJ. As discussed below, the enumerated offenses can be properly applied to a broad spectrum of misconduct, including offenses considered war crimes. Due to the nature of the misconduct, however, a prosecutor should also consider the possibility of charging the servicemember with violation of war crimes[5] by assimilating federal law in addition to the enumerated offenses. This primer outlines various offenses that the prosecutor could potentially charge as war crimes. It concludes that only in the rarest of circumstances should a prosecutor charge a war crime by assimilating federal laws governing the prosecution of violations of the laws of war.

Hypothetical Fact Pattern[6]

First Lieutenant Smith (*1LT Smith*), a reserve military intelligence officer, was activated to serve in a hostile fire zone where the United States was engaged in armed conflict within a sovereign nation's borders. While stationed at a confinement facility that housed civilian and military detainees collected as a result of coalition operations, *1LT Smith* interrogated several detainees. During the course of these interrogations, he slapped and hit several of them. On one occasion, *1LT Smith* struck a senior foreign officer in the temple with a closed fist hard enough to knock the detainee unconscious. On two separate occasions, he slapped a detainee who was falling asleep during an extended interrogation. Several of the interrogators discussed various methods to effectively break down detainees' resistance to questioning, and *1LT Smith* suggested sleep deprivation as a form of punishment for refusing to answer questions and for violating camp rules.

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[*] Judge Advocate, U.S. Army. Presently assigned as Group Judge Advocate, First Special Forces Group (Airborne), U.S. Army, Fort Lewis, Washington. LL.M., 2005, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D. 1993, Southern Methodist University; B.A., 1990, Emory University.

[1] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 1 - 113 (2005) [hereinafter MCM].

[2] UCMJ art. 134 (2005).

[3] *Id.*

[4] *Id.*

[5] There are several definitions of "war crimes." *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (July 1956) ("The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.") [hereinafter FM 27-10]. In addition, the *Department of Defense Law of War Program* defines law of war as the following:

> [t]hat part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 3.1 (9 Dec. 1998). For purposes of this primer, a "war crime" is considered to be a criminal act committed during international armed conflict against an individual who is protected from such acts by codified and/or traditional laws of war.

[6] The facts in the hypothetical are loosely based on an *Army Regulation* (AR) *15-6* investigation into abuses allegedly committed by American servicemembers and civilians against Iraqi detainees at the Abu Ghraib prison in Iraq. During the course of his investigation, the Investigating Officer, Major General Fay, detailed forty-four alleged instances of detainee abuse ranging from murdering and raping to humiliating and photographing detainees. *See* LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (Aug. 23, 2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf [hereinafter Fay Report]. During the remainder of this article, the author uses the Abu Ghraib investigation and findings to provide real world background to the theory presented in this primer.

On several occasions, *1LT Smith* observed dog handlers abuse detainees, although he did not order them to do so. He did, however, instruct subordinate Soldiers to strip several detainees naked. In a photograph of a group of naked detainees, *1LT Smith* is distinctly visible smirking at the camera. An investigation into this incident revealed that he instructed a specialist (SPC) to take the photograph. On another occasion, *1LT Smith* used his personal camera to take a picture of two Soldiers who had removed a detainee's corpse from a body bag. In the picture, the two Soldiers are grinning wildly, and one is flashing a "thumbs up." During an investigation, *1LT Smith* admitted that he took the photo as a personal memento.

Perhaps the most egregious offenses committed by *1LT Smith* were his involvement in two rapes. On one occasion, he raped a female detainee while another servicemember stood guard in the hallway. Two nights later, *1LT Smith* repaid the favor by watching the entranceway to a cell to ensure that the other servicemember was not observed while he committed rape.

During an investigation into these matters, several servicemembers, including *1LT Smith*, made credible statements that the highest levels of command had given them both implicit and explicit orders to mistreat detainees.[7] You are the trial counsel for the much maligned 23d Fictional Brigade, which has court-martial jurisdiction over *1LT Smith*. After a lengthy and highly-publicized investigation, you are preparing to prefer charges against him. How do you proceed?[8]

Application

Enumerated Offenses Overview

The first step in analyzing how to charge the servicemember is to look for any offenses specifically enumerated in UCMJ Articles 80 through 132. The trial counsel should begin with this analysis due to the preemption doctrine. The preemption doctrine "prohibits application of Article 134 to conduct covered in Articles 80 through 132."[9] In *1LT Smith*'s case, several enumerated offenses are readily apparent. The prosecutor should also look for evidence that the accused aided or abetted another in violation of UCMJ Article 77.

Rape and Assault[10]

Rape, assault, and all other traditional offenses should be charged under the article that best characterizes the offense rather than charged under the General Article—Article 134. In the hypothetical situation, *1LT Smith* should be charged with a violation of Article 120, Rape, and numerous violations of Article 128, Assault.

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[7] Several of the Soldiers charged with mistreating prisoners at Abu Ghraib stated that they were only following orders. *See 8 Years for Abu Ghraib Soldier*, CNN.COM, Oct. 21, 2004, http://www.cnn.com/2004/WORLD/meast/10/21/iraq/abuse/index.html (stating that "an e-mail from the U.S. command in Baghdad," told a warrant officer "to order his interrogators to be tough on prisoners." The e-mail further stated that "[t]he gloves are coming off, gentlemen, regarding these detainees . . . the command 'wants the detainees broken.'"). Although the facts in the hypothetical suggest the possibility that individuals higher in the chain of command may be held criminally liable for acts committed by *1LT Smith*, this primer will not discuss the issue of command responsibility. For a thorough discussion of command responsibility, see Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL L. REV. 155 (2000).

[8] The importance of a properly drafted charge sheet cannot be overemphasized. *See, e.g.*, Practice Note, *The Art of Advocacy: Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. , 2002, at 54, 54 [hereinafter *Tactical Charging*].

> From the government's standpoint, trial advocacy begins with the charging decision. Equating a court-martial to a battlefield, the art of advocacy is like the art of war. In war, commanders attempt to shape the battlefield to their advantage by electing to fight on terrain of their own choosing. In trial practice, the government possesses the initial advantage because trial counsel have the ability to shape the battlefield through the charging decision. Effective trial counsel recognize the tactical importance of selecting the most advantageous terrain through the charging process. They realize that trial advocacy does not begin with opening statements or even voir dire. Trial advocacy begins when counsel draft charges against an accused.

Id.

[9] MCM, *supra* note 1, pt. IV, ¶ 60c(5)(a).

[10] The charges are discussed in order of severity based upon maximum punishment available under the UCMJ. Although Rule for Courts-Martial (RCM) 307(c) gives a broad overview of requirements for the proper preferral of charges, it neither suggests nor requires that the charges be placed in a certain order. The prosecutor should find a logically consistent method that applies to the particular fact pattern. In this case, the offense of rape, which carries a potential life sentence, should probably be charged first. One advantage of doing so is that, in a trial by panel members, the first charge that the members will read will be the one that carries the greatest punishment. Depending on the facts, however, the prosecutor may determine that the charge sheet is more logical and clear if it is ordered by victim, by date, or by numerical order of the punitive articles.

Some of the hits or slaps, such as those committed with an open fist, will most likely satisfy the elements of assault, which the UCMJ defines as "an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated."[11] The act of striking the foreign senior officer in the temple with a closed fist hard enough to render him unconscious should be charged as aggravated assault, assuming that the evidence is sufficient to satisfy the elements.[12]

Under these facts, the victim's status as a superior commissioned officer in the enemy's armed forces would not apply as an aggravation to the offense. The greater punishment associated with assault on an officer under Article 128 only applies to assault "committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power."[13]

Conspiracy

As the Abu Ghraib incidents illustrate, systemic problems can cause or at least allow several Soldiers to commit offenses together. Therefore, the prosecutor should look for evidence that the accused conspired with another to commit the offense(s). In order to do so, the prosecutor must state with whom the accused conspired, what offenses were agreed upon, and what some of the overt acts were.[14]

In the hypothetical, *1LT Smith* appears to have conspired with other Soldiers in several of his actions, including stripping detainees naked, depriving detainees of sleep, and mistreating the corpse of one of the detainees. Additionally, the facts suggest that *1LT Smith* "entered into an agreement with"[15] another servicemember to assist him in the commission of rape by keeping watch to prevent the crime from being detected. Assuming that each of these acts constitute an offense, *1LT Smith* has also committed the offense of conspiracy in that he "entered into an agreement . . . to commit an offense," and "at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy."[16] The prosecutor may charge the underlying offenses separately from the conspiracy, since the accused can be guilty of both.[17]

Failure to Obey a Lawful Order or Regulation

The abuse described in the hypothetical scenario violates several requirements of the Army regulation (AR) dealing with treatment of prisoners of war, *AR 190-8*, including paragraph 1-5(b), which, for example, prohibits murder, sensory deprivation, and all cruel and degrading treatment. [18] *Army Regulation 190-8*, however, is not punitive, so the violations

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[11] MCM, *supra* note 1, pt. IV, ¶ 54a.

[12] The elements of Article 128, Aggravated Assault, are: "(i) That the accused assaulted a certain person; (ii) That grievous bodily harm was thereby inflicted upon such person; (iii) That the grievous bodily harm was done with unlawful force or violence; and (iv) That the accused, at the time, had the specific intent to inflict grievous bodily harm." *Id*. pt. IV, ¶ 54b(4)(a).

[13] *Id.* pt. IV, ¶ 54c(3)(a).

[14] *See id.* pt. IV, ¶ 5b. The elements of conspiracy are:

> (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
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> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Id.

Article 81 of the UCMJ states that "[a]ny person subject to this chapter who conspires with any other person to commit an offense . . . shall, if one or more conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." *See id*. pt. IV, ¶ 5a. Additionally,

> A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

See id. pt. IV, ¶ 5c(8).

[15] *Id*. ¶ 5b.

[16] *Id*.

[17] *Id*. ¶ 5c(8).

[18] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-5(b) (1 Oct. 1997) [hereinafter AR 190-8].

cannot be charged as disobeying a lawful general order.[19] The prosecutor must look for any local general orders or evidence that a senior official gave the accused a lawful order not to commit the acts in question. Under Article 92(2), failure to obey other lawful order, the accused "must have had actual knowledge of the order or regulation,"[20] although such knowledge can be "proved by circumstantial evidence."[21]

The prosecutor should look for any punitive regulations that may have been enacted in the wake of Abu Ghraib for a violation of UCMJ Article 92(1), disobeying a lawful general order, as well as determine whether the servicemember's actions violated any "other lawful order issued by a member of the armed forces" that the servicemember had a "duty to obey" under Article 92(2).

Cruelty and Maltreatment

First Lieutenant Smith can be charged with cruelty and maltreatment under Article 93, UCMJ. Article 93 applies to "cruelty toward, or oppression or maltreatment of, any person subject to his orders."[22] There are two critical issues regarding a decision to charge under Article 93.

First, Article 93 defines a "victim" of oppression or maltreatment as "all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless of whether the accused is in the direct chain of command of the person."[23] The Geneva Convention Relative to the Treatment of Prisoners of War states that "[a] prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power."[24] Similarly, if a detainee does not warrant the status of prisoner of war as an "internee" under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the force that interned that individual will apply "the laws in force in the territory in which they are detained" and may apply additional restrictions. [25] Under the Convention, "[r]egulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand."[26] This is important when considering whether to charge Article 93, since failure to prove proper status as a victim is failure to prove the offense. If the individual who is maltreated is not subject to the orders of the individual who maltreats him, there is not a proper victim, and the offense does not apply.[27] Therefore, the prosecutor must allege and prove that the individual was subject to his orders.

The second consideration under Article 93 is the accused's actions. The "nature of the act" of oppression or maltreatment is "measured by an objective standard,"[28] and "[a]ssault, improper punishment, and sexual harassment may constitute this offense."[29] Many of *1LT Smith*'s acts committed against the detainees appear to meet the objective standard of maltreatment.

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[19] The regulation only states that "[a]ny act or allegation of inhumane treatment or other violations of this regulation will be reported to [Headquarters Department of the Army] . . . as a Serious Incident Report." *Id.* para. 6-9(e). *See* MCM, *supra* note 1, pt. IV, ¶ 16.

[20] *See* MCM, *supra* note 1, pt. IV, ¶ 16c(2)(b). Note that a large focus of the Fay Report describes the uncertainty that Soldiers and commanders had regarding the proper treatment of Soldiers, so it would be difficult if not impossible to prove that these individuals disobeyed a lawful order. None of the Soldiers who have presently been charged with crimes arising from Abu Ghraib have been charged with violation of an order relating to the proper treatment of detainees. *See* Fay Report, *supra* note 6.

[21] *See* MCM, *supra* note 1, pt. IV, ¶ 16c(2)(b).

[22] *Id.* pt. IV, ¶ 17a.

[23] *Id.* pt. IV, ¶ 17c (1).

[24] Geneva Convention Relative to the Treatment of Prisoners of War art. 82, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[25] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, sec. IV, ch. 9, art. 117, *opened for signature* Aug. 12, 1949, 6 U.S. T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] describes "Penal and Disciplinary Sanctions" against internees.

[26] *Id*. art. 99.

[27] The first element of the offense is that the victim "was subject to the orders of the accused." *See* MCM, *supra* note 1, pt. IV, ¶ 17b(1).

[28] *Id*. art. 17c(2); *see also* United States v. Springer, 58 M.J. 164, 172 (2003) (quoting United States v. Carson, 57 M.J. 410, 415 (2002). "It is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's action reasonably could have caused physical or mental harm or suffering." In *Springer*, the Court of Appeals for the Armed Forces applied the standard to the objective victim, finding that a female Airman could objectively feel maltreated by a male non-commissioned officer improperly groping her under the guise of training the proper method of conducting an EPW search. *See Springer*, 58 M.J. at 172.

[29] MCM, *supra* note 1, pt. IV, ¶ 17c(2).

Dereliction of Duty

Dereliction of duty is another specifically enumerated offense that applies under the hypothetical fact pattern. This offense applies to a broad range of conduct.[30] Article 92, UCMJ lists three separate types of dereliction of duty—willful dereliction, or through neglect or culpable inefficiency.[31]

For willful dereliction, the accused must have actual knowledge of the duty.[32] "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."[33] The duty to treat prisoners properly may be found in a number of sources. *Field Manual 27-10, The Law of Land Warfare*, for example, describes the duty for servicemembers to treat prisoners of war properly.[34]

Under certain circumstances, an observer who fails to act to prevent harm to a detainee could be derelict in the duty to protect the prisoner, provided that the observer was able to prevent the acts or at least report them. In the hypothetical, *1LT Smith* was present several times while dog handlers threatened the detainees with dogs.[35] Therefore, he could be charged with dereliction of duty for failing to safeguard the detainees from the dog handlers and the dogs. As an officer, he should have issued a lawful order to the dog handlers to prevent their misconduct.

Additionally, he could be charged with dereliction of duty for instructing the Soldiers to remove detainees' clothing. Although there are situations in which a guard would have a legitimate purpose in removing a detainee's clothing, the facts of the hypothetical indicate that the practice was improperly used as punishment.[36] Therefore, *1LT Smith* was derelict in his duty to safeguard the detainees' well-being by instructing his Soldiers to remove the detainees' clothing. Given *LT Smith's* duty to safeguard the prisoners, much of his alleged misconduct, either through a willful and deliberate act or through his purposeful or negligent inaction, could be charged as a violation of Article 92. The incident in which *1LT Smith* photographed the Soldiers as they mistreated the corpse is one of the few acts he committed that did not violate a specific duty.[37]

The maximum punishments for dereliction of duty are very low, despite the gravity of the offenses listed above. Even for willful dereliction, the maximum sentence is a "[b]ad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months."[38] One of the benefits of a dereliction of duty charge, however, is that the offense can be applied to a broad variety of offenses that would otherwise not be easily charged.[39]

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[30] *See* Practice Note, *Dereliction of Duty and Weather Reports*, ARMY LAW., Oct. 1990, at 41 ("[T]he potential sources of the duty that can serve as the basis for a conviction under article 92(3) are almost boundless.").

[31] MCM, *supra* note 1, pt. IV, ¶¶ 16f(3)(A), 16f(3)(B).

[32] United States v. Ferguson, 40 M.J. 823, 828 (1994).

[33] MCM, *supra* note 1, pt. IV, 16c(3)(A).

[34] *See* FM 27-10, *supra* note 5, para. 89 ("Prisoners of war must at all times be humanely treated . . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."). Additionally, *FM 27-10*, *supra* note 5, para. 90 states that "Prisoners of war are entitled in all circumstances to respect for their persons and their honor." Although *FM 27-10* is neither a regulation nor punitive, its contents "are of evidentiary value insofar as they bear on questions of custom and practice." *Id*. para 1; *see also* Smidt, *supra* note 7, at 185. According to Major General Fay, many of the Soldiers that were the subject of the investigation failed to safeguard detainees. The Fay Report states that the "duty to protect imposes an obligation on an individual who witnesses an abusive act to intervene and stop the abuse." *See* Fay Report, *supra* note 6, at 14. The Fay Report also cites *AR 190-8*, which prohibits cruel and degrading treatment. *Id*. para. 1-5(b).

[35] The Fay Report states that the military working dogs were routinely misused. On at least one occasion, there was "an alleged contest between the two Army dog handlers to see who could make the internees urinate or defecate in the presence of the dogs." Fay Report, *supra* note 6, at 68.

[36] The Fay Report describes how "[m]any of the Soldiers who witnessed [the guards frequent removal of detainees' clothing] were told that this was an accepted practice. Under the circumstances, however, the nakedness was clearly degrading and humiliating." *Id*.

[37] Arguably, the corpse had a right to be treated humanely; however, this act is better charged under UCMJ art. 133 or art. 134, discussed below.

[38] MCM, *supra* note 1, pt. IV, ¶ 16e(3)(B).

[39] *See, e.g.*, United States v. Bivins, 49 M.J. 328, 333 (appellant had a duty "to not engage in underage drinking"); *see also Marine Dismissed from Corps in Death of Iraqi Inmate*, CNN.COM, Nov. 11, 2004, http://edition.cnn.com/2004/LAW/11/11/prisoner.abuse.ap/ (reporting that two of the Marine officers involved in mistreatment of detainees in Iraq were charged with dereliction of duty). A Marine major was "convicted of dereliction of duty and maltreatment of an Iraqi who died at the prison he commanded." The officer was "accused of ordering a subordinate to drag [an Iraqi detainee] by the neck out of a holding cell." The detainee was "stripped naked and left outside for seven hours before he was found dead." *Id*.

Principals (Article 77)

While drafting a charge sheet, a prosecutor should examine whether, in addition to conspiring with others, the servicemember assisted another in the commission of any of the offenses, even if he did not commit the offense himself. Article 77, UCMJ "eliminates the common law distinctions between"[40] the perpetrator (the one who actually commits the offense)[41] the "aider and abettor" (the "one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime")[42] and the "accessory before the fact," ("one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime")[43] making all of these individuals "principals."[44] The effect of the elimination of such distinctions is that an individual is equally punishable whether he personally commits an offense or whether he acts as an aider and abettor or "causes an act to be done which if performed by him would be punishable by this chapter."[45]

Under the facts of the hypothetical situation, *1LT Smith* can be charged with the rape that he committed. He also assisted another servicemember in committing rape. Under Article 77, *1LT Smith* can be charged with both rapes as if he committed them both himself. The prosecutor should also consider whether *1LT Smith*'s actions would make him liable for other offenses committed. If his presence encouraged other Soldiers to commit offenses, he is liable for those offenses. For instance, *1LT Smith* suggested that interrogators use sleep deprivation to break down detainees' resistance to questioning. Although he did not deprive any detainees of sleep, his statements were most likely an encouragement to others to commit an offense.[46]

Enumerated Offenses Summary

As discussed, the enumerated offenses cover a broad array of misconduct. In the hypothetical, *1LT Smith* committed several separate offenses, almost all of which can and should be prosecuted under the enumerated offenses in the UCMJ.[47] The *Manual for Courts-Martial* (MCM) states that "ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war."[48] *First Lieutenant Smith* also committed several acts that may not fit neatly into any of the enumerated offenses. For these acts, the prosecutor must consider charging the offenses under Article 133 or Article 134, or both.

Conduct Unbecoming

Article 133, conduct unbecoming an officer and a gentleman,[49] applies to certain acts performed by the accused that "under the circumstances . . . constitute[s] conduct unbecoming an officer and gentleman."[50] The nature of the acts that fall

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[40] MCM, *supra* note 1, pt. IV, ¶ 1b(1).

[41] *Id.* ¶ 1b(2)(a).

[42] *Id.* ¶ 1b(1).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] The offense of wrongfully depriving detainees of sleep would most likely be charged as cruelty and maltreatment or dereliction of duty. *See id.* pt. IV, ¶ 17 and 16.

[47] As an example, of the servicemembers who have been prosecuted for offenses arising out of their misconduct at Abu Ghraib, Specialist Charles Graner was charged with the most serious acts of misconduct and faced the highest maximum punishment. Specialist Graner was initially charged with two specifications of conspiracy to maltreat subordinates, one charge of dereliction of duty for failing to protect the detainees from maltreatment, four specifications for maltreatment, four specifications for assault, and three specifications for violation of Article 134. Each of the Article 134 offenses was specifically enumerated (i.e. adultery, indecent acts, and wrongful interference with an administrative proceeding). *See* Preferred Charges Against Spc. Charles Graner (May 14, 2004), http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html. "Prosecutors dropped two assault charges, one count of adultery, and one count of obstruction of justice on January 6, 2005. On 14 January 2005, a jury found Graner guilty of nine out of ten counts stemming from his abuse of prisoners at *Abu Ghraib* prison in Iraq." *Id*.

[48] MCM, *supra* note 1, R.C.M. 307(c)(2); *see also* Smidt, *supra* note 7, at 194.

[49] MCM, *supra* note 1, pt. IV, ¶ 59.

[50] *Id*. pt. IV, ¶ 59b.

under Article 133 are those that "in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or . . . seriously compromises the person's standing as an officer."[51]

The broad definition of Article 133 allows for a huge array of misconduct to fall under it. Unlike Article 134, Article 133 is not subject to the preemption doctrine.[52] As a commissioned officer, every act that *1LT Smith* committed that seriously compromised his standing as an officer or his character as a gentleman is punishable under Article 133. Since most acts of misconduct committed by officers violate Article 133, courts have drawn strict requirements to prevent multiplication of charges.

Although most of *1LT Smith*'s acts could properly be characterized as conduct unbecoming an officer, he cannot be punished for both the substantive offense and the underlying misconduct.[53] One advantage of charging under Article 133 is that a dismissal is authorized for an officer convicted of conduct unbecoming.[54] Unlike a conviction for conduct unbecoming, if *1LT Smith* were found guilty of only the offense of dereliction of duty, and if the fact-finder determined that the dereliction was not willful, he would not be eligible for a punitive discharge.[55] In drawing up the charge sheet for *1LT Smith*, the prosecutor may choose to charge both the underlying misconduct and the charge of conduct unbecoming, cognizant of the fact that one of the charges will be dismissed for multiplicity.[56] One disadvantage to charging under Article 133 is that the prosecutor has to prove that the misconduct caused the requisite dishonor to the officer.

The General Article

The *MCM* allows the government to charge servicemembers with violations of the general article, Article 134, provided that the misconduct cannot be prosecuted under one of the enumerated offenses.[57] The general article

> makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law . . . If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article.[58]

Under the preemption doctrine, a prosecutor cannot charge Articles 80 through 132 under any clause of Article 134.[59] For preemption to apply, it must be shown that Congress intended the other punitive article to completely cover a class of offenses.[60]

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[51] *Id*.

[52] *Id*. pt. IV, ¶ 60c(5)(a).

[53] *See* United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984). In Timberlake, an officer was charged with forgery and conduct unbecoming for the exact same offense. The court held that forgery should be considered a lesser included offense of conduct unbecoming under these circumstances since the elements are identical for the two charges except for Article 133's discredit requirement. Therefore charging both offenses would be multiplicious. *Id; see also* Major David D. Velloney, *Recent Developments in Substantive Criminal Law: A Continuing Education*, ARMY LAW., Apr./May 2003 1990, at 64, 80. Although Article 133's note of explanation states that an officer can be charged with both the underlying offense and conduct unbecoming for the same offense, case law holds that he cannot be convicted of both. *See* United States v. Frelix-Vann, 55 M.J. 329 (2001) (holding conduct unbecoming charge to be multiplicious for charge of larceny arising from the same conduct); United States v. Cherukuri, 53 M.J. 68 (2000) (holding conduct unbecoming charges to be multiplicious for charges of indecent assault arising from the same conduct).

[54] MCM, *supra* note 1, pt. IV, ¶ 59e (stating that the maximum punishment for conduct unbecoming is "[d]ismissal, forfeiture of all pay and allowances, and confinement . . . ").

[55] *Id*. pt. IV, ¶ 16e(3)(A). The maximum punishment for dereliction through neglect or culpable inefficiency is "[f]orfeiture of two-thirds pay per month for 3 months and confinement for 3 months." *Id*.

[56] *See Timberlake*, 18 M.J. 371.

[57] MCM, *supra* note 1, pt. IV, ¶ 60a.

[58] *Id*. pt. IV, ¶ 60c(1).

[59] *Id*. pt. IV, ¶ 60c(5)(a); *see also* United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[60] *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979) (stating that "preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element").

The incident in which *1LT Smith* took a photograph of the Soldiers mistreating the detainee's corpse can most likely be successfully charged under Clause 1 or 2 of the general article. Such conduct is not specifically enumerated—made punishable—by another article of the UCMJ. Given the gravity of the other offenses allegedly committed by *1LT Smith*, however, the prosecutor may choose not to enter into the uncertainty inherent in charging outside of the enumerated articles in the UCMJ.[61] Unlike specifically enumerated offenses, the *MCM* does not have model specifications or a list of well-established elements for offenses assimilated under Article 134.[62] If an offense is properly charged under a model specification, and not under Article 134, there can be no valid motion to dismiss for failure to state an offense. Additionally, a seasoned prosecutor should always consider whether he should charge an accused with every offense for which he may be found guilty.[63]

Clause 1

To prove an offense under Clause 1, the government must prove beyond a reasonable doubt "[t]hat, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces . . . "[64] As with Article 133, most of *1LT Smith*'s misconduct is a violation of Clause 1 of Article 134, as long as his acts were "to the prejudice of good order and discipline in the armed forces."[65] Applying the preemption doctrine, however, these acts are punishable under other specifically enumerated charges and cannot be charged under Clause 1.[66]

For example, under the circumstances, striking unarmed, unthreatening detainees under his control was most likely prejudicial to "good order and discipline,"[67] and could be charged under Clause 1. The act of striking these individuals, however, is specifically enumerated under the offense of assault, and therefore cannot be charged under Article 134.

Clause 2

Under Clause 2, the government must prove "[t]hat the accused did or failed to do certain acts" and "[t]hat, under the circumstances, the accused's conduct was . . . of a nature to bring discredit upon the armed forces."[68] Unlike Clause 1, which requires actual prejudice to good order and discipline, Clause 2 must simply be "of a nature that tends to"[69] cause discredit.

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[61] *See* Interview with Major Michael Holley, Instructor, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Mar. 15, 2005). Major Holley, who prosecuted Specialist Graner and other individuals accused of committing offenses at Abu Ghraib, stated that "[t]he decision to charge [the guards] was made on a number of factors, one of which was the desirability of remaining within the known boundaries of the UCMJ." *Id.* A benefit of doing so was that the prosecution "remained with something that we would understand, the judges would understand, and that panel members will understand," and to prosecute in such a manner that the "defense will know the right and left limits of the law . . . . Don't reach beyond the Manual unless you need to, because you may find yourself unnecessarily adding uncertainty to the prosecution in crossing legal ground previously covered only lightly or not at all." *Id.* Major Holley stated that despite the different types of misconduct committed at Abu Ghraib, prosecutors were able to cover the gravaman of the offenses without assimilating Federal or state law. *Id.*

[62]

> [I]n modern practice, [we follow] the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

See United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953).

[63] *See, e.g.*, *Tactical Charging*, *supra* note 8, at 54. "Tactical charging focuses on preferring only those charges that are consistent with the government's theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining 'what' they can charge [as opposed to considering whether they should be charging it in the first place]." *Id.*

[64] *See* Lewis v. United States, 523 U.S. 155 (1998).

[65] MCM, *supra* note 1, pt. IV, ¶ 60b(1), (2).

[66] *See id.* pt. IV, ¶ 60c(1). "If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." *Id.*

[67] *Id.* pt. IV, ¶ 60b(1), (2).

[68] *Id.*

[69] *Id.* ¶ 60c(2)(b).

As with Clause 1 of Article 134, most of *1LT Smith*'s misconduct violates Clause 2 in that the acts were of a nature to be "likely to cause discredit upon the armed forces."[70] These acts also constitute conduct that is punishable under specifically enumerated UCMJ offenses and cannot be charged under Clause 2. For example, raping a detainee is clearly a "[b]reach of a custom of the service"[71] as well as being of a "tendency to bring the service into disrepute or … lower it in public esteem;"[72] however, the offense is specifically enumerated and is therefore preempted by UCMJ Article 120.

One advantage of charging under Article 134 Clause 1 or 2 is that the prosecutor can use service-discrediting evidence and evidence prejudicial to good order and discipline in the merits of the case rather than save the evidence for sentencing.[73] Such evidence, which would ordinarily be considered irrelevant or prejudicial, is necessary to prove an element of the offense—the accused's conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the service.

Clause 3

Clause 3 allows the prosecutor to prosecute a servicemember under federal or state law for offenses not contained within the UCMJ. Article 134 cannot be used to charge capital offenses.[74] Under Clause 3, the government "must establish every element of the crime or offense as required by the applicable law."[75]

Under the Constitution, "all treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."[76] Theoretically, servicemembers could assimilate the Protocols of the Geneva Conventions that the United States has ratified. The servicemember, however, must have had fair notice that his conduct was illegal.[77]

In the hypothetical, some of the detainees abused by *1LT Smith* were civilians. The rights of these individuals are described in Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).[78] Article 27 of GC IV states that "[p]rotected persons shall at all times be protected against all acts of violence or threats thereof and against insults and public curiosity."[79]

Although a reading of Article 134 by itself would allow a prosecutor to assimilate federal law to charge *1LT Smith's* misconduct as war crimes, Rule for Courts-Martial 307(c) states that "ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war."[80] Unfortunately, the *MCM* does not provide further guidance on when an exception to the general rule may apply. Several federal laws adequately address the misconduct committed by *1LT Smith*.

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[70] *Id*.

[71] *Id.*

[72] *Id*. ¶ 60c(3).

[73] One of the elements of an Article 134 offense is that that act "was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." *Id*. ¶ 60(b).

[74] *See* UCMJ art. 134 (2005); United States v. French 27 C.M.R. 245 (C.M.A. 1959).

[75] MCM, *supra* note 1, pt. IV, ¶ 60b.

> If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:
>
> (1) That the accused did or failed to do certain acts; and
>
> (2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[76] U.S. CONST. art. VI, cl. 2.

[77] *See* United States v. Vaughn, 58 M.J. 29, 31-32 (2003). Federal law, state law, military case law, military custom and usage, and military regulations have been found to provide general notice that certain conduct is proscribed. *See id*. at 31.

[78] *See* GC IV, *supra* note 25.

[79] *Id*. art. 27; *see also* Fay Report, *supra* note 6, at 13.

[80] MCM, *supra* note 1, R.C.M. 307(c)(2); *see also Smidt*, *supra* note 7, at 194.

Jordan Paust, former International Law professor at the Army Judge Advocate General's Legal Center and School states that:

> War crimes, including "grave breaches" of the Geneva Conventions, can be prosecuted either under 10 U.S.C. § 818 (which incorporates the laws of war as offenses against the laws of the United States) coupled with 18 U.S.C. § 3231 (which provides federal district courts with original, and at least concurrent, jurisdiction over any offense against the laws of the United States) or under 18 U.S.C. § 2441 (for "grave breaches" and violations of article 3 of the Geneva Conventions committed by U.S. nationals).[81]

Prosecutors could also assimilate 18 U.S.C. § 2340A, which states that "torture committed by public officials under color of law against persons within the public official's custody or control" is prohibited.[82] "Torture is defined to include acts specifically intended to inflict severe physical or mental pain or suffering."[83] Several of the acts committed by *1LT Smith* would constitute torture under this definition; however, these acts should be charged under the enumerated offenses discussed above.

Defense of Following Orders

The MCM states that "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[84] For a patently unlawful order, this defense does not apply. In *United States v. Calley*, the United States Court of Military Appeals stated the following:

> A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a Soldier is not the obedience of an automaton. A Soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.[85]

In the hypothetical, despite evidence that the chain of command implicitly or explicitly ordered Soldiers to commit the offenses described, the defense of "merely following orders" will not apply if "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.[86]

Conclusion

As discussed with the hypothetical fact scenario, a huge array of conduct may be prosecuted under the UCMJ's enumerated offenses without using the general article to assimilate federal or state law. Accordingly, all possibilities for charging under the enumerated offenses should be considered before charging an unenumerated offense.

The decision to charge a servicemember with violations of the law of war by assimilating federal law is rife with political repercussions. As previously discussed, a prosecutor could charge *1LT Smith* with a violation of international law prohibiting law of war violations, effectively treating him as a war criminal for his violation of the Geneva Conventions and other international agreements that have been ratified by the United States. Doing so would be an admission that an American

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[81] Jordan J. Paust, *Will Prosecution and Cashiering of a Few Soldiers and Resignations Comply with International Law?*, *available at* http://www.nimj.com/documents/AbuGhraib.doc. (last visited Feb. 6, 2006).

[82] 18 U.S.C. § 2340A (2000) (torture).

[83] *Id*.

[84] MCM, *supra* note 1, R.C.M. 916(d).

[85] United States v. Calley, 48 C.M.R. 19, 26-27 (C.M.A. 1973).

[86] MCM, *supra* note 1, R.C.M. 916(d).

servicemember violated international law. "The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy state."[87]

Prosecuting U.S. servicemembers for war crimes committed under violations of treaties is uncharted territory. In My Lai, perhaps the most publicized American war crime, American Soldiers killed between 150 and 400 noncombatants, "[h]owever, there was only one conviction, that of Lieutenant Calley."[88] First Lieutenant William Calley was "convicted of the premeditated murder of twenty-two infants, children, women, and old men, and of assault with intent to murder a child of about two years of age."[89] Each of these offenses was charged under the UCMJ.

In subsequent armed conflicts, servicemembers have been prosecuted for a variety of offenses; however, American servicemembers have not been charged with violations of war crimes. The more visible the prosecution, the less likely a prosecutor should want to stick to the tried and true. Therefore, the enumerated offenses under the UCMJ should be the primary tool for prosecuting servicemembers suspected of violating the laws of war.

[87] *See* FM 27-10, *supra* note 5, para. 507(b); *see also Ex parte* Quirin, 63 S. Ct. 2 (1942) (involving German soldiers who, wearing uniforms and carrying explosives, landed from German submarines, buried their uniforms, and attempted to sabotage war facilities.)

[88] Smidt, *supra* note 7, at 191 (citing LT. GEN. W.R. PEERS (U.S. Army Ret.), THE MY LAI INQUIRY 24, 165 (1979)).

[89] *Calley*, 48 C.M.R. at 21.