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Prosecuting Members of the U.S. Military for Wartime Environmental Crimes

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ARTICLES

Prosecuting Members of the U.S. Military for Wartime Environmental Crimes

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*Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.*¹

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1. United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 24, U.N. Doc. A/CONF. 151/26 (Vol. I) (June 14, 1992), reprinted in 31 I.L.M. 874, 880 (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visited Mar. 27, 2005).

I. INTRODUCTION

The environmental effects of the 1991 Gulf War² and Saddam Hussein's apparent apathy about this environmental degradation shocked the world.³ Since the 1991 Gulf War, there has been an increased international focus on protecting the environment during hostilities⁴ and international environmental law has become one of the fastest growing areas of international law.⁵ As the international community anticipated renewed hostilities in Iraq in 2003, many commentators feared a new round of damages to an environment already weakened by the 1991 Gulf War.⁶ While these damages did not materialize at the scale anticipated, it appears that the Hussein regime had plans to again damage the environment during warfare.⁷ Many commentators have argued that such environmental damage occurs because international environmental law enforcement mechanisms are inadequate and poorly enforced during times of armed conflict.⁸

In order to remedy this situation and provide better protection of the environ-

2. See generally Peter J. Richards & Michael N. Schmitt, *Mars Meets Mother Nature: Protecting the Environment During Armed Conflict*, 28 STETSON L. REV. 1047, 1051-54 (1999); Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L L. & POL'Y 265, 310-11 (2000); Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1-2 (2004); Jessica E. Seacor, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 10 AM. U. J. INT'L L. & POL'Y 481, 481-82 (1994).

3. See Anthony Liebler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67, 67-68 (1992); Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War*, 35 VA. J. INT'L L. 405, 408-09 (1995); Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 40-41 (1992); Mark J.T. Caggiano, Comment, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479, 480-81 (2003). See also Suzanne M. Bernard, *Environmental Warfare: Iraq's Use of the Oil Weapon During the Gulf Conflict*, 6 N.Y. INT'L L. REV. 106, 106-09 (1993); Margaret T. Okordudu-Fubara, *Oil in the Persian War: Legal Appraisal of an Environmental Warfare*, 23 ST. MARY'S L.J. 123, 129-42 (1991); Schmitt, *supra* note 2, at 266-68; Aaron Schwabach, *Environmental Damage Resulting from the NATO Military Action Against Yugoslavia*, 25 COLUM. J. ENVTL. L. 117, 118 (2000) (asserting that, like Gulf War I, the environmental damage that occurred in Kosovo was less than originally anticipated); Laura Edgerton, Note, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?*, 22 GA. J. INT'L & COMP. L. 151, 151-54 (1992); Nicholas G. Alexander, Note and Comment, *Airstrikes and Environmental Damage: Can the United States Be Held Liable for Operation Allied Force?*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 471, 479-80 (2000).

4. See Cynthia G. Wagner, *War Crimes Against Nature*, FUTURIST, May-June 2003, at 9-10.

5. Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 27. In 2001, over 900 treaties had provisions dealing with environmental protection. See Laurent R. Hourcle, *Environmental Law of War*, 25 VT. L. REV. 653, 674-75 (2001).

6. Experts Warn of Environmental Catastrophe, International Law Violations in Iraq War, U.S. NEWSWIRE, Mar. 18, 2003, available at LEXIS, News Library, CURNWS File.

7. See Kate Dourian, *Iraqi Workers Helped Save Southern Wells, US Says*, PLATT'S OILGRAM NEWS, Apr. 11, 2003, at 4.

8. See Mark A. Drumbl, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, 22 FORDHAM INT'L L.J. 122 (1998); Rymn James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, "Greenkeeping," and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 GEO. INT'L ENVTL. L. REV. 441, 441-42 (1998).

ment during armed conflict, it is important to exercise enforcement and deterrence on individuals as well as States. Although deleterious actions are often attributed to “States” during times of armed conflict, they are normally the result of military operations conducted by individual soldiers, sailors, airmen, or marines. These actions might result from a military member’s negligence, intentional misconduct, or decision to follow orders from a superior. Because environmental damages often originate from individual actions, any attempts to effectively criminalize wartime environmental damage, and to deter future damage, must include the ability to hold individual members of the military responsible for their actions and provide an appropriate method for punishment.

The Uniform Code of Military Justice (UCMJ), which applies to all members of the United States Armed Forces, provides sufficient penalties and other enforcement mechanisms to deter potential environmental law violators, punish convicted criminals, and protect the environment. While members of the United States military may also be subject to international tribunals and domestic courts for wartime damage to the environment, the UCMJ is the superior mechanism for prosecuting environmental damage caused by United States military personnel.

This paper will consider three potential forums for prosecuting military personnel for violations of the international law of environmental warfare: international tribunals, United States domestic courts, and military courts known as courts-martial. International tribunals will be treated only briefly, as the United States has made it clear that it objects to United States soldiers appearing before these tribunals. United States domestic courts will also be treated briefly, as there is limited jurisdiction for such prosecutions, and the United States military has a clear preference for using courts-martial as the appropriate domestic forum. Finally, the paper will conduct an extensive analysis of courts-martial as a forum for prosecution of U.S. military personnel and conclude that the UCMJ provides a sufficient basis for prosecuting military personnel at courts-martial for illegal damage to the environment.

II. INTERNATIONAL TRIBUNALS

While many have proposed systemic changes that affect how States can or should be held responsible,⁹ few have commented on the process of holding

9. Scholars and practitioners have proposed a broad range of systemic changes. One is a new convention to protect the environment during times of armed conflict. Sebia Hawkins, Remarks at the Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, in 85 AM. SOC’Y INT’L L. PROC. 214, 220-21; Myron H. Hordquist, *Panel Discussion on International Environmental Crimes: Problems of Enforceable Norms and Accountability*, 3 ILSA J. INT’L & COMP. L. 697, 702 (1997) (calling for a Protocol V to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects); Eric T. Jensen, *The International Law of Environmental Warfare: Active and Passive Damage During Times of Armed Conflict*, 38 VAN. J. TRANSNAT’L L. 145, 149 (2005) (proposing a new convention dividing all environmental damage into either

individual military personnel or commanders responsible for battlefield acts of environmental damage. Those who have discussed individual or commander responsibility have normally done so with a view to prosecution in the newly formed International Criminal Court (ICC).¹⁰ This may be because, unlike other recent international tribunals, the ICC specifically deals with the issue of environmental crimes.

Article 8(2)(b)(iv) of the Rome Statute of the ICC criminalizes “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹¹ The use of this language is problematic as an enforceable standard and will be discussed in greater detail in Part IIIA below; the issue of jurisdiction is also significant.¹²

The United States is not a party to the ICC and will not likely become a party in the near future.¹³ Further, the United States is actively seeking various means to ensure that its military personnel never appear before the ICC in any function.¹⁴ Even if the United States did become a member, trial before the ICC would still be unlikely to occur. Under Article 17, the ICC would not seek jurisdiction for individual wartime acts until the host nation has had an opportunity to take action and either been “unwilling or unable genuinely” to do so.¹⁵

It is possible that some other international tribunal may be formed to cover a discrete conflict or set of facts, such as the International Criminal Tribunal for the

active or passive damage); Parsons, *supra* note 8, at 472-74 (discussing Greenpeace’s proposal of a Fifth Geneva Convention). An alternative is to create a “Green Cross” counterpart to the Red Cross. Seacor, *supra* note 2, at 519–21. An International Environmental Court has also been proposed. Susan M. Hinde, Note, *The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw*, 32 HOFSTRA L. REV. 727, 727 (2003). Finally, several scholars have proposed to more strictly enforce existing standards of international law. Sharp, *supra* note 3, at 55-56; Low & Hodgkinson, *supra* note 3, at 481; Caggiano, *supra* note 3, at 480-81 (urging a war crimes tribunal); Drumbl, *supra* note 8, at 122; Parsons, *supra* note 8, at 475-76 (discussing a symposium sponsored by the Naval War College that concluded “more effective and efficient enforcement of the existing law is needed”).

10. See Drumbl, *supra* note 8, at 124-25; Schmitt, *supra* note 2, at 282.

11. See Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1006, available at <http://www.un.org/law/icc/statute/romefra.htm> (last visited Apr. 10, 2005).

12. See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) (discussing complementarity and jurisdictional issues with the ICC).

13. See Jim Lobe, *Bush ‘Unsigns’ War Crimes Treaty*, ALTERNET (May 6, 2002), at <http://www.alternet.org/module/printversion/13055> (last visited Mar. 18, 2005).

14. See *Legal Advisor Rosand Comments on Adoption of Resolution Concerning Report of International Criminal Court in Sixth Committee*, U.S. FED. NEWS, Nov. 19, 2004, available at LEXIS, News Library, CURNWS File (stating that the U.S. has signed ninety-six Article 98 agreements, where nations agree to not turn over U.S. military members to the ICC); Judith Kelley, *Big Stick Diplomacy Ill-Serves Our Cause*, NEWS AND OBSERVER (Raleigh, No. C.), Dec. 4, 2004, available at LEXIS, News Library, CURNWS File.

15. Rome Statute of the International Criminal Court, *supra* note 11. See also John R. Bolton, Remarks to the Federalist Society (Nov. 14, 2002).

former Yugoslavia¹⁶ or the International Criminal Tribunal for Rwanda.¹⁷ Because of extensive support for the ICC,¹⁸ it is likely that any future criminal tribunal will adopt the same crimes and elements.¹⁹ There is no indication that the United States would decide to become a party in such a tribunal.

There is little precedent for handling battlefield environmental damage in front of an international tribunal. After World War II, the Nuremberg trials included nine civilian German administrators who were tried for extensive exploitation of Polish forests.²⁰ Others were tried for “massive devastation of the environment.”²¹ Despite the fact that the rulings were inconsequential, this was the first time that an international tribunal prosecuted wartime crimes against the environment.

Given the current issues surrounding the use of international criminal tribunals, they will probably not be an effective means of prosecuting United States military personnel for the foreseeable future, regardless of the crimes alleged. While they may be useful against members of other nations’ militaries, and may become a good forum for developing international custom in the area, the United States will likely rely on other forums for prosecuting U.S. military members.

III. NATIONAL COURTS

Another potential forum for the prosecution of U.S. military members is the United States Federal District Courts²² under the 1996 War Crimes Act.²³ Under

16. See United Nations, International Criminal Tribunal for the former Yugoslavia Homepage, at <http://www.un.org/icty> (last visited Mar. 13, 2005).

17. See United Nations, International Criminal Tribunal for Rwanda Homepage, at <http://www.ict.org> (last visited Mar. 13, 2005).

18. For a current list of countries that have signed and ratified the Rome Statute creating the ICC, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty10.asp>. (last visited Mar. 14, 2005).

19. The elements of the crimes listed in the treaty may be found at [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements\(e\).html?page=library/officialjournal/basicdocuments/elements\(e\)](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).html?page=library/officialjournal/basicdocuments/elements(e)) (last visited Apr. 9, 2005).

20. See Caggiano, *supra* note 3, at 486-87; Bernard K. Shafer, *The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible During Hostilities*, 19 CAL. W. INT’L L.J. 287, 310-11 (1988-1989).

21. See Caggiano, *supra* note 3, at 486-87; Shafer, *supra* note 20, at 310-11.

22. See Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 GEO. WASH. INT’L L. REV. 1, 2 (2004) (discussing the use of federal courts to implement and enforce the law of war). The author identifies the aspirational nature of international law as one of the problems with domestic implementation of international law:

There is an additional reality that complicates any assessment of the role domestic courts play in implementing international law and the role international law plays in the decision-making of the political branches: international law has long admitted both *lex lata*, the established law, and *lex ferenda*, the emerging law—a fact that subverts any simple distinction between relevant binding obligation and irrelevant hortatory aspiration. International norms can have meaning and weight, even if they are not binding. Sometimes designated “soft law,” these norms—whether in the form of

the War Crimes Act, military personnel could be prosecuted for "war crimes." While this language may appear to provide an effective forum, it actually provides an extremely limited basis for the prosecution of environmental crimes. Subparagraph (b) gives jurisdiction to crimes that are committed by members of the armed forces, but only for crimes in violation of the conventional law found in subparagraph (c).²⁴ In terms of environmental regulation, the only applicable international treaty²⁵ would be the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GCC).²⁶

Article 147 of the GCC lists the grave breaches to that convention. The pertinent one for environmental destruction is "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully

"standards" or "principles"—exert an influence that cannot accurately be assessed in the either-or world where norms are either obligatory or trivial.

Id.

23. See 18 U.S.C. § 2441 (2000). The Act states:

- (a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in Subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
- (c) Definition.—As used in this section the term "war crime" means any conduct—
 - (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
 - (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
 - (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

24. See Steinhardt, *supra* note 22, at 20, where the author states "these four categories of crimes hardly exhaust the universe of war crimes, but the statute does create a limited domestic framework for IHL prosecutions."

25. Neither the provisions of Protocol I, ENMOD, nor Protocol III of the CCW, which are discussed *infra* at Part IIIA, are included in this definition section. Although subparagraph 1 references Protocol I, the United States is not a party to this treaty. The United States has signed Protocol I but not ratified it, which only gives the United States the obligation to not "defeat the object and purpose," Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336, of its provisions and would not be a basis for prosecution under the Act. Therefore, any prosecution for environmental crimes would have to occur based on the commission of a grave breach of one of the 1949 Geneva Conventions.

26. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

and wantonly.”²⁷ The Commentary to the GCC interprets this provision with no reference to the environment and only one reference to “foodstuffs.”²⁸ However, an argument could be made that the word “unlawfully” would now incorporate much of the law discussed below in Part IIIA that may have risen to the level of customary law.²⁹

While this possibility does exist as an alternative for the prosecution of members of the armed forces, it is unlikely in practice that the War Crimes Act would be the basis of any prosecution. It is far more likely that military personnel would be prosecuted under domestic law, applied through the UCMJ.³⁰

IV. MILITARY COURTS-MARTIAL

The third, and most likely, forum for prosecution of a military member who has committed an environmental crime is a military court-martial. Courts-martial are convened under the authority of the UCMJ and are the means by which commanders maintain good order and discipline among the ranks. Courts-martial are superior to either international tribunals or domestic courts for prosecuting soldiers. The UCMJ at courts-martial has more advantages than the other options.

The UCMJ applies to all service members regardless of whether the offense can directly be tied to military discipline and effectiveness.³¹ The UCMJ is applicable both in the United States and in foreign countries.³² Because the

27. *Id.*

28. COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 601 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/659a26a51bb6fe7ac12563cd0042f063?OpenDocument> (last visited Mar. 26, 2005).

29. See, e.g., Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987) (discussing which articles of Protocol I the United States believes are customary international law and to which the United States objects); see also Andy Rich, *The Environment: Adequacy of Protection in Times of War*, 12 PA. ST. ENVTL. L. REV. 445, 450 (2004) (“It is not difficult to draw an analogy between the illegitimacy of sickbays and farm villages as military targets, and that of intentionally or recklessly damaging the environment of an opposing combatant.”).

30. See Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49, 56 (2003) (noting the discussion following Rule for Court-Martial 307(c)(2) which states that “[o]rdinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war” (citation omitted)).

31. While personal jurisdiction can be a complex area, as a general rule it will be found to exist if the accused is a member of the armed forces at the time of trial. See 10 U.S.C. § 802 (1983 & Supp.1989). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 (2002 ed.), available at <https://www.jagcnet.army.mil/eJaws> (last visited Mar. 18, 2005) [hereinafter MANUAL FOR COURTS-MARTIAL]; *id.* R.C.M. 203. Subject matter jurisdiction is dependent on the accused having a military status at the time the offense was committed. *Solorio v. United States*, 483 U.S. 435, 450-51 (1987). See also MANUAL FOR COURTS-MARTIAL, R.C.M. 202-03.

32. The Uniform Code of Military Justice, pursuant to 10 U.S.C. § 805, is applicable to all places, including foreign countries. *Stevens v. Warden, U.S. Penitentiary, Leavenworth Kan.*, 536 F.2d 1334 (10th Cir. 1976). Operation of the Uniform Code of Military Justice is not limited by national boundaries. *United States v. Frost*, 19 M.J. 509 (AFCMR 1984). The Uniform Code of Military Justice is applicable to all active duty soldiers in all places in the world as to offenses prohibited by it. *Thompson v. Willingham*, 217 F. Supp. 901, 903 (M.D. Pa.

UCMJ applies worldwide, a court-martial convened under the UCMJ may be held anywhere in the world.³³ This flexibility allows for the prosecution to take place near the situs of the crime, presumably near the location of any relevant witnesses.³⁴ This makes the prosecution of a crime that occurs during the conduct of military operations, such as in Iraq, easier than it would be if the case had to be heard in a Federal District Court or before an international body convened at The Hague or some other site distant from the crime's location.

United States military personnel have a long history of being subject to a disciplinary code. Based on Article 1 of the United States Constitution,³⁵ and beginning with the 1806 Articles of War,³⁶ military personnel were subject to a code that required them to obey certain laws and customs of war or face trial by court-martial or military tribunal.³⁷ This code evolved³⁸ into its most recent edition, known as the UCMJ.³⁹

The UCMJ provides four paradigms to regulate the actions of service members in relation to the environment: 1) it provides a means to prosecute soldiers for

1962), *aff'd*, 318 F.2d 657 (3d Cir. 1963).

33. The power to convene a court-martial is vested in certain military commanders and is not limited by the location of the trial itself. *See generally* 10 U.S.C. §§ 805, 822-824; MANUAL FOR COURTS-MARTIAL, *supra* note 31, R.C.M. 504. The constitutional requirement that the trial of a crime occur in the district in which the crime was committed does not apply to the military. *Chenoweth v. Van Arsdall*, 22 C.M.A. 183 (1973).

34. The locations of courts-martial are generally governed by practical concerns such as the location of witnesses and necessary courtroom personnel. Cases are regularly tried in foreign countries and in deployed environments. Rule for Courts-Martial 504 allows the convening authority to designate the location where the court-martial will be held, and Rule for Courts-Martial 905(11) allows for a later change in that location by the military judge either to prevent prejudice to the rights of the accused or for the convenience of the government if doing so will not prejudice those rights. *See* Rule 504, MANUAL FOR COURTS-MARTIAL, *supra* note 31, R.C.M. 504; *id.* R.C.M. 906(11).

35. U.S. CONST. art. I, § 8. For an excellent history of the Uniform Code of Military Justice and Article 18 of the UCMJ, see Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 90-101 (2001).

36. 2 Stat. 359 (1806).

37. Initially, the term "military tribunal" was used, but during the time of the civil war, the term "military commission" came into use. *See* Brian W. Earley, *The War on Terrorism and the Enemy Within: Using Military Commissions to Prosecute U.S. Citizens for Terrorist-Related Violations of the Laws of War*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 84 (2004). Both Congress and the President have authority to establish a military commission. *See* Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW 19, 24 (Mar. 2002). Customary law gives the commander the authority to establish a military commission to prosecute suspected war criminals. *Id.* at 22. Commissions have been used throughout the nation's history. *Id.* at 26-30. Of course, they are also in current use in Guantánamo. Military Order No. 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). However, it is clear that though the United States could use military commissions to try members of the armed forces, they currently do not, but instead rely on courts-martial. *See* Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW, Mar. 2002, at 26-30; Steinhardt, *supra* note 22, at 14.

38. *Lee, supra* note 30, at 49-51.

39. *See* 10 U.S.C. §§ 801-942 (2003).

violations of the law of war;⁴⁰ 2) it enumerates crimes that directly proscribe certain activities that could damage the environment; 3) it has provisions that indirectly protect the environment; and 4) it also provides a method to incorporate other rules and laws to punish those who commit environmental crimes.

These four complementary paradigms make the UCMJ extremely flexible in its ability to uphold existing standards and adjust to previously unforeseen problems and to punish wrongdoers. These paradigms are not mutually exclusive, and a member of the military may be prosecuted under all four, although he would only be punished once for each act of misconduct.⁴¹

A. THE LAW OF WAR AND INTERNATIONAL ENVIRONMENTAL LAW

For a member of the military to be tried by court-martial for a violation of international law, such as illegal damage to the environment, there are two predicates that must be established: 1) the crime must be a violation of the law of war, and 2) the crime must involve individual responsibility.⁴² Once these two elements are established, military personnel are subject to trial and may be punished according to the law of war. The initial question, therefore, is what environmental degradation constitutes a violation of the law of war.

Field Manual 27-10, *The Law of Land Warfare*,⁴³ states the U.S. Army's understanding of what constitutes a crime under international law. Paragraph 498 states, "[a]ny person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace; b. Crimes against humanity; c. War crimes."⁴⁴ Paragraph 499 further adds, "[t]he term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."⁴⁵

40. A General Court-Martial has jurisdiction over offenses committed in violation of the Law of War. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, R.C.M. 203.

41. A constitutional violation under the Double Jeopardy Clause of the Constitution occurs if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct. *See Ball v. United States*, 470 U.S. 856, 861 (1985); *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981). A conviction for what is essentially the same act under one of the enumerated articles and for a violation of Article 133 has been determined to violate the principal of multiplicity.

42. *See Aldykiewicz & Corn*, *supra* note 35, at 82, 101.

43. U.S. DEP'T OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* (July 1956) (C1, 15 July 1976) [hereinafter *FM 27-10*].

44. *Id.* at para. 498.

45. *Id.* at para. 499. Article 18 of the UCMJ also gives subject matter jurisdiction for any soldier who violates the law of war. Article 18 states:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial

In the context of international environmental law, a member of the military would commit a war crime by either not complying with a convention or treaty binding on the United States⁴⁶ or by violating customary international law.⁴⁷ However, determining exactly what specific actions amount to a violation of international environmental law can be difficult.

The codification of international environmental law began as early as 1863 in the Lieber Code,⁴⁸ which restricted the destruction of property that was not militarily necessary.⁴⁹ Likewise, the Second International Peace Conference at The Hague in 1907 produced the Convention (IV) Respecting the Laws and Customs of War on Land.⁵⁰ Article 23(g) makes it unlawful to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war,”⁵¹ and Article 55 requires an occupying force to safeguard the resources and property of the occupied land.⁵²

Other conventional law documents continued this trend, including the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (GCC).⁵³ However, the most widely accepted statements of the current law of environmental warfare can be found in three international law documents: the 1977 Protocol I to the Geneva Conventions (Protocol I),⁵⁴ the 1977 United

also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

10 U.S.C. § 818 (1956).

46. JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, LAW OF WAR HANDBOOK 213-14 (Major Keith Puls ed., 2004).

47. See Aldykiewicz & Corn, *supra* note 35, at 103. See also 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 6 (1963), stating that:

It is not possible for the Court to apply a custom; instead, it can observe the general practice of States, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time.

Id.

48. See THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

49. See *id.* at 6.

50. See *id.* at 63; see also *Is Environmental Destruction a War Crime? In Iraq and Elsewhere, It Is Not Just Guns and Missiles that Kill People. Yet International Law Seems Powerless to Heal Nations Ravaged By Conflict*, ONEARTH, Jan. 1, 2005, available at LEXIS, News Library, CURNWS File.

51. See THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 82–83.

52. See *id.* at 91. Section III, which contains article 55, deals with occupation and is titled Military Authority over the Territory of the Hostile State. See also Sharp, *supra* note 3, at 11.

53. See Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 495. Article 53 prohibits an occupying power from destroying “real or personal property . . . except where such destruction is rendered absolutely necessary by military operations.” *Id.* at 517.

54. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of

Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),⁵⁵ and the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW),⁵⁶ particularly Protocol III.⁵⁷

There is substantial debate on the actual standard that these documents produce.⁵⁸ In general terms, Articles 35⁵⁹ and 55⁶⁰ of Protocol I prohibit intentionally targeting the environment or unintentionally causing widespread, long-term, and severe damage.⁶¹

ENMOD is strictly worded and prohibits modification of the environment⁶²

Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 621.

55. Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, *opened for signature* May 18, 1977, art. 1(1), 31 U.S.T. 333 (entered into force Oct. 5, 1978); *see also* DOCUMENTS ON THE LAWS OF WAR 377 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

56. *Id.* at 473.

57. *Id.* at 484.

58. *See* John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War*, 15 FLA. J. INT'L L. 481, 485 (2003); Jensen, *supra* note 9, at 173; Richards & Schmitt, *supra* note 2, at 1064-65.

59. Article 35 states:

1. In any armed conflict, the right of the Parties to the armed conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

THE LAWS OF ARMED CONFLICTS, *supra* note 48, at 644-45.

60. Article 55 states:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Id. at 653. In addition to this article, Article 52 provides protection to civilian objects, Article 53 protects cultural objects and places of worship, Article 54 provides protection to objects indispensable to the survival of the civilian population including such things as agricultural areas and irrigation works, and Article 56 protects works and installations containing dangerous forces such as dams, dikes, and nuclear electrical generating facilities. *Id.* at 652-53.

61. *See* Whitaker, *supra* note 5, at 38, where the author states:

Most experts agree with the commentary to GP I, which states that 'long-term' should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded. Within GP I, the term 'widespread' probably means several hundred square kilometers, as it does in the ENMOD Convention. While 'severe' can be explained by Article 55's reference to any act that 'prejudices the health or survival of the population.

Id. (citations omitted).

62. Article 1 states:

that is widespread, long-lasting, and severe.⁶³ Such techniques have been attempted before⁶⁴ and their use is likely to increase as technology advances. Finally, Protocol III of the CCW proscribes using incendiaries against forests and other plant cover unless they are being used by the enemy.⁶⁵

These three treaties provide the elements of criminal wartime acts involving the environment. As mentioned above, the ICC adopted the language from Protocol I prohibiting widespread, long-term, and severe damage to the environment as the required elements for a violation under Article 8 of the Rome Statute.

While these treaties and their elements may seem clear on paper, they have not provided a clear standard in practice. For example, there were numerous differing opinions as to whether Saddam Hussein had violated international law during the 1991 Gulf War when he dumped oil into the Persian Gulf and set fire to the oil wells, blackening the sky with smoke.⁶⁶ In the end, most nations felt that the law was not clear enough to specifically proscribe Saddam Hussein's actions.⁶⁷

Clarifying this ambiguity is beyond the scope of this paper. It is enough here to

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

DOCUMENTS ON THE LAWS OF WAR, *supra* note 55, at 377-78.

63. *See id.* at 377-78. The Article 1 text continues:

It is the understanding of the Committee that, for the purposes of this Convention, the terms "widespread", "long-lasting", and "severe" shall be interpreted as follows:

- (a) "widespread": encompassing an area on the scale of several hundred square kilometers;
- (b) "long-lasting": lasting for a period of months, or approximately a season;
- (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion [sic] with any other international agreement.

Id. But see Florenzio J. Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT'L L. & POL'Y 793, 806-09 (1996) (stating that not all states accepted these interpretations).

64. Michael N. Schmitt, *The Environmental Law of War: An Invitation to Critical Reexamination*, 6 U.S. AIR FORCE ACAD. J. LEGAL STUD. 237, 239 (1996).

65. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 55, at 484.

66. *See* Low & Hodgkinson, *supra* note 3, at 409-12 (discussing how Saddam Hussein's attacks on the environment during the 1991 Persian Gulf War may not have met the threshold requirements to violate international law). *But see* Sharp, *supra* note 3, at 48 (stating that the world community has clearly stated that Saddam's actions were violations of the laws of armed conflict). *Cf.* Schmitt, *supra* note 2, at 315 (stating that many of the scientific predictions of calamity that would result from Saddam Hussein's actions in Gulf War I never materialized); Schwabach, *supra* note 3, at 118.

67. *See* Whitaker, *supra* note 5, at 31-32.

say that if the facts were sufficient to determine there might have been a violation of the international environmental law of war, military personnel could be tried at a general court-martial in accordance with Article 18 of the UCMJ.⁶⁸

At the trial, military members would have the same defenses available to them that are available in any other disciplinary proceeding, including the defense of superior orders to the extent that it applies.⁶⁹ A prosecution under the UCMJ for a violation of the law of war would be processed in the same manner as any other criminal violation; the only difference would be in the form of the charge. Instead of alleging the violation of a specific article of the UCMJ, the soldier would be charged for violating the law of war.⁷⁰

In conclusion, members of the armed forces may be prosecuted for violations of both customary and conventional international environmental law by general courts-martial. At a general court-martial, the standard would be determined by Protocol I, ENMOD, other applicable agreements such as Protocol III of the CCW, and customary international law.

B. ENUMERATED CRIMES

As quoted above, Article 18 gives authority to the military to try people for violations of the law of war, making them subject to international law. However, the first clause of Article 18 also gives the military the authority to punish members for other violations specifically enumerated in the UCMJ.

Subject to Section 817 of this title (Article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.⁷¹

Articles 80 through 134 constitute the punitive articles of the UCMJ,⁷² and define those actions by service members that will subject them to criminal liability. Articles 80 through 132 are the common crimes that one would expect to find in any State criminal code, including arson,⁷³ burglary,⁷⁴ rape,⁷⁵ murder,⁷⁶

68. See Aldykiewicz & Corn, *supra* note 35, at 100; Michael Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 221 (2000) (discussing Rule for Courts-Martial 201f, which also clarifies that general courts-martial have jurisdiction over law of war violations).

69. See generally Smidt, *supra* note 68.

70. See MANUAL FOR COURTS-MARTIAL, *supra* note 31, R.C.M. 307(c)(2) discussion.

71. 10 U.S.C. § 818.

72. 10 U.S.C. § 800-934.

73. 10 U.S.C. § 912a.

74. 10 U.S.C. § 929.

75. 10 U.S.C. § 920.

76. 10 U.S.C. § 918.

and the prohibition against the use of illegal drugs.⁷⁷

These “common” crimes could be used, under the appropriate factual scenario, to impose criminal liability against military perpetrators of environmental crimes.⁷⁸ For example, the unnecessary destruction of a chemical plant could be charged as a violation of UCMJ Article 109, for the intentional or reckless destruction of property.⁷⁹ Willful and wrongful damage to property such as a chemical plant, through intentional targeting without proper authorization which also causes damage to the environment, could not only subject a service member to criminal liability for the damage to the plant but also for the resulting damage to the environment from the release of toxic chemicals.⁸⁰ This Article could also apply to the destruction of crops, dams, or other property whose destruction would have deleterious effects on the environment.

UCMJ Article 110 prohibits the improper hazarding of a vessel.⁸¹ Under this article, a member of the military who puts a vessel “in danger of loss or injury”⁸² may be prosecuted. Under Article 110, any damage to the environment, such as a resulting oil spill or dispersal of hazardous chemicals, would be treated as an aggravating factor rather than the principal element of the crime itself.⁸³

Any military member who willfully and maliciously sets fire to an oil well could face charges for a law of war violation as well as a violation of Article 126 for arson.⁸⁴ While the charge itself would be based on damage to the oil well, the

77. 10 U.S.C. § 921(a).

78. For a related discussion regarding the use of state common law to prosecute environmental crimes see Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311 (Winter 1990).

79. Article 109 states “[a]ny person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.” 10 U.S.C. § 909. The maximum punishment for this offense is dependant on the dollar value of the damage. The maximum punishment for this offense when the damaged caused is in excess of \$500 is a Dishonorable Discharge from the service, forfeiture of all pay and allowances, reduction to the lowest enlisted grade (enlisted members only), confinement for five years, and a fine. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 33e.

80. A conviction for damage to non-military personal property has been held to require specific intent to cause the damage, whereas a conviction for the waste or spoliation of real property requires only a finding of recklessness. *United States v. Garcia*, 29 M.J. 721 (C.G.C.M.R. 1989).

81. 10 U.S.C. § 910.

82. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 34c(1).

83. Like most military crimes, hazarding a vessel has no minimum punishment and a soldier convicted of this offense could receive anything from no punishment to the maximum punishment. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, R.C.M. 1001(b)(4) allows the prosecution to introduce “evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.” *Id.*

84. 10 U.S.C. § 926b (1956). Article 126b, otherwise known as simple arson, states “[a]ny person subject to this chapter who willfully and maliciously burns or sets fire to the property of another. . . shall be punished as a court-martial shall direct.” The maximum punishment for simple arson resulting in damage of more than \$500 is a Dishonorable Discharge, forfeiture of all pay and allowances, reduction to the lowest enlisted grade (enlisted members only), confinement for five years, and a fine. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 52e (2002).

direct negative effects on the environment would likely be admissible evidence that the court could consider in determining the appropriate sentence.⁸⁵

The coverage of the environment is not extensive in the enumerated crimes, but the UCMJ does provide a basis for prosecution if the facts fit the elements of the crime in question. Further, most charges related to environmental damage may only be indirect and only used as aggravating factors in a prosecution, but this still does allow for some protection and provide a means of enforcement for environmental degradation. An area that provides less specific but broader protection is that of indirect protection.

C. INDIRECT PROTECTION

In addition to the crimes commonly found in civilian jurisdictions, the UCMJ also criminalizes many actions unique to the military. In terms of their applicability to environmental offenses, three specific articles warrant discussion: Articles 92,⁸⁶ 133,⁸⁷ and 134.⁸⁸ These Articles do not mention the environment but rather make illegal certain actions that either are in violation of a military order or directive or are not in keeping with common military standards.

Article 92 of the UCMJ proscribes disobeying orders and not performing duties to the appropriate military standard. Article 92 states:

Any person subject to this chapter who –

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties; shall be punished as a court-martial shall direct.⁸⁹

This Article of the UCMJ has the potential for use against the perpetrators of environmental crimes who disobey orders or take actions below the acceptable military standard.

In every recent armed conflict in which the United States has engaged, commanders at the highest levels have given specific directions on what elements of civilian infrastructure could and could not be destroyed as part of the conflict.⁹⁰ These directives may be issued as oral or written orders⁹¹ or incorpo-

85. MANUAL FOR COURTS-MARTIAL, *supra* note 31, R.C.M. 1001(b)(4).

86. 10 U.S.C. §892.

87. 10 U.S.C. §933.

88. 10 U.S.C. §934, cls. 1-2.

89. 10 U.S.C. §892.

90. Many factors are considered in drafting the rules of engagement, including the law of war and the principle of military necessity and proportionality, which plays such a prominent role in international law and the treaties mentioned in Part IIIA.

91. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, APPENDIX H (31 May 1997), available at http://www.dtic.mil/doctrine/jel/service_pubs/101_5.pdf (last visited Mar. 18,

rated as rules of engagement.⁹² For instance, after analyzing enemy terrain, a commander may determine that there is a dam on which the enemy has placed weapon systems or a chemical factory that is being put to military use.⁹³ He may give his subordinate commanders an order to not destroy that dam or to use certain incendiary type weapons to control the potential spread of destructive chemicals. In either case, a subordinate violating a commander's orders could be punishable under UCMJ Article 92.

Many of the standards of warfare found in the conventions and treaties discussed above have also been incorporated by the military in its promulgation of Field Manuals,⁹⁴ Regulations,⁹⁵ Rules of Engagement, and other binding directives.⁹⁶ Even if a violation of the treaty were not punishable in and of itself under the law of war, if its principles have been incorporated into military doctrine to the extent that it constitutes a duty, then violations of these duties are punishable under Article 92.⁹⁷

For example, assume that the United States is engaged in armed conflict with another State. It is almost certain that the military would create a "no-strike" list of targets, which either prohibits the targets from being struck or requires specific levels of authority to hit them.⁹⁸ This list might include things like dams or oil

2005).

92. See THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (30 Nov. 2004), available at www.dtic.mil/doctrine/jel/doddict/data/r/04629.html (last visited Mar. 18, 2005) (defining rules of engagement (ROE) as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. Also called ROE.")

93. See Protocol I, *supra* note 54, art. 52.2 (declaring that a normally civilian object such as a dam or factory may become a legitimate military target based on its nature, location, purpose or use). However, a commander may determine that regardless of the military nature of the target, other factors convince him that he does not want those targets destroyed.

94. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-100.4, ENVIRONMENTAL CONSIDERATIONS IN MILITARY OPERATIONS (Jun. 15, 2000 with change May 11, 2001), available at <https://134.11.61.26/CD5/Publications/DA/FM/ByPub.htm> (last visited Mar. 19, 2005).

95. See U.S. DEP'T OF ARMY, ARMY REGULATION 200-2, ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (2002), available at http://www.usapa.army.mil/pdffiles/r200_2.pdf (last visited Mar. 18, 2005).

96. See Environmental Effects Abroad of Major Federal Actions, Exec. Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 4, 1979).

97. There are several ways Article 92 may be violated. Some military regulations are punitive in nature. To be convicted of violating a punitive regulation, a service member need not have actual knowledge of the regulation. Violations of other non-punitive regulations may also be punishable under Article 92 if the prosecution proves that the accused had actual knowledge of the duty set forth in the regulation. A service member can also be convicted under Article 92 for violating verbal orders or other established duties, even in the absence of a regulation, if the government can establish the existence of the order or duty and that the accused had knowledge of the order or duty. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, ¶ 16 (2002). Service members may also be punished under Articles 90 and 91 for disobeying the specific orders of superior officers or noncommissioned officers. See 10 U.S.C. § 892.

98. See Foreign Press Center Briefing with Major General Stanley McChrystal, Subject: Special Targeting Procedures, FEDERAL NEWS SERVICE, Apr. 3, 2003, available at LEXIS, News Library, CURNWS File; see also Andrea Gerlin et al., Coalition Forces Move into Basra, Tighten Control Around Baghdad, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Apr. 7, 2003, available at LEXIS, Nexis Library, CURNWS File.

refineries which, if attacked, would cause environmental damage and destroy key infrastructure. This list would likely be incorporated into the Rules of Engagement and then given out as a lawful order regulating the conduct of hostilities. Every member of the U.S. military would have a duty to obey that order. If someone attacked one of these targets, he or she would be in violation of Article 92 and could be prosecuted.

UCMJ Article 133 criminalizes any conduct by an officer⁹⁹ that is considered by a court to be conduct unbecoming of “an officer and a gentleman.”¹⁰⁰ The range of conduct covered by this article is expansive, and could encompass violations of international environmental law by commissioned officers. Generally speaking, it is a violation of Article 133 for an officer to act in such a manner “which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman.”¹⁰¹ To be convicted under Article 133, a court would have to find that (1) the act occurred, and (2) that the act was conduct unbecoming of an officer.¹⁰²

A third avenue for prosecuting military personnel for environmental crimes is UCMJ Article 134.¹⁰³ Article 134 is commonly referred to as the “general article.” Its three clauses allow for the prosecution of (1) all disorders and neglects to the prejudice of good order and discipline in the armed forces, (2) all conduct of a nature to bring discredit upon the armed forces, and (3) all crimes and offenses not capital. Clauses 1 and 2 criminalize any act that interferes with good order and discipline, or is of a nature to bring discredit upon the armed forces. Clause 3 will be discussed below.

Article 134 is a flexible tool for military prosecutors. To be convicted under Clauses 1 or 2 of Article 134, the court would have to find that (1) the act occurred, and (2) the act was detrimental to good order and discipline or of a nature to bring discredit upon the armed forces. Historically, Article 134 has been

99. The military rank structure is generally divided into four categories: commissioned officers, warrant officers, noncommissioned officers, and enlisted personnel. Article 133 applies only to commissioned officers and also cadets and midshipmen who are attending the military academies in preparation for becoming commissioned officers. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 59a. In the vast majority of instances, commanders are commissioned officers.

100. 10 U.S.C. § 933.

101. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 59c(2).

102. “Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentlemen, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentlemen, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.” *Id.*

103. The text of Article 134 states “[t]hrough not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.” 10 U.S.C. § 934.

used to prosecute a wide variety of behavior not specifically criminalized elsewhere in the code.¹⁰⁴ Many of these past uses have been added over time to the Manual for Courts-Martial by executive order.

For example, in *United States v. Woods*, the prosecutor charged an HIV-positive soldier with a violation of Article 134 for engaging in unprotected sexual intercourse with another service member.¹⁰⁵ Despite a challenge to the legal sufficiency of the specification, the United States Court of Military Appeals upheld the conviction, stating that "the essence of the specification, hence its criminality, is that the accused engaged in sexual intercourse with another, knowing that to do so without protection was an 'inherently dangerous' act likely leading to 'death or great bodily harm,' and that under the circumstances his conduct was 'prejudicial to the good order and discipline in the Armed Forces.'"¹⁰⁶ The gravamen of the offense in this case, reckless endangerment, was included in the 2000 edition of the Manual for Courts-Martial.¹⁰⁷

Reckless endangerment, as it is now set forth in the Manual for Courts-Martial, criminalizes reckless or wanton conduct that wrongfully creates a substantial risk of death or serious injury to others.¹⁰⁸ If a service member's reckless acts resulted in poisoning water systems, dispersal of airborne toxic chemicals, or some other environmental disaster likely to cause death or grievous bodily harm, and that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline of the armed forces or was of a nature to bring discredit upon the armed forces, the service member could be convicted of Reckless Endangerment under Article 134. The key to the value of this Article in protecting the environment is that the *mens rea*, or mental intent standard, is only recklessness.¹⁰⁹ Rather than require proof of a specific intent to cause the harm, a prosecutor would only have to prove that "under all the circumstances, the accused's conduct was of a heedless nature that made it actually or imminently dangerous to the rights or safety of others."¹¹⁰

104. Article 134, UCMJ as codified by 10 U.S.C. § 934 is based on Article 66 of the Laws of War. Article 66 was intended to provide a means to charge all kinds of offenses not otherwise specified. *See generally* William Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. rev. 1920).

105. The actual charge read as follows: Charge: Violation of the UCMJ, Article 134. Specification: In that Hospitalman Robert A. Woods, U.S. Navy, Naval Medical Clinic, Norfolk, Virginia, on active duty, in or around Virginia Beach, Virginia, sometime between 14-28 November 1987, then knowing that his seminal fluid contained a deadly virus (Human T-cell Lymphotropic Virus 3) capable of being transmitted sexually, and having been counseled regarding infecting others, an act that he knew was inherently dangerous to others, and that death or great bodily harm was a probable consequence of the act, and that was an act showing wanton disregard of human life, did engage in unprotected (without the utilization of a condom or other device to protect the partner from contamination) sexual intercourse with Seaman [C___], U.S. Navy, such conduct being prejudicial to the good order and discipline in the Armed Forces. *United States v. Woods*, 28 M.J. 318 (1989).

106. *Id.* at 320.

107. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 16, 1999).

108. *MANUAL FOR COURTS-MARTIAL*, *supra* note 31, pt. IV ¶ 100a (2002).

109. *Id.*

110. *Id.*

Depending on the facts in a given case, an environment-specific Article 134 offense not currently listed in the Manual could be drafted and charged. For example, if a service member in charge of waste disposal for one of our forward operating bases in Iraq decided that he did not want to haul sewage to an appropriate disposal site, and instead began dumping raw sewage into a nearby river, he could be charged under Article 134. A sample specification could be drafted as follows: "In that Sergeant Joe Smith, U.S. Army, did, at Camp Liberty, Iraq, on or about 1 December 2004, willfully and wrongfully dispose of raw sewage in a river used by local nationals, such conduct being of a nature to bring discredit upon the armed forces." The penalty for such a crime would be determined by looking to the maximum punishment of the most closely related offense set forth in the Manual, and if no closely related offense exists in the Manual, to the most closely related offense prohibited by the United States Code.¹¹¹

Articles 92, 133, and 134 are flexible enough to adjust to changing standards in society and the military as to what is or is not acceptable conduct in a wartime environment. Should a commander in today's military decide to follow in the footsteps of Spartan leaders by salting the fields of his adversary, he could be prosecuted under Article 133 or Article 134 for service-discrediting conduct, or under Article 92 for dereliction of duty or violation of the rules of engagement. As the environmental standard increases throughout the world, these Articles provide ever-increasing protection to the environment.

D. PROTECTION THROUGH INCORPORATION

Clause 3 of Article 134 makes all "crimes and offenses not capital" punishable under the UCMJ. This provision allows individuals subject to the UCMJ to be tried in military courts for violations of federal criminal statutes. In prosecutions under Clause 3 of Article 134, it is actually the federal statute that is being prosecuted, not an enumerated crime in the UCMJ, and therefore that statute must prohibit the conduct in question and must apply extraterritorially (internationally) if the conduct in question occurred outside of the United States.¹¹² By utilizing Clause 3 of Article 134 of the UCMJ, a military prosecutor may charge a service member with a violation of any applicable federal statute.¹¹³

It appears that there are not currently any federal environmental crimes with extraterritorial application.¹¹⁴ If Congress were to pass an environmental statute

111. *Id.*, R.C.M. 1003(c)(1)(B).

112. See generally *United States v. Pullen*, 41 M.J. 886 (1995).

113. This practice is often used for the prosecution of offenses involving firearms and offenses involving child pornography. See *United States v. Evans*, 33 M.J. 309 (1991); *United States v. Irvin*, 60 M.J. 23 (2004).

114. INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 224 (Maj. Derek I. Grimes ed., 2005), available at <https://www.jagcnet.army.mil/eJaws> (last visited Mar. 25, 2005) (The exception is NEPA, which is applicable to major

applicable outside the United States, it could be prosecuted under Clause 3 of Article 134. While the fact that a statute is not extraterritorial in nature would prohibit its use under Clause 3, the principals underlying the statute could be used to form the basis of an offense under Clause 1 or 2.¹¹⁵ For example, the Clean Water Act prohibits the discharge of any radiological, chemical, or biological warfare agent, and level of radioactive waste, or any medical waste into the navigable waters.¹¹⁶ If the Clean Water Act were not held to be extraterritorial, the elements of the Clean Water Act could be incorporated into a 134 offense and charged as follows: "In that Sergeant Joe Smith, U.S. Army, did, at Camp Liberty, Iraq, on or about 1 December 2004, willfully and wrongfully dispose of biological warfare agents into navigable waters, such conduct being of a nature to bring discredit upon the armed forces." In this sample charge, the soldier is not actually being prosecuted for the underlying federal offense, but for related conduct that is also alleged to be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

In conclusion, the UCMJ provides ample means to prosecute military members under domestic law. It allows for the prosecution of violations of the law of war. If the environmental damage at issue did not rise to the level of a law of war violation, the UCMJ may still punish wrongdoers. Common crimes such as arson or destruction of property are among the enumerated crimes in the UCMJ and would cover many environmental crimes that might be committed during armed conflict. Articles 92, 133 and 134 also provide a basis on which to prosecute commanders or military members who commit environmental damage that may not be listed as an enumerated crime. Whether there is a violation of the law of war, an order, a rule of engagement, or simply an activity that would bring discredit upon the military or is prejudicial to good order and discipline, the UCMJ provides a vehicle for prosecution of military personnel.

V. CONCLUSION

There is no doubt that as the technological ability to wage war increases, the potentially degrading effects on the environment from armed conflict will also increase.¹¹⁷ This increased damage does not occur spontaneously, but often as the

federal actions located outside the United States but with significant impacts inside the United States.).

115. "In any situation where no federal statute is directly applicable . . . the government may nevertheless use an existing federal or state statute as a guide in developing the language of the specification and the elements of the offense. *See generally*, MANUAL FOR COURTS-MARTIAL, *supra* note 31, pt. IV ¶ 60c(4)(c)(i). We find nothing inherently wrong with using an existing statute from another jurisdiction as a sample from which to draft a new offense under Clause 1 or 2 of Article 134, UCMJ, to capture wrongful conduct that is legitimately criminalized within the civilian sector." *United States v. Saunders*, 56 M.J. 930, 934 (2002).

116. 33 U.S.C. § 1311(f) states: "Notwithstanding any other provisions of this Act [33 USCS §§ 1251 et seq.] it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters."

117. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, WARFARE IN A FRAGILE WORLD: THE

result of decisions made by military leaders and soldiers. If increased environmental protections are to have any effect during armed conflicts, there must be a mechanism to enforce those standards amongst soldiers and leaders. In addition to potential ICC charges for countries party to the Rome Statute, this obligation rests on each nation's military.

Within the United States, it is clear that there are sufficient laws and regulations in place to hold individuals and commanders responsible for illegal environmental damage during wartime. While damage to the environment could be prosecuted in international tribunals, or in federal district court under the 1996 War Crimes Act, the UCMJ is the superior enforcement mechanism. It allows for prosecution for violations of the law of war and provides enumerated crimes that lend protection to the environment against such acts as arson or willful damage to property. It also provides indirect protection to the environment by compelling compliance with orders, regulations, and directives given by competent authority through mechanisms such as ROE. Even broader in scope, the UCMJ allows prosecution of acts that are not in keeping with the good order and discipline of the military or would bring discredit upon the armed forces of the United States. Finally, the UCMJ allows for the incorporation of other laws into a court-martial proceeding.

The UCMJ provides sufficient enforcement mechanisms to deter potential violators, punish convicted criminals, and protect the sustainable environment. There is no need to look elsewhere for an adequate means to prosecute U.S. military members and commanders for environmental crimes during wartime.

