

ABU GHARIB INCIDENT AND PROSECUTING WAR CRIMES IN AMERICAN LAW*

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SUMMARY

This article explains how the American service-members accused of committing war crimes in Abu Ghraib prison were prosecuted and discusses the various offenses that were charged as war crimes. The facts in this article are loosely based on an Army investigation into abuses allegedly committed by American service-members and civilians against Iraqi detainees at the Abu Ghraib prison in Iraq. During the course of investigation, the investigators detailed forty-four alleged instances of detainee abuse ranging from murdering and raping to humiliating and photographing detainees. During the investigation into these matters, several service-members made credible statements that the highest levels of command had given them both implicit and explicit orders to mistreat detainees. Several of the soldiers charged with mistreating prisoners at Abu Ghraib stated that they were only following orders.

Trying U.S. service-members with war crimes under violations of treaties is uncharted territory. A prosecutor could charge the service-members with a violation of international law prohibiting law of war violations, effectively treating him as a war criminal. Doing so would be an open admission that an American service-member has violated international law. The decision to prosecute an American service-member with violations of the law of war by assimilating federal law is rife with political repercussions. Each of these offenses was charged under the Manual for Courts-Martial.

KEY WORDS Abu Ghraib incident, prosecuting war crimes in American Law, rape, failure to obey a lawful order or regulation, conspiracy, dereliction of duty, cruelty, maltreatment, torture, defenses.

* The views expressed in this article reflect the views of the author, and do not necessarily reflect the views of the Turkish Armed Forces, which do not advocate specific policy positions.

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ÖZET

Makalede Ebu Gureyp cezaevinde meydana gelen olaylar ve cezaevindeki tutsaklara karşı savaş suçu işledikleri iddia edilen Amerikalı sivil ve askeri yetkilileri hakkındaki soruşturmanın nasıl yapıldığı açıklanmıştır. Makalede ele alınan olaylar Amerikan ordusunca yapılan soruşturma sonucunda düzenlenen raporda açıkça yer almış olup, söz konusu raporda Ebu Gureyp cezaevindeki Iraklı tutsaklara karşı sistematik olarak; cinayetten ırza geçmeye ve aşağılayıcı muameleden tutsakların fotoğraflarının çekilmesine kadar, toplam kırk dört ayrı kötü muamelenin tespit edildiği belirtilmiştir. İlginçtir, soruşturmada ifadesine başvuru faillerin çoğunluğu amirlerinin kendilerine tutsaklara kötü davranılmasını açıkça veya zımnen emrettiklerini, kendilerinin de sadece verilen emirlere uyduklarını beyan etmişlerdir.

Her ne kadar Ebu Gureyp cezaevinde Amerikalı yetkililerinin savaş suçu işledikleri açıkça görülmekteyse de, sanıklar sadece Amerikan Askeri Ceza Yasasına aykırı eylemleri sebebiyle yargılanmışlardır. Amerikalı yetkililerinin savaş suçlarından dolayı yargılanmasının birçok politik sorunu da beraberinde getirdiği düşüncesiyle, savaş suçu işledikleri iddiasıyla yargılanmamışlardır. Buradaki en büyük çekince; savaş suçundan dolayı Amerikalı askerlerin yargılanmasının, Amerikanın uluslararası hukuku ihlal ettiğinin kabulü anlamına geleceği olmuştur.

ANAHTAR KELİMELER

Ebu Gureyp olayı, Amerikan hukukunda savaş suçlarının soruşturulması, tecavüz, emre itaatsizlikte ısrar, komplo, görevi kötüye kullanma ve ihmâl, eziyet, kötü muamele, işkence, savunmalar.

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I. Introduction

There are several definitions of “war crimes” in American Law.¹ The term “war crime” is the technical expression for a violation of the law of war by any person, military or civilian.² Every violation of the law of war is a war crime. The law of war is “[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.”³

This article explains how the American service-members accused of committing war crimes in Abu Ghraib prison in Iraq were prosecuted. In this article, the author will discuss the Abu Ghraib incidents involving soldiers who commit several acts of misconduct while deployed. Although the individuals higher in the chain of command may be held criminally liable for acts committed by subordinates, this article will not discuss the issue of command responsibility.⁴ The prosecution began with offenses enumerated in the Uniform Code of Military Justice.⁵ As discussed below, the enumerated offenses were properly applied to a broad spectrum of misconduct. Due to the nature of the misconduct, it is possible to prosecute the service-members with violation of war crimes by assimilating federal law in addition to the enumerated offenses. This article discusses the various offenses that were charged as war crimes.

II. Abu Ghraib Incident

The United States was engaged in armed conflict within the borders of Iraq in 2003. Thousands of civilian and military detainees were collected as a result of coalition operations. Most of the detainees were interrogated.

¹ See e.g. U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 499 (July 1956) [hereinafter FM 27-10].

² 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 the law of war.

³ See also U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD Law of War Program para. 3.1 (9 Dec. 1998) [hereinafter DOD DIR 5100.77].

⁴ See Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL L. 155 (2000) (discussing command responsibility).

⁵ UNIFORM CODE OF MILITARY JUSTICE, UNITED STATES (2002) [hereinafter UCMJ].

During the course of these interrogations, several of the American service-members slapped and hit several of the detainees. On some occasions, senior officers struck the detainees in the temple with closed fist hard enough to knock the detainees unconscious. On other occasions, detainees who were falling asleep during an extended interrogation were slapped. Several of the interrogators applied various methods to effectively break down detainees' resistance to questioning, among them were sleep deprivation as a form of punishment for violating camp rules and for refusing to answer questions.⁶

On several occasions, dog handlers abused detainees. Several subordinate soldiers were instructed to strip several detainees naked. The investigation into these incidents revealed that several American service-members were instructed to take photographs. Perhaps the most egregious offenses committed by American service-members were their involvement in several rapes. Several female detainees were raped while other service-members watched the hallway to make sure that their actions were not observed.⁷

During the investigation into these matters, several service-members made credible statements that the highest levels of command had given them both implicit and explicit orders to mistreat detainees. Several of the soldiers charged with mistreating prisoners at Abu Ghraib stated that they were only following orders. "An e-mail from the U.S. command in Baghdad," told a warrant officer "to order his interrogators to be tough on prisoners." This e-mail further stated that "[t]he gloves are coming off, gentlemen, regarding these detainees ... the command 'wants the detainees broken.'"⁸

⁶ The facts in this article are loosely based on an Army Regulation (AR) 15-6 investigation into abuses allegedly committed by American service-members 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 (44) alleged instances of detainee abuse ranging from murdering and raping to humiliating and photographing detainees. See ARMY REGULATION 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (U) [hereinafter FAY REPORT].

⁷ *Id.* at 68.

⁸ See *8 years for Abu Ghraib soldier*, Associated Press, October 21, 2004, at <http://www.cnn.com/2004/WORLD/meast/10/21/iraq/abuse/index.html> (last visited Feb. 6, 2005).

III. Prosecuting War Crimes in American Law

A. Enumerated Offenses

Due to the preemption doctrine, the prosecutors first analyzed how to charge the service-members and looked for any offenses specifically enumerated in the Uniform Code of Military Justice Articles 80 through 132. The preemption doctrine “prohibits application of Article 134 to conduct covered in Articles 80 through 132.”⁹ In Abu Ghraib incident, several enumerated offenses are readily apparent.

The offences are discussed in order of severity based upon maximum punishment available under the Manual for Courts-Martial (MCM). 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. In Abu Ghraib incident, the offense of rape carries a potential life sentence and can probably be charged first.

1. Rape and Assault

Rape, assault, and all other traditional offenses should be charged under the article that best characterizes the offense rather than charged under Article 134. In the Abu Ghraib situation, a service-member was charged with violation of Article 120, Rape, and numerous violations of Article 128, Assault.

The Manual for Courts-Martial defines assault 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.”¹⁰ The elements of Article 128 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.” The assaults committed with an open fist will most likely satisfy the elements of assault. The act of striking the Iraqi 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.¹¹

⁹ UCMJ, *supra* note 5, pt. IV, 60c(5)(a) (2002).

¹⁰ *Id.* pt. IV, 54.a.

¹¹ *Id.* pt. IV, 54.c (3)(a).

Under these facts, the status of the victim as a superior commissioned officer in the enemy Army 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.”¹²

2. Failure to Obey a Lawful Order or Regulation

Although the abuse in the Abu Ghraib incident violates virtually all of the requirements of the Army Regulation (AR) dealing with treatment of prisoners of war, AR 190-8, paragraph 1-5(b)¹³, is not punitive, so the violations cannot be charged as disobeying a lawful general order.¹⁴ It is necessary to look for any local general orders or evidence that a senior individual gave the accused a lawful order not to commit the acts in question. Article 92(2) requires that the accused “must have had actual knowledge of the order or regulation,”¹⁵ although this can be “proved by circumstantial evidence.”¹⁶

A large focus of the Fay Report describes the uncertainty that soldiers and commanders had regarding the proper treatment of soldiers. 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.

3. Conspiracy

The accused may have conspired with another soldier to commit the offense(s).¹⁷ As the Abu Ghraib incidents illustrate, systemic problems can cause or at least allow several soldiers to commit offenses together. Several of the service-members appear to have conspired with other soldiers in several of their actions, including stripping detainees naked, depriving detainees of sleep, and mistreating the corpse of one of the detainees. Additionally, the Fay Report donates that several of them “entered into an

¹² *Id.*

¹³ 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].

¹⁴ MCM, *supra* note 5, pt. IV, 16.

¹⁵ *See* UCMJ, *supra* note 5, 16.c(2)(b).

¹⁶ *Id.*

¹⁷ *See* UCMJ, *supra* note 5, pt. IV, 5.b.

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agreement with” another service-member to assist him in the commission of rape by keeping watch to prevent the crime from being detected.¹⁸

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 (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. 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.”¹⁹ 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.²⁰

The service-members have 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.”²¹ It is possible to charge the underlying offenses separately from the conspiracy, since the accused can be found guilty of both.²²

4. Dereliction of Duty

Dereliction of duty is another specifically enumerated offense that applies to the Abu Ghraib incident. This offense applies to a broad range of conduct.²³ Article 92 of the Uniform Code for Military Justice lists three separate types of dereliction of duty. Dereliction may be “[t]hrough neglect or culpable inefficiency” or the dereliction may be “willful”.²⁴ For willful

¹⁸ See FAY REPORT, *supra* note 6, at 68.

¹⁹ *Id.* pt. IV, ¶ 5.a.

²⁰ *Id.* pt. IV, ¶ 5.c.(8).

²¹ *Id.*

²² *Id.*

²³ See TJAGSA Practice Notes: *Criminal Law Notes*, 1990 ARMY LAW. 41, 42 (1990) (stating that the potential sources of the duty that can serve as the basis for a conviction under article 92(3) are almost boundless).

²⁴ UCMJ, *supra* note 5, pt. IV, ¶ 16.f.(3)(A)(B)).

dereliction, the accused must have actual knowledge of the duty.²⁵ “A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.”²⁶

The duty to treat prisoners properly may be found in a number of sources. Field Manual 27-10, The Law of Land Warfare, describes the duty for service-members to treat prisoners of war properly. “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.”²⁷ Additionally, FM 27-10, para. 90 states that “(p)risoners 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.”²⁸ In Abu Ghraib incident, 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.”²⁹ The Fay Report also cites Army Regulation 190-8, Paragraph 1-5(b), which prohibits cruel and degrading treatment.

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. 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.”³⁰ Therefore, they could be charged with dereliction of duty for failing to safeguard the detainees from the dog handlers and the dogs.

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.” Additionally, they could be charged with dereliction of duty for instructing the soldiers to remove detainees’

²⁵ United States v. Ferguson, 40 M.J. 823, 828 (1994).

²⁶ UCMJ, *supra* note 5, pt. IV, 16.c.(3)(A).

²⁷ See FM 27-10, *supra* note 1, para. 89.

²⁸ See also Smidt, *supra* note 4, at 185.

²⁹ See FAY REPORT, *supra* note 6, at 14.

³⁰ *Id.*, at 68.

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clothing. Although there are situations where a guard would have a legitimate purpose in removing a detainee's clothing, the facts of the Abu Ghraib incident indicate that the practice was improperly used as punishment.³¹ Therefore, the American service-members were derelict in failing to safeguard the detainees' well-being by instructing soldiers to remove the detainees' clothing. The American service-members had a duty to safeguard the prisoners.

Given the gravity of the offenses listed above, the maximum punishments for dereliction of duty are very low. Even for willful dereliction, the maximum sentence is "bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months."³² However, one of the benefits of a dereliction of duty charge is that the offense can be applied to a broad variety of offenses that would otherwise not be easily charged.³³

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."³⁴

5. Cruelty and Maltreatment

Additionally, the accused were charged with Cruelty and Maltreatment under Article 93 of the UCMJ. Article 93 applies to "cruelty toward, or oppression or maltreatment of, any person subject to his orders."³⁵ 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."³⁶

³¹ *Id.*

³² UCMJ, *supra* note 5, 16.e.(3)(B).

³³ *See, e.g.*, United States v. Bivins, 49 M.J. 328, 333 (noting that appellant had a duty "to not engage in underage drinking"). *See also Marine dismissed from corps in death of Iraqi inmate*, CNN.COM, November 11, 2004, at <http://edition.cnn.com/2004/LAW/11/11/prisoner.abuse.ap/> (last visited Jan. 15, 2006).

³⁴ *Id.*

³⁵ UCMJ, *supra* note 5, pt. IV, 17 (a).

³⁶ *Id.* pt. IV, 17.c (1).

The nature of the act of oppression or maltreatment is measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Many of the accused's acts committed against the detainees appear to meet the objective standard of maltreatment.

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.”³⁷ 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,³⁸ he is also required to follow orders from individuals from the armed force of the Detaining Power. 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.”³⁹ 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.⁴⁰

6. Principals (Article 77)

Article 77 of the Uniform Code of Military Justice eliminates the common law distinctions between the perpetrator,⁴¹ the “aider and abettor,”⁴² and “accessory before the fact,” making all of these individuals “principals.”⁴³ 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.”⁴⁴ The offense of

³⁷ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [hereinafter GC III], Chapter III, Art. 82.

³⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter GC IV], Chapter VII, Art. 99.

³⁹ *Id.*

⁴⁰ The first element of the offense is that the victim “was subject to the orders of the accused. See UCMJ, *supra* note 4, 17.b.(1). 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.

⁴¹ the one who actually commits the offense.

⁴² the one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime.

⁴³ UCMJ, *supra* note 4, pt. IV, 1b.(1).

⁴⁴ *Id.*

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wrongfully depriving detainees of sleep would most likely be charged as cruelty and maltreatment or dereliction of duty.⁴⁵

Of the service-members 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, 1 charge of dereliction of duty for failing to protect the detainees from maltreatment, 4 specifications for maltreatment, 4 specifications for assault, and 3 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). Despite the broad range and severity of his criminal acts, the prosecution did not charge Specialist Graner under clauses 1, 2, or 3 of Article 134.⁴⁶ “Prosecutors dropped two assault charges, one count of adultery, and one count of obstruction of justice on January 6, 2005. On January 14, 2005, a jury found Graner guilty of nine out of ten counts stemming from his abuse of prisoners at *Abu Ghraib* prison in Iraq.”⁴⁷

B. Conduct Unbecoming (Article 133)

The nature of the acts that fall under Article 133 are those which “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.”⁴⁸ Article 133, conduct unbecoming an officer and a gentleman⁴⁹ applies to certain acts performed by the accused that “under the circumstances ... constitute[s] conduct unbecoming an officer and gentleman.”⁵⁰ The broad definition of Article 133 allows for a huge array of misconduct to fall under it.

Article 133 is not subject to the preemption doctrine whereas Article 134 is.⁵¹ Every act that the accused committed in Abu Ghraib prison that

⁴⁵ *Id.*

⁴⁶ See *Preferred Charges Against Spc. Charles Graner*, May 14, 2004., at <http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html> (last visited Jan. 21, 2006).

⁴⁷ *Id.*

⁴⁸ UCMJ, *supra* note 4, ¶ 133.

⁴⁹ *Id.* 59.

⁵⁰ *Id.* 59b.

⁵¹ *Id.* 60.c.(5)(a)

seriously compromised his standing as an officer or his character as a gentleman and is punishable under Article 133. 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.⁵²

Although most of the abuses could properly be characterized as conduct unbecoming an officer, the accused cannot be punished for both the substantive offenses and the underlying misconduct.⁵³ Since most acts of misconduct committed by officers violate Article 133, courts have drawn strict requirements to prevent multiplication of charges. One disadvantage to charging under Article 133 is that the prosecutor has to prove that the misconduct caused the requisite dishonor to the officer. However, an advantage of charging under Article 133 is that a dismissal is authorized for an officer convicted of conduct unbecoming.⁵⁴ In the Abu Ghraib incident, if the accused 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 the accused, 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

C. The General Article

The Manual for Courts-Martial allows the government to prosecute service-members with violation of the General Article provided that the misconduct cannot be prosecuted under one of the enumerated offenses.⁵⁷

⁵² See also TJAGSA Practice Notes: Criminal Law Notes, 1990 ARMY LAW. 41, 80 (1990).

⁵³ 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. See *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) [hereinafter *United States v. Timberlake*].

⁵⁴ See UCMJ, *supra* note 4, 59.e. (noting 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). noting that the maximum punishment for dereliction through neglect or culpable inefficiency is "forfeiture of two-thirds pay per month for 3 months and confinement for 3 months."

⁵⁶ See *United States v. Timberlake*, *supra* note 51.

⁵⁷ See UCMJ, *supra* note 4, 60a.

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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 cover a class of offenses in a complete way. 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.⁶⁰

The incident in which several of the service-members took a photograph of the soldiers mistreating the detainee’s corpse can most likely be successfully charged under Clause 1, 2, or 3 of the General Article. Given the gravity of the other offenses allegedly committed by the accused, the prosecutor may choose not to enter into the uncertainty inherent in charging outside of the Uniform Code of Military Justice. The decision to charge the service-members was made to go within the boundaries of the UCMJ because the government knew the boundaries of those laws. Additionally, it is a practice to remain with something that the prosecutors understand, the judges understand, panel members will understand, and to prosecute in such a manner that defense will know the right and left limits of the law. It is also a practice not to reach beyond the Manual unless you need to. Otherwise you are on ground that hasn’t been tread or hasn’t been tread often. Despite the different types of misconduct committed at Abu Ghraib, prosecutors were able to cover the gravamen of the offenses without assimilating federal or state law.

A disadvantage of charging under Article 134 is that the Manual does not have model specifications or a list of well-established elements that

⁵⁸ *Id.*, pt. IV, 60c.(1).

⁵⁹ *Id.*, pt. IV, 60c(5)(a). *See also* U.S. v. Wright, 5 M.J. 106 (C.M.A. 1978).

⁶⁰ *See* U.S. v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

must be proven.⁶¹ Rather than attempting to prove that a specification is legally sufficient and that the elements have been established, it is preferable to charge under an enumerated offense. If an offense is properly charged under a model specification, there can be no valid motion to dismiss for failure to state an offense.

1. Clause 1

Most of the accused's misconduct is a violation of Clause 1 of Article 134, as long as their acts were "to the prejudice of good order and discipline in the armed forces."⁶² However, applying the preemption doctrine, these acts are punishable under other specifically enumerated charges, and cannot be charged under Clause 1.⁶³

Striking unarmed, unthreatening detainees under control was most likely prejudicial to "good order and discipline,"⁶⁴ and apparently could be charged under Clause 1. However, the act of striking these individuals is specifically enumerated under the offense of assault, and therefore cannot be charged under Article 134. 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."⁶⁵

2. Clause 2

Most of the accused's misconduct violates Clause 2 in that the acts were of a nature to be "likely to cause discredit upon the armed forces."⁶⁶ However, as with Clause 1, these acts constitute conduct that is punishable under specifically enumerated charges, so it cannot be charged under Clause

⁶¹ "[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 *U.S. v. Sell*, 31 U.S.C.M.A. 202, 206 (1953).

⁶² UCMJ, *supra* note 4, 60b(1) and (2).

⁶³ See *id.* pt. IV, 60c.(1) (noting that 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).

⁶⁴ *Id.* 60b(1), (2).

⁶⁵ See *Lewis v. United States*, 118 S.Ct. 1135 (1998).

⁶⁶ *Id.*

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2. For example, raping a detainee is clearly of a nature that is “likely to cause discredit upon the armed forces;”⁶⁷ however, the offense is specifically enumerated, and is therefore preempted by the Manual for Courts-Martial 120.

One advantage of charging under Article 134 Clause 1 or 2 is that the prosecutor can use service-discrediting evidence and evidence of prejudice to good order and discipline in the merits of the case rather than saving this information for sentencing. The evidence which would ordinarily be considered irrelevant and/or prejudicial is required to prove the element of discredit to the service. 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 cause discredit.

3. Clause 3

Some of the detainees abused by the American service-members were civilians. The rights of these individuals are described in Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁶⁹ Article 27 of this convention 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.”⁷⁰

Under the Constitution, “all treaties made...under the Authority of the United States, shall be the supreme Law of the Land.”⁷¹ Theoretically, service-members could assimilate the Protocols of the Geneva Conventions that the United States has ratified.⁷² It is, however, necessary that the service-member be put on fair notice that his conduct is illegal.⁷³

Clause 3 allows the prosecutor to prosecute a service-member under federal or state law that is not contained within the Manual for Courts-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ GC IV, *supra* note 36, art. 27.

⁷⁰ *See also* FAY REPORT, *supra* note 5, at 13.

⁷¹ U.S. CONST. art. VI, cl. 2.

⁷² *See* Geneva Conventions I - IV, Aug. 12, 1949 [hereinafter GC].

⁷³ *See* U.S. v. Vaughn, 58 M.J. 29, 31-32 (2003) (stating that federal law, state law, military case law, military custom and usage, and military regulations may give notice as required under the 5th Amendment).

Martial. 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

Although a reading of Article 134 by itself would allow a prosecutor to assimilate federal law to charge the accused’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.”⁷⁶ However, the Manual does not give further guidance on when an exception to the general rule may apply. Several federal laws adequately address the misconduct committed by the accused.

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).⁷⁷

Torture is defined “to include acts specifically intended to inflict severe physical or mental pain or suffering.”⁷⁸ Several of the acts committed by the accused would constitute torture under this definition. 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.⁷⁹

D. Defenses

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

⁷⁴ See UCMJ art. 134 (2002); United States v. French 27 CMR 245 (1959).

⁷⁵ MCM, *supra* note 4, ¶ 60b.

⁷⁶ UCMJ, *supra* note 4, R.C.M. 307(c)(2). See also Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 194 (2000).

⁷⁷ 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 Jan. 16, 2006).

⁷⁸ *Id.*

⁷⁹ Torture, 18 U.S.C. Section 2340A (1998).

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depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of automation. 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.⁸⁰

The Manual for Courts-Martial 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.”⁸¹ In the Abu Ghraib incident, 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 because it is a patently unlawful order.

IV. Conclusion

The enumerated offenses cover a broad array of misconduct. In the Abu Ghraib incident, the accused committed several separate offenses, almost all of which can be prosecuted under the enumerated offenses. The Manual for Courts-Martial 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.”⁸² A huge array of conduct may be prosecuted under the Manual for Courts-Martial’s enumerated offenses without using the General Article to assimilate federal or state law. Accordingly, all possibilities for prosecuting under the enumerated offenses should be considered before charging an unenumerated offense.

Victors against the foreign enemy traditionally prosecute war crimes.⁸³ Trying U.S. service-members with war crimes under violations of treaties is uncharted territory. As discussed previously, a prosecutor could charge the service-members with a violation of international law prohibiting law of war violations, effectively treating him as a war criminal. Doing so would be an open admission that an American service-member has violated international law. The decision to prosecute an American service-member

⁸⁰ See *United States v. Calley*, 22 U.S.C.M.A 534, 541-542 (1973).

⁸¹ MCM, *supra* note 4, R.C.M. 916(d).

⁸² UCMJ, *supra* note 4, R.C.M. 307(c)(2). See also Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 194 (2000).

⁸³ See *e.g.* *Ex Parte Quirin et al*, 63 S.Ct. 2 (1942) (citing that German soldiers, wearing uniforms and carrying explosives, landed from German submarines, buried their uniforms, and attempted to sabotage war facilities).

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with violations of the law of war by assimilating federal law is rife with political repercussions.

In My Lai, perhaps the most publicized American war crime, American soldiers killed between 150 and 400 noncombatant civilians, “[h]owever, there was only one conviction, that of Lieutenant Calley.”⁸⁴ First Lieutenant Calley was “convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age.”⁸⁵ Each of these offenses was charged under the Manual for Courts-Martial.⁸⁶

In subsequent armed conflicts, service-members have been prosecuted for a variety of offenses, however, none have charged American service-members with violations of war crimes. Otherwise it is an open admission that an American service-member has violated international law. Only in the rarest of circumstances would a prosecutor be advised to charge a war crime by assimilating federal laws governing the prosecution of violations of the laws of war.

⁸⁴ Smidt, *supra* note 6, at 191.

⁸⁵ United States v. Calley, 22 U.S.C.M.A. 534, 536 (1973).

⁸⁶ *Id.*