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No. 1

Command Responsibility for Subordinates' War Crimes

A Twenty-First Century Primer

By Major Michael D. Winn

[T]he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.¹

Legal advisor, take heed—when an enlisted member or officer of your unit commits a war crime in an armed conflict, your commander may be held responsible.² Recent updates to the *Department of Defense Law of War Manual*, *The Commander's Handbook on the Law of Land Warfare*, and *Army Command Policy* confirm President Roosevelt's declaration that commanders are ultimately responsible to keep their subordinates' actions in check.³

Following World War II, German and Japanese commanders were tried for war crimes in international tribunals at Nuremberg and Tokyo.⁴ Some of these commanders were tried for war crimes they ordered their troops to commit, but other commanders were tried for war crimes they merely failed to prevent.⁵ In the seventy-five years following those prosecutions, commanders have been aware that they may be held liable for not doing enough to prevent, halt, or punish war crimes committed by their subordinates.⁶

The Vietnam War and the Global War on Terror have provided various examples of commanders running afoul of the requirements of the law of war. From the My Lai massacre to the abuses at Abu Ghraib prison to the murder of detainees during Operation Iron Triangle in Iraq, U.S. military forces have not

always lived their righteous values—and leaders have been called to account.⁷ Now, as the U.S. military shifts its focus toward large-scale combat operations (LSCO) against peer and near-peer competitors, we must be ready to apply the law of war to a higher-speed, higher-intensity operating environment.⁸ Commanders—and by extension, their legal advisors—must prepare now for the legal and leadership challenges that LSCO will entail.⁹

This article first considers the breadth of command responsibility for war crimes and summarizes the current standards in customary international law (CIL). It then explains how the international standard, first articulated by the United States in the tribunals following World War II, has made its way back into U.S. regulation and policy. Finally, the article considers commanders' affirmative duties under the 2020 update to *Army Command Policy*, highlighting both good and bad examples from recent U.S. history and offering practice tips for command legal advisors.

Definition of War Crimes

In July 2020, the Army updated Army Regulation (AR) 600-20, *Army Command Policy*.¹⁰ The new version of the regulation added

paragraph 4-24, “Command responsibility under the law of war.”¹¹ The paragraph provides:

Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control. These measures include requirements to train their Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated.¹²

This new provision on command responsibility for war crimes does not define the term “war crimes.”¹³ What then, are war crimes? Synthesizing the relevant

look to the five LOAC principles derived from CIL: military necessity, distinction, proportionality, humanity, and honor.¹⁷ A failure to comply with these principles may indicate a LOAC violation.¹⁸

Second, not all LOAC violations are war crimes.¹⁹ A LOAC violation must be *serious* to be a war crime.²⁰ An example of a non-serious LOAC violation is that of a combatant who steals bread from a civilian’s home in occupied territory to feed himself, in violation of the Hague Convention.²¹ In contrast, serious violations of the LOAC may be considered war crimes.²² For example, the U.S. War Crimes Act of 1996 criminalizes “grave breaches” of the Geneva Conventions and portions of other key international treaties.²³

Third, the actor must have acted intentionally or at least with culpable negligence—there is no such thing as a purely “accidental” war crime.²⁴ A contemporary example is the attack by a U.S. AC-130U gunship on a hospital in Kunduz, Afghanistan, in 2015.²⁵ Although at least thirty occupants of the hospital were killed, the incident was not a war crime, since the U.S. Service members involved did not know

itary leaders, including platoon leaders and noncommissioned officers (NCOs), tasked with leading troops.³⁰ Any commander or other leader who ordered or encouraged a subordinate to commit a war crime would be criminally liable as a principal for the act or omission of that subordinate.³¹ For example, during Operation Iron Triangle near Samarra, Iraq, in 2006, Staff Sergeant Ray Girouard of the 101st Airborne Division encouraged, or perhaps ordered, his squad members to kill three Iraqi detainees.³² At his court-martial, Girouard was tried as a principal for premeditated murder.³³

Command responsibility applies not only to those leaders who order or encourage their subordinates’ war crimes, but also to those leaders who fail to take appropriate action to counter such abuses.³⁴ The cases explored below demonstrate the genesis of that duty.

Genesis of the “Knew or Should Have Known” Standard

From the 1474 trial of Peter von Hagenbach by the Archduke of Austria to U.S. courts-martial during the Philippine insurgency at the turn of the twentieth century, commanders have been held criminally liable for acts committed by their subordinates.³⁵ Nonetheless, it was not until three U.S. prosecutions following World War II that the international standard for command responsibility crystallized.³⁶

In the first trial, General Tomoyuki Yamashita, commander of Japanese forces in the Philippines, was convicted by a U.S. military commission for “permitting” widespread atrocities by those forces.³⁷ Although the prosecution introduced little direct evidence that Yamashita actually knew of his troops’ actions, the panel found him liable for “crimes . . . so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused.”³⁸ In other words, Yamashita was convicted because he “must have known” of the crimes yet failed to stop them.³⁹ The *Yamashita* judgment is historic, not for defining the exact contours of command responsibility, but for establishing that a commander may be held personally, criminally liable for failing to supervise and control subordinate troops.⁴⁰

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sources, a war crime is an act or omission that is 1) a violation of the law of armed conflict (LOAC), 2) serious, 3) committed intentionally, 4) and pursuant to an armed conflict, as considered below.¹⁴

First, all war crimes are violations of the LOAC, also referred to as the law of war.¹⁵ In determining whether a LOAC violation exists for any act or omission, consider whether there has been a violation of the Geneva Conventions, the Hague Convention of 1907, or another treaty that is ratified by the United States or that reflects CIL.¹⁶ In the absence of any specific rule,

they were firing on a medical facility.²⁶

Fourth, a war crime can occur only incident to an armed conflict.²⁷ A war crime may arise during an international armed conflict,²⁸ or it may occur during a non-international armed conflict, as shown at the International Criminal Tribunal for Rwanda.²⁹ With “war crimes” defined, the next section considers what it means to have command responsibility for them.

Historical Development

Command responsibility goes beyond those in a command billet and implicates all mil-

The *Yamashita* standard for command responsibility was soon refined by two cases from Nuremberg.⁴¹ In the *Hostage Case*, a panel of U.S. judges convicted Field Marshal Wilhelm List and other German generals under a theory of command responsibility for their subordinates' murders of civilian hostages in occupied territory.⁴² Later, in the *High Command Case*, Field Marshal Wilhelm von Leeb and other German officers were tried under a similar theory of command responsibility for subordinates' war crimes on the Eastern Front.⁴³ In both cases, the judges considered whether the accused knew or *should have known* that their subordinates were engaging in war crimes and that they failed to prevent or stop the crimes.⁴⁴

The "Knew or Should Have Known" Standard and Customary International Law

The "knew or should have known" standard for command responsibility for war crimes took root in international jurisprudence.⁴⁵ In 1977, the standard was incorporated into Additional Protocol I to the Geneva Conventions in its provision for holding commanders liable for war crimes committed by subordinates.⁴⁶ Later, in the 1990s, the "knew or should have known" standard was employed by the International Criminal Tribunal for Yugoslavia (ICTY).⁴⁷ That same decade, the United States and over 150 countries negotiated the Rome Statute, which established the International Criminal Court (ICC)⁴⁸ and incorporated the concept of "knew or . . . should have known" as the standard for command responsibility for war crimes.⁴⁹ The ICC prosecutor applied it recently against a commander whose men had murdered, raped, and pillaged during an operation in Central Africa.⁵⁰

Although the United States has not ratified AP I or the Rome Statute, it accepts the command-responsibility provision in AP I as reflective of CIL.⁵¹ Customary international law is consistent practice that states follow out of "a sense of legal obligation."⁵² According to CIL, then, commanders may be responsible for failing to prevent war crimes which they knew or had reason to know their subordinates would commit.⁵³



A panel of American judges convicted Field Marshal Wilhelm List for war crimes on a theory of command responsibility. (Credit: German Federal Archive)

Current U.S. Policy on Command Responsibility for War Crimes

The Uniform Code of Military Justice (UCMJ) does not expressly incorporate the international standard of "knew or should have known."⁵⁴ Nevertheless, a U.S. commander should still be mindful of it, for the standard is both germane to multinational

operations and fully incorporated into U.S. military policy, as explained below.

To start, the standard constitutes CIL⁵⁵ and is the rule by which many of our allies and partners judge their commanders' actions.⁵⁶ A U.S. commander in a coalition operation will want to keep in mind that partner-nation commanders may be judged



"The Americans are back in Courtroom 600." Waltraut Bayerlein, the Vice President of the Higher Regional Court of Nuremberg, noted the historic nature of the return of American Service members to the courtroom that hosted the Nuremberg Trials. Lieutenant Colonel Jeremy Steward, Staff Judge Advocate for 7th Army Training Command, presides as judge for the mock-court martial held in the storied room as part of an outreach to the local German community. (Credit: Staff Sergeant Ashley Low)

based on what they "should have known."⁵⁷ Furthermore, although not common, a foreign nation may attempt to exert criminal jurisdiction over a U.S. commander.⁵⁸ For example, during the 2003 invasion of Baghdad, Iraq, a U.S. armored tank crew, believing it was under attack from enemy inside a hotel, opened fire and damaged the building.⁵⁹ A Spanish journalist at the hotel was killed.⁶⁰ Although a U.S. military investigation determined that the tank crew's actions were justified, Spanish authorities charged two U.S. officers and an NCO with murder and issued arrest warrants.⁶¹ Spain did not drop the charges until 2008.⁶² The international "knew or should have known" standard would likely come into play in any foreign prosecution against a U.S. commander.⁶³

More importantly for American commanders, however, U.S. regulation and policy have fully embraced the "knew or should have known" standard for

command responsibility for subordinates' war crimes.⁶⁴ In its section on command responsibility for subordinates' war crimes, the 2015 *Department of Defense Law of War Manual* cites to the statute defining the liability of principals under military commissions.⁶⁵ That statute includes as a principal a commander who "knew, had reason to know, or should have known" of subordinates' punishable acts.⁶⁶ Likewise, paragraph 4-24 of the 2020 version of AR 600-20 provides, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish."⁶⁷ The "knew or should have known" standard is also found in Field Manual (FM) 6-27, *The Commander's Handbook on the Law of Land Warfare*, published in 2019.⁶⁸

While all three of these recently released policies require a commander to take steps to prevent war crimes by subordinates, they

differ in how they word the commander's duty.⁶⁹ The *DoD Law of War Manual* imposes on commanders a duty to "take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."⁷⁰ The term, "necessary and reasonable measures," was adapted from language in the 1956 Army publication, FM 27-10, *Law of Land Warfare*, and was carried over to its 2019 successor, FM 6-27.⁷¹ Army Regulation 600-20 employs a seemingly stricter standard for Army commanders, requiring them to take "all feasible measures within their power to prevent and suppress" LOAC violations on the part of their troops.⁷² Regardless, there is little practical difference between "all feasible measures," from AR 600-20, and "necessary and reasonable measures," from FM 6-27.⁷³

These policies instruct that commanders may be held accountable for not taking adequate measures to "prevent or repress" violations of the law of war.⁷⁴ Command-

ers are expected to act on what they *should have* known as they take these measures.⁷⁵ Commanders who fail to comply with their obligations with regard to the LOAC are at risk of an administrative reprimand or elimination.⁷⁶ Worse, failure to comply could serve as the basis for a court-martial for dereliction of duty.⁷⁷

The Commander's Affirmative Duties and the Legal Advisor's Role

Given that commanders may be held accountable for their omissions, a responsible commander must lead proactively.⁷⁸ In regard to subordinates' war crimes, AR 600-20 reminds commanders of their three *affirmative* obligations: prevent, stop, and punish.⁷⁹ These cornerstone duties are described in turn.

Prevent

As noted earlier, AR 600-20 requires commanders "to take all feasible measures within their power to prevent or repress breaches of the law of war"⁸⁰ The regulation states that preventive measures "include requirements to train . . . Soldiers on the law of land warfare, investigate suspected or alleged violations, report violations of the law of war, and take appropriate corrective actions when violations are substantiated."⁸¹ The components of prevention, i.e., to train, report, investigate, and take corrective action, are explored below.

Train

The DoD Law of War Program demands that all military units be trained periodically on the law of war.⁸² The Army has reinforced this directive in AR 350-1, *Army Training & Leader Development*, by imposing annual training requirements on units organized under a military table of organization and equipment (MTOE)—in other words, deployable, combat-ready units.⁸³ In addition to annual training, MTOE units must also be trained in the law of war prior to deployment.⁸⁴ The commander is responsible to ensure troops receive the training, but the instruction itself may be conducted only by a judge advocate (JA) or a paralegal NCO certified by a JA.⁸⁵ Additionally, the training must be specific to the unit's designated

missions or contingency plans and should be woven into field exercises.⁸⁶

Time to train is always in short supply, especially leading up to a deployment.⁸⁷ The command legal advisor must work diligently

(CCDR).⁸⁶ The duty to report does not depend on the status of the alleged violators; they could be American, coalition, enemy, or neutral.⁸⁷ Furthermore, the standard for determining whether an incident must be

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.¹⁰⁹

with the staff to ensure LOAC training be nested within the unit's annual or pre-deployment training plan.⁸⁸ The command legal advisor or NCO should deliver the training personally,⁸⁹ but the commander must continually reinforce LOAC precepts by emphasizing respect for noncombatants.⁹⁰

A cautionary example of a commander who failed to train his subordinates adequately is Colonel (COL) Thomas Pappas, who in 2003–04 commanded the 205th Military Intelligence Brigade, with responsibility over the Soldiers who engaged in atrocities at Abu Ghraib prison in Iraq.⁹¹ Soldiers in the brigade abused Iraqi prisoners, in violation of common Article 3 of the Geneva Conventions.⁹² Colonel Pappas received general-officer non-judicial punishment, in part because of his failure to train subordinates adequately in how to interrogate prisoners the correct way.⁹³ Commanders must learn from COL Pappas's example—it is easy to deprioritize LOAC training requirements when the operational tempo is high, but the consequences may be dire for failing to train.⁹⁴

Report and Investigate

Of course, when U.S. commanders learn of a suspected war crime, they have the duty to report up the chain of command or to an appropriate investigative body, such as the U.S. Army Criminal Investigation Division (CID).⁹⁵ What may surprise some commanders, however, is that they have a duty to report *any* alleged violation of the LOAC, not just allegations of serious violations, up the chain of command to the appropriate Combatant Commander

reported is *credible information*—although a commander must report the allegation even should it fail to clear that low bar.⁹⁸

A legal advisor may want to advise the commander to err on the side of overreporting. Failure to report an alleged LOAC violation for fear of the boss's disapproval could lead to far worse results.⁹⁹ For example, immediately after the My Lai massacre during the Vietnam War, the division commander and his assistant received information that a couple dozen noncombatants had been killed under suspicious circumstances.¹⁰⁰ Nonetheless, the officers chose not to investigate the killings thoroughly, and they violated theater policy by failing to relay the information to higher headquarters.¹⁰¹ Their failure to properly investigate and report the My Lai killings, which claimed far more than a couple dozen victims, has contributed to an enduring stain on the Army's reputation.¹⁰²

When commanders learn of a reportable incident, they must direct an investigation into the incident, unless already begun by higher headquarters or an investigative agency such as CID.¹⁰³ As with the duty to report, the duty to investigate should be complied with strictly.¹⁰⁴ Commanders should err on the side of investigating too much rather than too little.¹⁰⁵

Take Corrective Action

Commanders who learn that their troops have become undisciplined—e.g., dehumanizing the enemy or disregarding LOAC training—have a duty to correct that issue.¹⁰⁶ Commanders in this situation must reinforce subordinates' understanding of

the law of war, reeducate them on how to apply it, and employ sufficient checks on the troops' conduct.¹⁰⁷ The focus in corrective action is on preventing future LOAC violations.¹⁰⁸

Correcting troops' indiscipline at the lowest level, even while still in garrison prior to deployment, is essential to preventing a larger-scale breakdown in discipline that could lead to LOAC violations.¹⁰⁹ When subordinates have a history of violence, substance abuse, or other misconduct, it should put a commander on guard about their propensity for LOAC violations, giving rise to a legal duty to take corrective action.¹¹⁰

The war in Afghanistan provides an example of when a commander *should have known* conditions were ripe for war crimes.¹¹¹ A squad leader in the 2d Infantry Division, serving in Kandahar, told his men that all Afghans were "savages."¹¹² Soldiers in the platoon began to fantasize openly about ways to kill Afghan children and other civilians, and they reveled in "trophy" photos with their kills.¹¹³ The Soldiers' behavior remained uncorrected by platoon and company leadership, even when the Soldiers shot an unarmed Afghan teenager in an open field.¹¹⁴ The platoon conducted at least four unjustified shootings of Afghans before it was reined in.¹¹⁵ An engaged commander, immediately correcting lower-level misconduct, might have prevented most or all of these war crimes.¹¹⁶ Instead, the Soldiers' actions, left unchecked, caused inestimable damage to the war effort in the minds of U.S. allies.¹¹⁷

In contrast, engaged commanders promote a climate of respect for the law of war.¹¹⁸ General Barry McCaffrey, who commanded the 24th Infantry Division in Operation Desert Storm, refused to allow Soldiers to speak of Iraqis disrespectfully, such as by disparaging their ethnicity or religion.¹¹⁹ He knew that talking of the enemy as subhuman would lead to treating the enemy as subhuman.¹²⁰ General McCaffrey ordered that any Soldier suspected of a war crime immediately be placed in handcuffs and sent to the rear.¹²¹ General McCaffrey's respect for Iraqi soldiers contributed to their willingness to surrender rather than fight.¹²²

Correcting loose talk and wrongheaded attitudes requires engaged, involved leadership by commanders.¹²³ Commanders must promote open dialogue with Soldiers, allowing them a safe place to discuss their emotions, to keep unchecked fear from leading to indiscriminate killing as was experienced at My Lai.¹²⁴ Furthermore, commanders must cultivate a culture in which subordinates are open to asking for clarification on orders and are not afraid to give the boss bad news.¹²⁵ Commanders must constantly keep their finger on the pulse of the unit and mentor their subordinate officers and NCOs to do the same.¹²⁶

Stop

The classic example of a U.S. Service member who stopped a war crime, at least in part, is Warrant Officer (WO1) Hugh Thompson, the Army aviator who intervened to save at least ten unarmed Vietnamese civilians during the My Lai massacre.¹²⁷ Although he was not a commander, Thompson displayed the behavior prescribed by *The Commander's Handbook on the Law of Land Warfare*—he investigated when he suspected a war crime was being committed, he questioned superiors as necessary, and he acted to protect the innocent.¹²⁸ Flying low over the hamlet in a light observation helicopter, Thompson, his door gunner, and crew chief saw up to one hundred bodies stacked in a ditch. Some were still alive.¹²⁹ Thompson landed and asked a platoon leader if he was going to aid the wounded, but a tense exchange followed in which the platoon leader told Thompson to mind his own business.¹³⁰ Thompson lifted off but soon saw ten civilians in a makeshift bunker, with U.S. troops closing in.¹³¹ Thompson landed again, placing his helicopter between the Soldiers and the civilians.¹³² With his gunner training his weapon toward the Soldiers, Thompson coaxed the villagers from the shelter and escorted them onto two larger helicopters which had landed nearby.¹³³ He stopped again at the ditch and rescued a living child from the stack of bodies.¹³⁴

Commanders are expected to have the courage to stop LOAC violations as soon as they learn they may be occurring.¹³⁵ Even if it means placing oneself in harm's way, as WO1 Thompson did at My Lai, a com-

mander's duty is to protect both noncombatants and the overarching strategic mission by leading from the front and intervening to stop war crimes.¹³⁶

Punish

A commander's responsibility with regard to subordinates' war crimes does not terminate once prevention of a war crime is no longer possible.¹³⁷ Commanders have a duty to punish war crimes once they learn of them, with the goal of deterring future war crimes.¹³⁸

The duty to punish means taking appropriate steps to bring a perpetrator to justice, such as by preferring or forwarding court-martial charges as appropriate.¹³⁹ The inclusion of the duty to punish in AR 600-20 should not be interpreted to mean that commanders no longer have independent discretion to dispose of misconduct in their ranks, for that would constitute unlawful command influence.¹⁴⁰ Similarly, commanders will not violate AR 600-20 should the prosecution of an accused fail for matters beyond their control or should they deem non-judicial punishment or administrative action more appropriate.¹⁴¹

Conclusion

Meeting our Nation's obligations under the law of war does not come automatically—it requires leadership.¹⁴² In this era of increased focus on command responsibility for war crimes, legal advisors have an important role to play in helping their commanders prevent, stop, and punish such offenses.¹⁴³ Accordingly, legal advisors keep their commanders on the high road of command responsibility, where they can focus on their mission—to prepare Soldiers for combat and lead them in defense of our Nation.¹⁴⁴ **TAL**

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Notes

1. See Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 9 (1973) (quoting U.S. President Theodore Roosevelt).

2. See OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 18.23.3 (12

June 2015) (C2, 13 Dec. 2016) [hereinafter DoD LoW Manual].

3. *Id.*; U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE paras. 8-29 to -31 (7 Aug. 2019) (C1, 20 Sept. 2019) [hereinafter FM 6-27]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-24 (24 July 2020) [hereinafter AR 600-20].

4. JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 139-264 (1954).

5. *See, e.g., id.* at 259 (discussing the Far East Military Tribunal); Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs. Wilhelm List et al.* (Feb. 1948), reprinted in *THE LAW OF WAR* 1303-43 (Leon Friedman, ed., 1972).

6. *See Parks, supra* note 1, at 20.

7. Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility Under International Humanitarian Law*, 18 CHI. J. INT'L L. 553, 574-75, 587-88 (2018); Raffi Khatchadourian, *The Kill Company*, NEW YORKER (June 29, 2009), <https://www.newyorker.com/magazine/2009/07/06/the-kill-company>.

8. *See* Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, ARMY LAW., Sept.-Oct. 2018, at 23, 27; Christopher M. Rein, *Weaving the Tangled Web: Military Deception in Large-Scale Combat Operations*, MIL. L. REV., Sept.-Oct. 2018, at 10, 14.

9. *See* ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY 334-41 (2012) (discussing recent historical changes to the practice of the law of war).

10. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (24 July 2020).

11. *See id.* para. 4-24.

12. *Id.*

13. *See id.* Working for the Union Army, Francis Lieber coined the term "war crime" in 1865 while examining the archives of the Confederacy in search of material implicating rebel leaders in such a crime. He did not find evidence to support a prosecution. Jessica Laird & John Fabian Witt, *Inventing the War Crime: An Internal Theory*, 60 VA. J. INT'L L. 53, 89-90 (2019).

14. *See* War Crimes Act, 18 U.S.C. § 2441; DoD LoW MANUAL, *supra* note 2, § 18.9.5; GARY D. SOLIS, THE LAW OF ARMED CONFLICT 329, 335-37 (2d ed. 2016). U.S. Army Field Manual 27-10, published in 1956 and now inactive, considered any violation of the law of war to be a war crime. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (July 1956) [hereinafter FM 27-10]. In defining "war crime," the *Department of Defense Law of War Manual* gives three options: the all-encompassing definition from Field Manual 27-10, the definition of "war crime" as a serious violation of the law of armed conflict (LOAC), and a third definition of "war crime" as a serious violation of domestic law applicable during armed conflict. This article uses the second definition of "war crime" as a serious LOAC violation, as it is the interpretation favored by the directive framing the DoD Law of War Program and is the generally accepted approach in the twenty-first century. *See* U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM para. G.2 (2 July 2020) [hereinafter DoDD 2311.01]; Oona A. Hathaway et al., *What is a War Crime?* 44 YALE J. INT'L L. 53, 55 (2019). The *Department of Defense Law of War Manual*

recognizes the third definition as antiquated, yet states it may be helpful to categorize acts such as espionage and treason, which do not fit neatly into other formalizations of war crimes. DoD LoW MANUAL, *supra* note 2, § 18.9.5.

15. *See* DoD LoW MANUAL, *supra* note 2, § 18.9.5. This article uses the terms "law of war" and "LOAC" interchangeably.

16. *See* 18 U.S.C. § 2441(c); Hathaway et al., *supra* note 14, at 68. The War Crimes Act specifically includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as a source of war-crimes law. 18 U.S.C. § 2441(c)(4).

17. OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 2.1 (12 June 2015) (C2, 13 Dec. 2016).

18. *Id.* § 2.1.2. *See, e.g.,* the conviction at the Tokyo International Military Tribunal of Japanese service members for cannibalism, which international law had never prohibited explicitly. SOLIS, *supra* note 14, at 332.

19. *See id.* § 18.9.5.2.

20. *Id.* For example, the London Charter, which established the Nuremberg International Military Tribunal, defined war crimes as "violations of the law or customs of war. Such violations shall include, but not be limited to, murder . . . deportation to slave labour . . . killing of hostages, plunder of public or private property, wanton destruction of cities . . . or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1547, 82 U.N.T.S. 280.

21. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Hathaway et al., *supra* note 14, at 88. Another example is a medic wearing a red-cross armband on the right arm rather than the left. DoD LoW MANUAL, *supra* note 2, § 18.9.5.2.

22. SOLIS, *supra* note 14, at 329-30.

23. War Crimes Act, 18 U.S.C. § 2441.

24. *See id.* § 2441(d)(1), (3) (establishing liability for intentional acts yet not for causing collateral or incidental damage). "Individual acts may constitute war crimes, and intent is not indispensable to prosecution. . . . Reckless, as well as intent, is a sufficient prosecutorial basis." SOLIS, *supra* note 14, at 330.

25. U.S. CENT. COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS 3 (n.d.), <https://www3.centcom.mil/FOIALibrary/cases/16-0061/00.%20CENTCOM%20Summary%20Memo.pdf>.

26. *Id.* "The label 'war crimes' is typically reserved for intentional acts—intentionally targeting civilians or intentionally targeting protected objects." *See also* McCarthy, *supra* note 7, at 579.

27. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); SOLIS, *supra* note 14, at 329, 335-37. The Pictet factors and *Tadić* factors provide a guide to determine when violence rises to the level of armed conflict. *See* 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1952), https://www.loc.gov/tr/frd/Military_Law/pdf/GC_1949-I.pdf; *Tadić*, Case No.

IT-94-1-T, ¶¶ 561-62. Not every crime committed during an armed conflict is a war crime; however, it must have a nexus to the battlefield. "If, for instance, a civilian merely takes advantage of the general atmosphere of lawlessness created by the armed conflict to kill a hated neighbor or to steal his property without his acts being otherwise closely connected to the armed conflict, such conduct would not generally constitute a war crime." GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 42 (2005).

28. *See, e.g.,* APPLEMAN, *supra* note 4, at 139-264 (describing the tribunals following World War II).

29. *See* S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing a UN-sanctioned international tribunal to prosecute "genocide and other serious violations of international humanitarian law" in Rwanda).

30. *See* CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 3553 (Yves Sandoz eds., 1987) [hereinafter ICRC Commentary].

31. DoD LoW MANUAL, *supra* note 2, § 18.23.1-.2. *See* 10 U.S.C. § 877.

32. Raffi Khatchadourian, *The Kill Company*, NEW YORKER (June 29, 2009), <https://www.newyorker.com/magazine/2009/07/06/the-kill-company>.

33. *Id.*; *United States v. Girouard*, 70 M.J. 5, 8 (C.A.A.F. 2011). The panel was instructed on negligent homicide as a lesser included offense of premeditated murder, and Girouard was convicted of three specifications of negligent homicide. *Girouard*, 70 M.J. at 6, 8. On appeal, the conviction was reversed for negligent homicide not being a lesser included offense of premeditated murder under the elements test. *Id.* at 9-12.

34. DoD LoW MANUAL, *supra* note 2, § 18.23.3. Moreover, as the 2020 update to AR 600-20 states, "Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish." AR 600-20, *supra* note 3, para. 4-24.

35. Captain Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112-17 (1972).

36. *See* SOLIS, *supra* note 14, at 423; RYAN, *supra* note 9, at 340; LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW 203-04 (2002).

37. *In re Yamashita*, 327 U.S. 1, 5, 13-14 (1946).

38. Decision of the United States Military Commission at Manila (Dec. 7, 1945), reprinted in *THE LAW OF WAR*, *supra* note 5, at 1596-98. Yamashita's conviction was upheld by the U.S. Supreme Court, which confirmed that a commander is responsible under the law of war to control his subordinates. *Yamashita*, 327 U.S. at 15.

39. SOLIS, *supra* note 14, at 423.

40. Parks, *supra* note 1, at 22, 37-38.

41. SOLIS, *supra* note 14, at 423.

42. Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs. Wilhelm List et al.* (Feb. 1948), reprinted in *THE LAW OF WAR*, *supra* note 5, at 1303-43; 8 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 88-89 (1949); RYAN, *supra* note 9, at 304-07.

43. Opinion and Judgment of the United States Military Tribunal at Nuremberg in *United States vs.*

Wilhelm von Leeb et al. (Oct. 1948), reprinted in THE LAW OF WAR, *supra* note 5, at 1421–1470; 12 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 111–12 (1949); RYAN, *supra* note 9, at 308.

44. The “knew or should have known” standard is widely known as the *Yamashita* standard in international jurisprudence. See, e.g., Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 200 (2000). However, the standard took form at the subsequent Nuremberg trials. RYAN, *supra* note 9, at 302–08; Parks, *supra* note 1, at 87–89. One expert refers to the “knew or should have known” standard as the von Leeb–List standard. See SOLIS, *supra* note 14, at 425.

45. Parks, *supra* note 1, at 88; SOLIS, *supra* note 14, at 423.

46. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

47. See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

48. *The US-ICC Relationship*, INT'L CRIM. CT. PROJECT, <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/> (last visited Dec. 14, 2021). Although the United States has signed the Rome Statute, the U.S. Senate has not ratified it.

49. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

50. Prosecutor v. Gombo, ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, ¶¶ 29–30, 51–57 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF. Jean-Pierre Bemba Gombo, the leader of the Movement for the Liberation of the Congo and its military branch, was convicted of murder, rape, and pillaging committed by his subordinates from 2002 to 2003 in the Central African Republic. *Id.* ¶¶ 1–2, 752. The International Criminal Court Appeals Chamber held that the Trial Chamber had incorrectly determined that Bemba had failed to take “necessary and reasonable measures” while acting as a remote commander with a non-linear command structure. Prosecutor v. Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III’s Judgment pursuant to Article 74 of the Statute, ¶¶ 171, 173, 191–92 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. The Appeals Chamber overturned the conviction. *Id.*, Judgment.

51. Michael Matheson, Deputy Legal Advisor to U.S. Department of State, 6th Annual American Red Cross–Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, reported in 2 AM. UNIV. INT'L L. REV. 419, 428 (1987), reprinted in NAT'L SEC. L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 249–50 (2020).

52. Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 3 (1989).

53. “The obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War

II.” John W. Vessey Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 app. at 85 (May 3, 1985), noted in Brian Finucane, *U.S. Recognition of a Commander's Duty to Punish War Crimes*, 97 INT'L L. STUD. 995, 1006 (2021). See also Smidt, *supra* note 44, at 200, 213–15.

54. See Smidt, *supra* note 44, at 215–19; Major Trenton W. Powell, *Command Responsibility: How the International Criminal Court's Jean-Pierre Bemba Gombo Conviction Exposes the Uniform Code of Military Justice*, 225 MIL. L. REV. 837, 871–79 (2017); *Instructions from the Military Judge to the Court Members in United States vs. Captain Ernest Medina*, reprinted in THE LAW OF WAR, *supra* note 5, at 1732.

55. Matheson, *supra* note 51.

56. See AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a). Most North Atlantic Treaty Organization members, for example, have ratified AP I and the Rome Statute. INT'L COMM. OF THE RED CROSS, TREATIES, STATES PARTIES AND COMMENTARIES, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=47 (last visited Jan. 13, 2022); *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 13, 2022).

57. See AP I, *supra* note 46, arts. 86–87; Rome Statute, *supra* note 49, art. 28(a).

58. *Spain Drops US Army Murder Case*, BBC NEWS (May 13, 2008, 5:05 PM), <http://news.bbc.co.uk/2/hi/europe/7398973.stm>.

59. *Id.*

60. *Id.*

61. *Id.*

62. See *id.*

63. Smidt, *supra* note 44, at 215. The American Servicemembers' Protection Act prohibits transferring or extraditing U.S. persons for prosecution by the International Criminal Court, but it does not and cannot foreclose prosecution by a court of a foreign nation. See 22 U.S.C. § 7423. See also SOLIS, *supra* note 14, at 330 (discussing a 2008 Italian criminal case against a U.S. Soldier stemming from a fatal shooting of an Italian officer at a checkpoint in Iraq).

64. See DoD LoW MANUAL, *supra* note 2, § 18.23.3.2 n.340; AR 600-20, *supra* note 3, para. 4-24.

65. DoD LoW MANUAL, *supra* note 2, § 18.23.3.2 n.340 (citing Military Commissions Act § 8, 10 U.S.C. § 950q (2009)).

66. 10 U.S.C. § 950q.

67. AR 600-20, *supra* note 3, para. 4-24.

68. FM 6-27, *supra* note 3, para. 8-31.

69. See DoD LoW MANUAL, *supra* note 2, § 18.23.3; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31.

70. DoD LoW MANUAL, *supra* note 2, § 18.23.3. For liability to attach, there must be “personal neglect amounting to a wanton, immoral disregard of the action of [the commander's] subordinates amounting to acquiescence in the crimes.” *Id.* § 18.23.3.2.

71. See FM 27-10, *supra* note 14, para. 501 (requiring “necessary and reasonable steps”); FM 6-27, *supra* note 3, para. 8-31. The term is also reflected in the Rome

Statute for the International Criminal Court. Rome Statute, *supra* note 49, art. 28(a)(ii).

72. AR 600-20, *supra* note 3, para. 4-24.

73. See sources cited *supra* note 69. The *Department of Defense Law of War Manual* uses “feasible” and “reasonable” without distinction. DoD LoW MANUAL, *supra* note 2, § 5.2.3.1. But see JAMES E. BAKER, THE CENTAUR'S DILEMMA 245 (2021) (holding “all feasible measures within their power,” from AP I, to be a higher standard than “reasonable measures,” as found in the Rome Statute).

74. Sources cited *supra* note 69. The standards expressed by these sources may be higher than those found in the UCMJ. See DoD LoW MANUAL, *supra* note 2, § 18.7.

75. DoD LoW MANUAL, *supra* note 2, § 18.23.3.2; AR 600-20, *supra* note 3, para. 4-24; FM 6-27, *supra* note 3, para. 8-31. The duty to “prevent or repress” violations under the “knew or should have known” standard carries with it a duty to investigate. See DoD LoW MANUAL, *supra* note 2, § 18.4.3.

76. See AR 600-20, *supra* note 3, para. 4-6a; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-2 (8 February 2020). For example, Colonel (COL) Michael Steele, commander of 3d Brigade, 101st Airborne Division (Air Assault), received an administrative reprimand for his response to the war crimes in Operation IRON TRIANGLE. Paul von Zielbauer, *Army Says Improper Orders by Colonel Led to 4 Deaths*, N.Y. TIMES (Jan. 21, 2007), <https://www.nytimes.com/2007/01/21/world/middleeast/21abuse.html>. Colonel Steele reportedly received the reprimand for failure to report Iraqi deaths and “other details of the raid.”

77. DoD LoW MANUAL, *supra* note 2, § 18.23.3.1. “A duty may be imposed by treaty, statute, regulation, lawful order” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 18c(3)(a) (2019) [hereinafter MCM]. See Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 401–13 (2006–2007) (advocating for a new article to the Uniform Code of Military Justice to address command responsibility for war crimes).

78. See Smidt, *supra* note 44, at 197. “Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control.” FM 6-27, *supra* note 3, para. 8-29.

79. AR 600-20, *supra* note 3, para. 4-24 (codifying the three-part duty to prevent, stop, and punish war crimes helps the United States comply with its obligations under customary international law). See AP I, *supra* note 46, art. 87; Matheson, *supra* note 51.

80. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-24 (24 July 2020).

81. *Id.*

82. DoDD 2311.01, *supra* note 14, para. 2.7.b. All training must be consistent with the *Department of Defense Law of War Manual*. *Id.* para. 2.7.b.(2).

83. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl.F-2 (10 Dec. 2017) [hereinafter AR 350-1]. See *History of Tables of Distribution and Allowances (TDA) Units*, U.S. ARMY CTR. OF MIL. HIST. (May 30, 1995), <https://history.army.mil/html/forestruc/tda-ip.html>.

84. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT tbl.F-2 (10 Dec. 2017) (Law of War/Detainee Operations Training).
85. *Id.*
86. *Id.*
87. See U.S. DEP'T OF DEF., INSTR. 1322.32, PRE-DEPLOYMENT TRAINING AND THEATER-ENTRY REQUIREMENTS para. 4.1.a (10 June 2020) (C1, 25 Aug. 2021).
88. See U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS paras. 3-24, 4-42, 4-47 (8 June 2020) [hereinafter FM 1-04].
89. *Id.*; AR 350-1, *supra* note 83, tbl.F-2 (Law of War/Detainee Operations Training).
90. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, MIL. L. REV., May-June 2009, at 17, 19.
91. *Abu Ghraib US Colonel Reprimanded*, BBC NEWS (May 12, 2005, 4:59 AM), <http://news.bbc.co.uk/2/hi/americas/4539033.stm>.
92. *Id.* See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.
93. *Abu Ghraib US Colonel Reprimanded*, BBC NEWS (May 12, 2005, 4:59 AM), <http://news.bbc.co.uk/2/hi/americas/4539033.stm>.
94. See *id.*; Rielly, *supra* note 90, at 19.
95. U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM para. 4.2 (2 July 2020).
96. *Id.* paras. 4.2, G.2. (defining "reportable incident").
97. *Id.* para. 4.2.b.
98. *Id.* para. 4.2.c.
99. See SEYMOUR M. HERSH, COVER-UP 256, 265-68 (1972) (discussing the consequences faced by the division and brigade commanders for covering up the My Lai massacre).
100. 1 LIEUTENANT GENERAL WILLIAM R. PEERS, U.S. ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 10-5, 10-12 to 10-16, 10-40 to 10-41, 11-12 (1974) [hereinafter peers inquiry].
101. *Id.*; HERSH, *supra* note 99, at 206-11.
102. See W.R. PEERS, THE MY LAI INQUIRY, at xi-xii (1979); MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 23, 185 (1992). The death toll comprised at least 347 noncombatants—mostly women, children, and old men. *Id.* at 92-93.
103. DoDD 2311.01, *supra* note 14, para. 4.2.a.
104. See DoD LoW MANUAL, *supra* note 2, § 18.4.3. Thorough investigation allows a commander to fulfill duties imposed by the "knew or should have known" standard of command responsibility. See Parks, *supra* note 1, at 90.
105. See MCM, *supra* note 77, R.C.M. 303 ("[T]he immediate commander shall make . . . a preliminary inquiry . . .").
106. AR 600-20, *supra* note 3, para. 4-24; Rielly, *supra* note 90, at 19-20.
107. See DoD LoW MANUAL, *supra* note 2, § 18.4.2, 18.4.4.
108. Rielly, *supra* note 90, at 23.
109. See McCarthy, *supra* note 7, at 556. "An Army leader operates with clear expectations regarding conduct so that indiscipline does not jeopardize mission success." U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-94 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].
110. See McCarthy, *supra* note 7, at 564, 586-87 (citing Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).
111. See Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011, 2:00 AM), <https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/>.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. See McCarthy, *supra* note 7, at 556; ADP 6-22, *supra* note 109, para 1-94.
117. See Jim Frederick, *Anatomy of a War Crime: Behind the Enabling of the "Kill Team"*, TIME (Mar. 29, 2011), <https://world.time.com/2011/03/29/anatomy-of-a-war-crime-behind-the-enabling-of-the-kill-team/> (discussing "outrage" in Europe over the "Kill Team" story despite a lack of interest in it in the United States).
118. Barry R. McCaffrey, *Human Rights and the Commander*, JOINT FORCES Q., Autumn 1995, at 10, 10-11.
119. See *id.* at 12. "[I]f we train a unit to hate insurgents and kill them in combat, and the unit finds it increasingly difficult to distinguish the insurgents from the population, in the minds of the Soldiers, the population may soon become the hated enemy and thus victims of unlawful conduct." Rielly, *supra* note 90, at 20.
120. Barry R. McCaffrey, *Human Rights and the Commander*, JOINT FORCES Q., Autumn 1995, at 10, 12.
121. *Id.*
122. *Id.*
123. *Id.* at 12-13. Leaders at all levels must also police their own speech. Even offhand remarks in jest, such as, "The only good prisoner is a dead one," may be overheard and misinterpreted by Soldiers, leading to a climate of disregard for the Law of Armed Conflict. See Parks, *supra* note 1, at 78-80.
124. Lieutenant Colonel Robert Rielly, *The Inclination for War Crimes*, MIL. L. REV., May-June 2009, at 17, 21.
125. *Id.* at 22. These problems contributed to the My Lai massacre and the failure of investigation afterward.
126. *Id.* at 22-23. "[A] moral, ethical command climate . . . is the single most important factor in preventing civilian casualties . . . No substitute exists for ethical leadership manifested by the provision of training in garrison and throughout deployments." DEF. LEGAL POL'Y BD., U.S. DEP'T OF DEF., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 60 (2013).
127. BILTON & SIM, *supra* note 102, at 138-40.
128. See FM 6-27, *supra* note 3, paras. 8-2, -4, -7.
129. PEERS INQUIRY, *supra* note 100, at 10-9 to -10.
130. MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 23, 138 (1992).
131. *Id.*
132. *Id.* at 138-39.
133. *Id.* at 139.
134. *Id.* at 139-40.
135. Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 14 (1982); see ADP 6-22, *supra* note 109, para. 8-4 (Leaders and Courage).
136. See PEERS INQUIRY, *supra* note 100, at 10-8 to -11; DoD LoW MANUAL, *supra* note 2, § 18.2 (discussing the practical reasons for enforcing compliance with the Law of Armed Conflict).
137. See AR 600-20, *supra* note 3, para. 4-24 (listing the duty to "prevent" as just one of a commander's duties with regard to war crimes).
138. Deterrence is a key goal of punishment. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 16, 2001).
139. MCM, *supra* note 77, R.C.M. 306 (initial disposition); Parks, *supra* note 1, at 80-81.
140. See MCM, *supra* note 77, R.C.M. 306(a); 10 U.S.C. § 37(a) (command influence). International law imposes no duty to punish certain offenses a particular way. FM 6-27, *supra* note 3, para. 8-5.
141. See MCM, *supra* note 77, R.C.M. 306. If a commander took unreasonably light action against an alleged war criminal, that could constitute a violation of the commander's duty to punish. Parks, *supra* note 1, at 80-81.
142. U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE paras. 8-1 (7 Aug. 2019) (C1, 20 Sept. 2019).
143. *Id.* para. 8-7. See AR 600-20, *supra* note 3, para. 4-24 (added to AR 600-20 in 2020).
144. See Chief of Staff, U.S. Army, & Sec'y of Army, The Army Vision (n.d.), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf. Enforcing compliance with the law of war enables mission accomplishment by enhancing troop discipline, setting an example for reciprocal compliance by opposing forces, and establishing a framework for perceived legitimacy by host-nation, allied, and U.S. populations. DoD LoW MANUAL, *supra* note 2, § 18.2.

