

Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War

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The alleged law of war violation in the previous article¹ is a great example to use to discuss reporting requirements. If it is, indeed, a violation of the law of war, does it have to be reported? What are the treaty and regulatory requirements? What is the intent of the law of war reporting requirements? And how are they applied in practice? How do administrative and criminal investigations impact or interact with reporting? Are they mutually exclusive or mutually reinforcing? What tools are available to the judge advocate at the brigade combat team level, or above, to assist in evaluating and accomplishing these requirements? Can we make the system more responsive to the needs of commanders and civilian leaders, at all levels? These questions, and many of their answers, have echoed through the years, as judge advocates have grappled with law of war reporting since the Vietnam era. More recently, reporting was a key issue in the Haditha case, where the battalion commander, Lieutenant Colonel (LtCol) Chessani, was charged with dereliction of duty for his failure to report the death of numerous civilians during a village clearance mission.² And the “Goldstone Report,” a report by the U.N. Special Rapporteur on alleged law of war violations during Operation Cast Lead, the Israeli incursion into Gaza last year, concluded that the Israeli investigation of allegations was inadequate.³ Adequate reporting and investigation of law of war violations is a policy requirement and a legal obligation, derived from binding law of war treaties, including the Geneva Conventions.

Legal and Regulatory Requirements

All four Geneva Conventions of 1949 establish the baseline for extensive investigation and reporting requirements for law of war violations. The Geneva Conventions require states to (1) establish “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”; (2) “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” (or hand over such persons for trial by another state party); and (3) “take measures necessary for the suppression of all acts contrary to the provisions of the present convention other than grave breaches.”⁴ These provisions include the so-called “prosecute or extradite” requirement, expressed in Latin as *aut dedere aut pedire*.⁵ The third provision established the requirement for corrective actions to address lesser violations of the law of war, to include criminal sanctions, administrative actions, or additional training.⁶ These Geneva Conventions requirements are the “cornerstone of the system used for the repression of breaches of the convention,”⁷ establishing the bedrock requirement to punish serious violations, mandating a “feedback loop” to suppress other violations, and clearly implying a need for reporting and investigation.

The other source for the legal obligation to report is derived from the treaty and case law on command responsibility.⁸ The requirement to ensure Soldiers act pursuant to the lawful orders of an equally responsible chain of command is built into the definition of lawful combatants, who, according to the Prisoner of War Convention, must be “commanded by a person responsible for his subordinates,” who are all charged with “conducting their operations in

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¹ Lieutenant Colonel Chris Jenks, *The Law and Policy Implications of “Baited Ambushes” Utilizing Enemy Dead and Wounded*, ARMY LAW., June 2010, at 92.

² Mark Walker, *Chessani Reserves Plea in Haditha Charges*, N. COUNTY TIMES, Nov. 16, 2007, available at http://www.nctimes.com/news/local/article_7bb042fa-81ca-52a9-81e5-8716b279ee87.html (“The crux of the case against Chessani is that he failed to accurately report and investigate a possible violation of war by Marines under his command.”).

³ Statement by Richard Goldstone on Behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict before the Human Rights Council, Human Rights Council 12th Session 5 (29 Sept. 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/OpeningStatement_GazaFFM_290909.doc (“The Mission is highly critical of the pusillanimous efforts by Israel to investigate alleged violations of international law . . .”). This was a somewhat unfair characterization of Israeli investigation and reporting efforts, as the Israeli Defense Forces have a reporting, administrative, and criminal investigation system that has engaged in extensive independent investigation of the conflict. See Israeli Ministry of Foreign Affairs, Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council (24 Sept. 2009), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm>.

⁴ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. All four Geneva Conventions have similar provisions.

⁵ COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 585 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY]; see also EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 108 (2008).

⁶ COMMENTARY, *supra* note 5, at 594 (“In the opinion of the International Committee, it covers everything which can be done by the State to avoid acts contrary to the Convention being committed or repeated.”).

⁷ *Id.* at 590.

⁸ See generally William Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

accordance with the laws and customs of war.”⁹ The responsibility of the commander is established explicitly by the provisions cited above, if he or she “orders to be committed” a crime.¹⁰ Responsibility of the commander as a principal is succeeded by responsibility as an accessory to law of war violations. As General A.P.V. Rogers, the former U.K. Judge Advocate General, put it, “There is a very fine distinction between complicity in war crimes committed by others on the one hand and an omission to act, which may itself amount to a war crime, on the other.”¹¹ The standard established in the *Yamashita* case, a case arising from Japanese atrocities committed in the Philippines at the end of World War II, was whether the commander “knew or should have known” about the alleged offenses.¹² Field Manual 27-10, *The Law of Land Warfare*, explicitly describes this theory of command responsibility:

The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.¹³

Whether the commander could be charged as a principal or an accessory to the crime, commanders may also be held responsible for dereliction of duty, under Article 92 of the Uniform Code of Military Justice (UCMJ), for a failure to adequately investigate. This theory was applied to LtCol Chessani in the Haditha investigation. As the Article 32 Investigating Officer (IO) noted:

In this case, LtCol Chessani failed to do his duty. He failed to thoroughly and accurately report and investigate a combat engagement that clearly needed scrutiny, particularly in light of the requirements of MCO 3300.4 [the service equivalent of directives discussed below]. He failed to

accurately report facts that he knew or should have known and inaccurately reported at least one critical fact he specifically knew (his claim to have “moved to the scene to conduct a command assessment of the events”) to his higher headquarters. I believe from my investigation that these acts constitute a violation of Article 92¹⁴

Current implementing regulations require the commander to report all “reportable incidents,” which are defined as “a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”¹⁵ Reports are to be transmitted through command channels “for ultimate transmission to appropriate U.S. agencies, allied governments, or other appropriate authorities.”¹⁶ The reporting requirements, though broad in scope, are intended to reflect several concepts embodied in the treaties and case law—the need to investigate, prosecute, or extradite individuals who have committed grave breaches; the need to take corrective action, or whatever measures are necessary to prevent other violations of the law of war; and the requirement for higher level commanders to know what is occurring in their area of operations so they can intervene to prevent further violations. Finally, the reporting requirements are intended to keep senior leadership informed of “serious incidents,” whether or not further criminal investigation is required.¹⁷

The operational reporting requirements are further elaborated in the Chairman of the Joint Chiefs of Staff Instruction. The current version of the Instruction, CJCSI 5810.01C (31 January 2007), contains little more than a repetition of the standards in the Department of Defense (DoD) Directive. It does, however, make it clear that dual reporting (in criminal investigation and command channels) is essential, so that initial reports are clearly communicated in command channels, while mechanisms are established to ensure these reports are also referred to the “appropriate military investigative authorities.”¹⁸ The upcoming revision

⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

¹⁰ *Id.* art. 146.

¹¹ GENERAL A.P.V. ROGERS, LAW ON THE BATTLEFIELD 196 (2004).

¹² *In re Yamashita*, 327 U.S. 1 (1946). *But see* Parks, *supra* note 8, at 87. Parks notes that “the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence,” rather than imputed knowledge. *Id.* at 31.

¹³ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976).

¹⁴ Memorandum, Investigating Officer, to Commander, U.S. Marine Corps Forces, Cent. Command, subject: Executive Summary of Pretrial Investigative Report in the Case of Lieutenant Colonel Jeffrey R. Chessani, USMC (10 July 2007) (on file with author).

¹⁵ U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DODD 2311.01E].

¹⁶ *Id.*

¹⁷ Violations of the law of war by enemy personnel against U.S. personnel or contractors should be reported through channels to the Department of the Army, which has Executive Agency for coordinating the investigation and prosecution of enemy personnel, through tribunals, extradition, or some other means. *Id.*

¹⁸ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter CJCSI 5810.01C].

of the instruction, CJCSI 5810.01D, which has recently cleared combatant command and service staffing, will shorten and clarify the existing instruction, requiring the National Joint Operations/Intelligence Center to consolidate and disseminate operational reports and add specific reference to the “Defense Incident Based Reporting System” and referral of serious crimes or grave breaches to major criminal investigative organizations (MCIO).¹⁹ Serious, or felony-level, crimes are under the investigative purview of MCIOs, like the Army Criminal Investigative Division (CID). By including these agencies in a dual-reporting role, it enables the command (after the initial report) to refer allegations of major crimes to the appropriate investigative agency without a concern about command influence, as subsequent criminal reports are made through appropriate CID and UCMJ reporting channels. In addition, the new instruction reiterates the need for reportable incidents to be reported through combatant command and military department chains of command, concurrently.²⁰ The DoD and Joint reporting instructions are further supplemented by combatant commander and service directives.

The U.S. Central Command (CENTCOM) has extensive guidance on and experience with law of war reporting, and CENTCOM regulations generally reflect the same attention to detail and compliance with the DoD Directive and CJCSI as other combatant commands.²¹ The CENTCOM Regulation, 27-1, dated March 2000, repeats the provisions of the regulatory guidance from higher headquarters. It also provides for over-inclusive reporting and preserves the dual-reporting concept of command (both combatant command and military department) and criminal investigative channels.²² The regulation emphasizes the need for thorough investigation and reporting of the results of investigation, through service and operational channels, and cautions commanders to ensure proper collection and preservation of evidence for possible subsequent prosecution. It refers to initial reports in operational channels, to be provided in the “OPREP-3” format dictated by the Joint Service Manual.²³ Subsequent CENTCOM guidance was issued in CENTCOM Fragmentary Order (FRAGO) 09-683, which “highlighted the need to reemphasize reporting requirements throughout the USCENTCOM AOR . . . to ensure senior leadership is

aware of potential high interest events.”²⁴ The FRAGO emphasizes the need to send immediate initial reports without delay “to ensure all information is available or correct and may be lacking in some level of detail”; it also requires follow-up reporting and that all formal and informal investigations be forwarded to the CENTCOM Staff Judge Advocate as soon as it is available.²⁵ The supplemental guidance in no way discourages parallel reporting, through service and criminal investigative channels, while emphasizing the command responsibility of the responsible combatant commander and subordinate commanders at all levels.

The Department of the Army (DA) reporting requirements for “reportable incidents” are embodied in Army Regulation (AR) 190-45, the “Law Enforcement Reporting” regulation. Paragraph 8-2b of the regulation categorizes “war crimes” as Category 1 “serious incidents,” to be reported in law enforcement reporting channels, with copies furnished to commanders and legal advisors, all the way up to the Headquarters, DA level.²⁶ The specific requirement of the AR is to report “[w]ar crimes, including mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons, or civilian internees; violations of the Geneva Conventions; and atrocities.”²⁷ The regulation is intended to be over-inclusive to provide a mechanism to keep higher headquarters informed of potentially serious incidents. As paragraph 8-1 explains:

Commanders should report any incident that might concern HQDA as a serious incident, regardless of whether it is specifically listed in paragraphs 8-2 and 8-3, below. In cases of doubt, report the incident. In determining whether an incident is of concern to HQDA, the following factors should be considered:

- (1) Severity of the incident.
- (2) Potential for adverse publicity.
- (3) Potential consequences of the incident.²⁸

Category 1 reports are to be transmitted by telephone, to be followed by a more detailed electronic message or e-mail report. The reporting formats are relatively straightforward, requiring “who, what, when, where” information, with

¹⁹ U.S. DEP’T OF DEF., DIR. 7730.74, DEFENSE INCIDENT-BASED REPORTING SYSTEM (15 Oct. 1996).

²⁰ See CJCSI 5810.01C, *supra* note 18, para. 7 (requiring units to submit the “initial report through the applicable operational command and Military Department”).

²¹ See, e.g., U.S. EUROPEAN COMMAND, DIR. 45-1, LAW OF WAR PROGRAM (7 Nov. 2006) [hereinafter USEC DIR. 45-1].

²² U.S. CENTRAL COMMAND, REG. 27-1, LAW OF WAR PROGRAM 3 (Mar. 2000) [hereinafter CENTCOM REG. 27-1].

²³ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, MANUAL 3150.03C, JOINT REPORTING STRUCTURE EVENT AND INCIDENT REPORTS (1 Feb. 2009).

²⁴ U.S. CENTRAL COMMAND, FRAGO 09-683, OPERATION IRAQI FREEDOM (4 Dec. 2004) [hereinafter CENTCOM FRAGO 09-683] (on file with author).

²⁵ *Id.*

²⁶ U.S. DEP’T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING (20 Mar. 2007) [hereinafter AR 190-45].

²⁷ *Id.* The term “war crimes” invokes the definition of war crimes from title 18, U.S. Code. War Crimes Act, 18 U.S.C. § 2441 (2006).

²⁸ *Id.*

whatever information is available at the time.²⁹ The idea is to provide an initial report with the information available, without waiting for all the facts or a preliminary adjudication of the facts to be completed.

What is a “Possible, Alleged, or Suspected Violation of the Law of War”?

The choice of an over-inclusive reporting standard was intentional. The reporting standard is intended to cause higher headquarters to react and provide the requisite amount of command attention to an allegation. As the IO in the Chessani Article 32 noted:

The program directive defines a reportable incident as a “possible, alleged, or suspected violation of the law of war.” Mr. Parks made the point [during his Article 32 testimony] that this low threshold is used specifically to generate reporting and investigation. This is due to the historical reluctance of organizations to look internally for wrongdoing in a combat environment [e.g., “my Marines don’t commit war crimes”], at least at the Battalion level. As he put it: “If it looks bad, report it.” In addition, the MCO [service directive] requires prompt reporting and thorough investigation of a reportable incident, to include directing that “on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents” Accordingly, I believe that the multiple deaths of civilians, including women and children in their homes, should have clearly hit the low threshold of this order. In other words, a reasonable and prudent commander should have made a sufficient inquiry to see if his Marines were following proper Rules of Engagement and Law of War during this engagement.

Reporting potential law of war violations may be counterintuitive to the company or battalion commander on the ground, but it reinforces command responsibility by addressing allegations with a “report and investigate” response that demonstrates the reporting commander and each successive commander in the chain of command is concerned about law of war compliance by his or her subordinates. When in doubt, report, particularly when the allegation involves grave breaches or serious crimes (like numerous civilian deaths or severe detainee abuse) that

²⁹ *Id.* fig.9-1.

could call into question the U.S. commitment to disciplined military operations and accountability for law of war violations. As the combatant command and service guidance indicates, higher headquarters should be sent real-time, though incomplete, reports, supplemented by follow-up reports as relevant information becomes available. This enables commanders at each level of command to provide the right amount of command and control to ensure military operations are conducted in a disciplined fashion, as their professional and treaty obligations demand.

Reporting, investigation, and accountability also demonstrate U.S. commitment to protecting the local populace in counterinsurgency operations. As the IO noted, again, in the *Chessani* case:

These actions display not only negligence with regard to those duties reasonably expected of a Battalion Commander in combat; they also belie a willful and callous disregard for the basic tenants [sic] of counterinsurgency operations and the need for popular support and legitimacy. A commander’s responsibility also includes setting the right command climate and matching commander’s intent to the operational environment. You cannot win popular support by killing over twice as many civilians as insurgents in one day’s engagement, and then attempting to lay the blame at the feet of that same population and their leaders, regardless of how corrupt you may perceive them. In LtCol Chessani’s own words, “he [the insurgents] wanted to make us look bad” and in this case the insurgents succeeded. To not recognize the potential for this event to reverberate far beyond the confines of Haditha is not to be in touch with the current nature of the conflict.

The current conflict in Afghanistan calls for a similar line of reasoning when reporting and investigating civilian deaths. As General McCrystal has made clear in his “Tactical Directive,” civilian deaths set back the allied cause and must be prevented, even at the cost of putting Soldiers at a tactical risk.³⁰ The strategic effect of failing to properly report and investigate law of war violations can be catastrophic for the mission.

³⁰ COMMANDER, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF), TACTICAL DIR. (6 July 2009) (“I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk whenever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level in our force.”).

But Is It a Credible Allegation?

A rule of reason should be applied to the reporting standard, however, and that is what is behind the addition of the “credibility” review to the reporting process. While the intent of the regulation and the implementing guidance is clearly over-inclusive, the addition of the term “credible” before “possible, alleged, or suspected violation” allows the commander and his judge advocate to sort the wheat from the chaff and only report “credible” allegations. But what is “credible”? Construing the reporting requirement too broadly will likely prompt superfluous reporting and jam the system; alternatively, construing the reporting requirement too narrowly runs the risk of excluding reports the spirit of the directives would otherwise include. There are several possible definitions of “credible information.” One suggestion would be to include information obtained by the commander that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead him to presume the fact or facts in question may be true or require further investigation. Another possible definition would include several factors.

Information, although incomplete, is deemed credible when considering the source and nature of the information and totality of the circumstances the information leads a prudent person to *suspect* [emphasis added] that a law of war violation may have occurred and investigate the allegation further. The severity of the alleged offense, the source of the information, and corroboration (if any) are all factors to consider in determining whether the allegation is credible. In case of doubt, the information must be presumed credible.

Each of these definitions, though not adopted or incorporated into the directive (to date), has several provisions in common: they require a preliminary review of the facts available, consideration of the “totality of the circumstances,” and application of a rule of reasonable suspicion to the reporting requirement. This approach is very similar to the criminal law concept which, under Military Rule of Evidence 314(f), authorizes further investigation of suspected criminal activity.³¹ Reasonable

³¹ The cite to this standard is not intended to propose the use of investigative detention in investigating allegations; the author merely proposes the standard of proof adopted in the classic *Terry* stop, by analogy. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302 discussion (2008) [hereinafter MCM]; see also 1 STEPHEN A. SALZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 3-375 (5th ed. 2006). While some would argue that the “credibility review” articulated above is closer to a “probable cause” standard, which, per RCM 302(c), authorizes the military equivalent of arrest or “apprehension,” adopting this standard would make the credibility review too high a standard for reporting and preliminary investigation.

suspicion exists if, after “reviewing the totality of the circumstances,” the commander has a “particularized and objective basis for suspecting illegal activity.”³²

The commander and his judge advocate have a number of tools available to conduct a “credibility review.” The most flexible is Rule for Court-Martial (RCM) 303. What is usually referred to as a “commander’s inquiry” consists of an informal preliminary review of “all reasonably available evidence” by the commander or his designee. In “serious or complex cases,” however, the commander should seek the assistance of law enforcement personnel (including the appropriate MCIO, or the CID for the Army).³³ Recommending the criminal investigation experts apply their skills to allegations of grave breaches or complex cases like Haditha is good advice, and immediate reporting and MCIO investigations should be the rule, rather than the exception, in such cases.

Another approach, often mandated by higher headquarters for civilian deaths or so-called “escalation of force” incidents at check-points,³⁴ is to conduct an informal administrative investigation, under provisions of AR 15-6 for the Army. The regulation allows for informal procedures to be used to gather additional information about an alleged incident. The appointing authority, usually a battalion commander or above, will appoint an uninvolved officer to conduct the inquiry and sort out the facts, making recommendations to the commander as to corrective action (in the case of lesser violations of the law of war), no further action, or further criminal investigation. The informal procedures allow for expedited evidence gathering and consideration of sworn statements and routine reports, rather than taking direct evidence.³⁵ While this approach provides

³² SALZBURG, SCHINASI & SCHLUETER, *supra* note 31, at 3-385 (“As the courts have recognized, the concept of reasonable suspicion is abstract, and not easily reduced to any sort of checklist or formula. In assessing reasonable suspicion . . . they may take into account their experience, training, reasonable inferences, and knowledge . . .”).

³³ MCM, *supra* note 31, R.C.M. 303.

³⁴ See, e.g., Robert F. Worth, *U.S. Military Braces for Flurry of Criminal Cases in Iraq*, N.Y. TIMES, July 9, 2006 (“In April, Lt. Gen. Peter W. Chiarelli, the No. 2 American commander in Iraq, issued an order that specified for the first time that American forces must investigate any use of force against Iraqis that resulted in death, injury or property damage greater than \$10,000.”); see also COMMANDER, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF), INITIAL ASSESSMENT, at E-3 (30 Aug. 2009) (“The fact that civilians were killed or property was damaged needs to be acknowledged and investigated, and measures must be taken for redress.”).

³⁵ U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS 13 (2 Oct. 2006). A detailed discussion of the conduct of AR 15-6 investigations is beyond the scope of this article, but judge advocates advising the investigating officer may, for example, be asked to provide advice on whether to give rights warnings, what criminal offenses may have been committed, and what appropriate adverse administrative actions to recommend. Additionally, a review by a judge advocate is usually required prior to action by the appointing authority. *Id.* at 7 (“The appointing authority will also seek legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative

additional operational flexibility and time for consideration of the facts, an administrative investigation should not be used as a tool to prevent timely reporting and referral to the appropriate law enforcement investigative agency. As the CENTCOM FRAGO notes, “timely reporting and [effective] investigation” of alleged or suspected violations are the goals of the law of war reporting directives.³⁶

What’s Next?

Initial reporting and investigation to determine credibility is only the beginning. Usually some follow-up reporting is required to complete the treaty obligations mentioned above. Presumably, in order for senior commanders to complete their obligations under a “command responsibility” theory, they need to follow up on allegations to take preventive measures, or prosecute, as appropriate.³⁷ Additionally, criminal law and the regulatory guidance permit various alternative dispositions for substantiated allegations, depending on the particular circumstance of each case, including who committed the alleged offenses, where they were committed, and against whom. The ultimate disposition of the most serious substantiated law of war violations would be to fulfill the “prosecute or extradite” requirements of the law of war treaties.

The CENTCOM requirements for law of war reporting have extensive follow-up requirements that are not required in the directives of higher headquarters. The combatant commander is charged with supervising his operational chain of command to ensure compliance with the law of war. This includes instituting programs to prevent violations, and periodic review of plans, policies, and directives (to include rules of engagement), “particularly in light of any violations reported.”³⁸ In order to accomplish this task, many combatant commanders and their service component commands have included a requirement to provide higher headquarters with follow-up reports and copies of final investigations.³⁹ While follow-up reporting is normally provided to services in law enforcement channels for

action (see para. 1-9), or will be relied upon in actions by higher headquarters.”).

³⁶ CENTCOM FRAGO 09-683, *supra* note 24.

³⁷ The commander and his judge advocate have to be careful to avoid “command influence,” the “mortal enemy of military justice,” in the charging and forwarding decision; however, this issue should not confuse or limit the commander’s ability to report and refer cases to criminal investigators. MCM, *supra* note 31, R.C.M. 306; *United States v. Griffin*, 41 M.J. 607 (C.A.A.F. 1994); *see also* UCMJ art. 37 (2008); MCM, *supra* note 31, R.C.M.s 104 & 401. Ironically, the *Chessani* case was the subject of a Government interlocutory appeal based on command influence issues. *See United States v. Chessani*, 2009 WL 690110 (N-M. Ct. Crim. App. 2009).

³⁸ DoDD 2311.01E, *supra* note 15, at 6.

³⁹ CENTCOM REG. 27-1, *supra* note 22, at 6.

substantiated allegations,⁴⁰ the follow-up of administrative investigations is essential to establish command responsibility and “take all measures necessary to suppress” lesser violations of the law of war, per the requirements of the Geneva Conventions.⁴¹ Whether or not criminal investigation or prosecution proceeds, the commander has an obligation under the law of war to follow up on substantiated law of war violations to ensure that appropriate measures—administrative sanctions, corrective actions, changes in doctrine or techniques, tactics and procedures, or training—are taken to make certain future military operations are conducted in a disciplined fashion.

Reports of suspected law of war violations by the enemy must be evaluated by the Executive Agent for such matters, the Secretary of the Army, who will propose (in coordination with the General Counsel of the Secretary of Defense, the State Department, and the Department of Justice (DoJ)) the appropriate mechanism for disposition of any war crimes prosecutions for enemy combatants.⁴² Recent examples of such a sorting process include the Iraqi War Crimes Documentation Center from the First Gulf War, which developed criminal cases against Saddam Hussein for his crimes against Kuwait;⁴³ the Regime Crimes Liaison Office of Operation Iraqi Freedom, which assisted the development of the Iraqi Special Tribunal that convicted Hussein and others;⁴⁴ the Central Criminal Court of Iraq, which prosecuted insurgents who directed their violence against coalition forces in Iraq;⁴⁵ and the Criminal Investigation Task Force, which investigated individuals subject to the Military Commissions Act.⁴⁶ Additionally, reports of alleged violations by allies are distributed to the combatant commanders, who are charged with determining the extent of further investigation and reporting, in coordination with “appropriate U.S. agencies, allied governments, or other appropriate authorities.”⁴⁷ The requirement to prosecute or extradite includes the obligation to prosecute for war crimes those individuals under control of the state and provide information to other states so they can exercise jurisdiction under their domestic law to that end.⁴⁸

⁴⁰ *See, e.g.*, AR 190-45, *supra* note 26, at 94.

⁴¹ COMMENTARY, *supra* note 5 and accompanying text.

⁴² DoDD 2311.01E, *supra* note 15, at 4.

⁴³ U.S. DEP’T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 623 (Apr. 1992).

⁴⁴ MICHAEL NEWTON & MICHAEL SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 60 (2008).

⁴⁵ COALITION PROVISIONAL AUTHORITY, ORDER 13 (Apr. 24, 2004), available at www.iraqcoalition.org/.../20040422_CPAORD_13_Revised_Amended.pdf (last visited Mar. 1, 2010).

⁴⁶ Eric Patterson, *CITF: Criminal Investigative Task Force—OSI*, BNET (Nov.–Dec. 2003), available at http://findarticles.com/p/articles/mi_m0PAJ/is_6_55/ai_112482127/.

⁴⁷ DoDD 2311.01E, *supra* note 15, at 7.

⁴⁸ LA HAYE, *supra* note 5, at 108.

Under U.S. law, both civilian and military authority exists to prosecute war crimes. For crimes committed on military installations and those committed off military installations that are normally subject to courts-martial, the military normally prosecutes as a matter of policy. The DoD and the DoJ have allocated responsibility for investigation and prosecution of war crimes committed by or against DoD personnel in a 1984 Memorandum of Understanding (MOU) between DoD and DoJ.⁴⁹ The MOU provides that DoD is responsible for investigating most crimes committed on a military installation or during military operations. When a crime is committed by a person subject to the UCMJ, the Military Department concerned will take the lead in prosecuting the offender; when the perpetrator is not subject to the UCMJ, DoJ is responsible for the prosecution.⁵⁰ The prosecution of Green (who had since been administratively eliminated from the service) for the rape of a young girl and the murder of her family members in Mahmudiyah provides a stark example of DoJ's authority to prosecute under these procedures.⁵¹ Coordination for DoJ prosecution should be done through service channels. Although the general court-martial convening authority (GCMCA) is empowered to coordinate such a prosecution at the lowest levels, the Criminal Law Division at OTJAG is available to assist in coordinating DoJ prosecutions, through the General Counsel of DoD.⁵²

Criminal prosecution under the UCMJ is ordinarily accomplished by charging a specific violation of the code, rather than a violation of the law of war, as a matter of practicality and policy.⁵³ Although the UCMJ provides the authority to prosecute "war crimes," per se, the code mentions no specific "law of war violation." However, that does not prevent military prosecutors and commanders from sanctioning such conduct. The UCMJ includes substantive criminal offenses that match the war crimes delineated in 18 U.S.C. § 2441 and the grave breaches enumerated in the Geneva Conventions, Common Article 3, and the Additional

Protocols.⁵⁴ Examples of substantive offenses that may be used to prosecute law of war violations include the following:

1. Art. 93 (10 U.S.C. § 893), Cruelty and Maltreatment;
2. Art. 103 (10 U.S.C. § 903), Captured or Abandoned Property;
3. Art. 109 (10 U.S.C. § 909), Waste, spoilage, or destruction of property other than military property of the United States;
4. Art. 118 (10 U.S.C. § 918), Murder;
5. Art. 120 (10 U.S.C. § 920), Sexual offenses;
6. Art. 121 (10 U.S.C. § 921), Larceny;
7. Art. 122 (10 U.S.C. § 922), Robbery;
8. Art. 128 (10 U.S.C. § 928), Assault; or
9. Art. 92 (10 U.S.C. § 892), Failure to Obey a Lawful Order or Regulation; Dereliction of Duty

Moreover, the examples of these sanctions applied to law of war violations by U.S. servicemembers are legion. The most notorious war crimes prosecution since World War II was the "My Lai massacre" prosecution of William Calley.⁵⁵ The *Chessani* case, discussed above, was only one of the Haditha prosecutions that originally included a "dereliction of duty charge" against the battalion legal advisor.⁵⁶ Additionally, numerous prosecutions for crimes arising from law of war violations have been pursued since the Iraq War began in 2003. Soldiers have been convicted of killing an Iraqi detainee after he had been bound and blindfolded,⁵⁷ and the perpetrators of the abuse in Abu Ghraib prison were prosecuted for their transgressions.⁵⁸ More recently, an Army sniper was convicted of killing an Iraqi civilian who stumbled into his position at night, and he was sentenced to ten years in prison.⁵⁹ This anecdotal evidence, which is backed up by numerous cases prosecuted in military courts, shows the efficacy of military prosecutions for law of war violations. The UCMJ manifests the U.S. commitment to the law of war and good order and discipline by providing an

⁴⁹ See U.S. DEP'T OF DEF., DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985); see also MCM, *supra* note 31, app. 3.

⁵⁰ MCM, *supra* note 31, at A3-2. Prosecution of contract employees of the Department of Defense accompanying the force "in time of declared war or contingency operation" is subject to the same approach (of primary DoJ jurisdiction), despite the amendment to Article 2(a)(10) of the UCMJ, per agreement with DoJ. Department of Justice prosecution for serious crimes may be pursued under the War Crimes Act. 18 U.S.C. § 2441 (2006).

⁵¹ For a complete discussion of this incident and the subsequent investigation, see JIM FREDERICK, BLACK HEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH (2010). See also Andrew Wolfson, *Ex-Soldier Convicted of Killing Iraqis*, LOUISVILLE COURIER-J., May 8, 2009, at A1.

⁵² U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 2-2; FM 27-10, *supra* note 13.

⁵³ See MCM, *supra* note 31; *id.* R.C.M. 307(c)(2) discussion.

⁵⁴ For example, "murder of a protected person" under 18 U.S.C. § 2441, which is a grave breach of each law of war treaty, would be charged as "murder" under Article 118, UCMJ. UCMJ art. 118 (2008).

⁵⁵ United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

⁵⁶ Mark Walker, *Stone Case May Set Tone for Haditha Prosecutions*, N. COUNTY TIMES, May 6, 2007. All, but the squad leader, Staff Sergeant Wuterich have had their cases dismissed, however. Mark Walker, *Court Upholds Dismissal of Haditha Prosecution*, N. COUNTY TIMES, Mar. 17, 2009.

⁵⁷ Steve Liewer, *1st ID Soldier Gets Seven Years in Killing of Iraqi Detainee During Interrogation*, STARS & STRIPES, May 20, 2005, at 3.

⁵⁸ John Gonzalez, *Prosecutions Wind Down at Fort Hood*, HOUS. CHRON. Apr. 4, 2005, at 1.

⁵⁹ *10 Years for Army Sniper for Killing Iraqi Civilian*, AP, Feb. 10, 2008, available at <http://www.msnbc.msn.com/id/23086927>.

established and effective mechanism to prosecute crimes that constitute violations of the law of war.

Conclusion

Several tools, and voluminous directives, can assist commanders and their judge advocates sort out possible, alleged, or suspected law of war violations, but the issue really boils down to judgment and the question every staff officer asks in determining information flow: “Who else needs to know?” The next level commander needs to know to fulfill his obligation, as the responsible commander, to prevent law of war violations from occurring. The MCIO needs to know about serious crimes or grave breaches to fulfill their investigative responsibility and to assist the commander and the nation in fulfilling their treaty obligations to investigate, prosecute, or extradite individuals responsible for grave breaches. Finally, the commander must correct less serious violations of the law of war; reporting and investigation also serve that aim.

Commanders are required to at least inquire into every allegation of a crime and to ensure appropriate investigation and disposition. Reports of what would amount to grave breaches or other serious misconduct, like murder of protected persons, rape, willful and wanton destruction of civilian property, or assaults or other serious abuse of detainees, trigger both reporting to higher headquarters and investigation by an MCIO. Reports of less serious violations of the law of war—like mutilation of an enemy corpse, failure to collect and bury the dead, theft of detainee property, misuse of a red cross symbol that does not result in death or serious bodily harm to an enemy combatant, or any other of a myriad of potentially less serious violations of the law of war—may require reporting, depending on the severity of the incident, the potential for adverse publicity, or the potential consequences of the incident. At a minimum, these reports require a commander’s inquiry to assess whether further investigation is required. In any case, commanders remain responsible to appropriately dispose of alleged offenses, under the particular circumstances of each case.

So how should the judge advocate or commander deal with an allegation of “baiting,” as discussed in Lieutenant Colonel Chris Jenks’s preceding article? They should first gather the pertinent facts, probably using the “commander’s inquiry” technique, to engage in a “credibility review” of the information. If the conduct appears to be a minor, debatable violation, easily correctible at the company level, without the involvement of perfidy or other grave breaches, the incident may not have to be reported or investigated further. For example, failure to collect the dead, alone, when the unit does not control the ground or cannot safely do so, may not even be a violation. If a pattern of questionable activity is evident, or more detailed facts cannot be ascertained with a “commander’s inquiry,” an informal AR 15-6 investigation might provide the commander better information with which to decide whether a credible allegation exists.

A clear violation of the law of war should be reported, and steps should be taken to prevent such violations in the future. When an initial report comes from a non-governmental organization, a reporter, or the ICRC, reporting is essential, with or without a “credibility review.” However, in cases of serious crimes or grave breaches—such as the murder of another combatant (lawful or unlawful) through misuse of a protective emblem, booby-trapping of a dead body, or collateral damage to civilians because of intentional misuse of civilian cultural and religious requirements to bury their dead—a report should be sent without delay, and the nearest MCIO should be notified. Further reporting through criminal investigation channels can assist commanders in determining the appropriate disposition of criminal charges, and follow-up reporting of the investigation (criminal or administrative) to the higher headquarters, along the lines of CENTCOM’s supplemental instructions, can prevent systemic violations in the future. Reporting and investigation, in the end, serves several purposes: correcting misconduct or mistakes and sanctioning serious criminal behavior, as well as allowing military commanders to ensure that their command responsibility is fulfilled in accordance with the treaty obligations of the United States.