

Targeting and the Law of War

**Administrative Investigations & Criminal Law
Supplement**



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
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FOREWORD

This supplement explains the analytical framework for assessing compliance with the Law of War. This framework enables Judge Advocates to quickly recognize pertinent lines of investigative effort required to thoroughly and impartially investigate suspected violations of the Law of War.

At the heart of this framework is the intersection of the Law of War and the criminal law. In particular, this supplement articulates the necessary elements of proof to substantiate a Law of War violation and explains which punitive articles under Uniform Code of Military Justice (UCMJ) are implicated. The UCMJ discussion is within the context of Law of War principles such as: target identification; advanced warnings; feasible precautions; proportionality; command responsibility. Moreover, this guide explains how violations of these principles may amount to a breach of the 1949 Geneva Conventions.

While Military Justice and the Law of War fall within separate disciplines of the Judge Advocate General Corps mission, the investigation of suspected Law of War violations demands that we understand and master how the two disciplines converge. This convergence is particularly important from the perspective of those outside the U.S. Military with whom we share the results of our investigations. From the perspective of our partners, allies, and non-governmental organizations, the Law of War is the lens through which they view U.S. adherence to the rule of law in the context of targeting. By contrast, from a domestic audience's perspective, adherence to the rule of law may be best understood through the application of common law concepts that underpin the UCMJ's punitive articles.

This supplement, therefore, will serve as a key resource for legal advisors to ensure officers investigating targeting incidents develop the pertinent facts and analyze the critical issues that bear upon both the UCMJ and the Law of War. In addressing both bodies of law, investigations illustrate the UCMJ and the Law of War are complementary and demonstrate our commitment to the rule of law.

As a first effort in this complex area to articulate an analytical framework, I am sure there is still much work to be done. But I trust this first effort will assist Judge Advocates and improve through constructive comments from the field.

Reviewed and approved on this date.

A handwritten signature in blue ink, appearing to read "Flora D. Darpino", is positioned above the printed name.

FLORA D. DARPINO
Lieutenant General, USA
The Judge Advocate General

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1. **Purpose and Intent.** This supplement explains the legal framework for enforcing the Law of War in the context of *jus in bello* targeting rules under the Uniform Code of Military Justice (UCMJ).¹ It is intended as a resource for U.S. Army Judge Advocates who advise investigating officers on targeting investigations. Although this supplement addresses a variety of legal issues related to the UCMJ and the Law of War, it does not change existing law or regulations.

2. **Overview and Organization.** This supplement addresses six overarching issues summarized in the table below that illustrate how the UCMJ and the Law of War interrelate for the purposes of determining the lawfulness of a targeting operation. These issues are addressed in the sequential order indicated in the table below to promote clarity and maximize understanding of the complementary nature of the UCMJ and the Law of War.

	Summary	Reference
Information Assessment Duties	The Law of War imposes a duty upon those who make targeting decisions to assess available information to determine whether an attack would be lawful, and a duty upon commanders to keep abreast of their subordinate’s compliance with the Law of War in executing such attacks.	Para 3; Table 1
Targeting Duties	The Law of War imposes duties upon those who make targeting decisions to take measures to limit harm to persons and property protected by the Law of War, and a duty upon commanders to prevent their subordinates from executing an attack that would unlawfully harm those persons and property.	Para 4; Table 1
Justification	A death, injury, or other act caused or done in the performance of duty and in compliance with the Law of War is justified and not unlawful with respect to that body of law.	Para 5
Errors in Judgment	An alleged breach of a duty imposed by the Law of War is not a violation unless the act in question amounted to more than a mere “error in judgment.”	Para 6; App. 1
Elements of Proof	The Law of War obligations addressed in this guide are violated when an individual willfully or through culpable negligence is derelict in complying with them, resulting in harm to persons or property protected by the Law of War. A Law of War violation also occurs when an individual attempts to commit, conspires to commit, or aids and abets the commission of such unlawful acts of harm.	Para 9; App. 2 – 5
Breaches	In the context of targeting, causing harm to persons or property referenced as protected in the 1949 Geneva Conventions may, depending on the circumstances, constitute a “grave breach” or other breach of those conventions.	Para 10; Table 2

3. **The Duty to Assess Information under the Law of War.** The Law of War imposes a duty to take “reasonable steps” to assess information before executing a targeting decision.² For example, the principle of proportionality requires that “combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that

may not be made the object of attack”³ such as by taking “reasonable steps to ensure that military objectives are identified.”⁴ Likewise, the Law of War imposes a requirement upon commanders whose subordinates make targeting decisions to take steps to keep abreast of their subordinates’ compliance with the Law of War “through reports received by him or through other means.”⁵ In the context of command responsibility, if a commander violates this duty, it is sometimes said he or she “should have had knowledge” of subordinate Law of War violations.⁶

4. **Targeting Duties and the Law of War.**

a. **Duties of those who make Targeting Decisions.** In addition to duties to assess information, the Law of War requires that those who make targeting decisions exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and property that may not be made the object of attack. Table 1 below lists these targeting duties along with corresponding duties to assess information.

b. **Duties of Commanders in the Context of Targeting.** As it relates to commanders whose subordinates make targeting decisions, they “have a great responsibility to exercise the leadership necessary to reduce the risk of harm to civilians and civilian objects.”⁷ Table 1 below describes this targeting obligation in further detail along with its corresponding duty to assess information.

Table 1

	Targeting duties	Information Assessment Duties
Target Identification	- Attack lawful targets only. ⁸	- Take reasonable steps to identify a person or object as legal target.
Specialized Warning	- Do not attack objects subject to special protection (e.g., medical units, enemy hospitals, medical transports) unless the enemy has misused them. ⁹	- Exercise due regard in determining whether an object subject to special protection lost its protected status under the Law of War.
	- Provide “due warning” before attacking an object subject to special protection ¹⁰ unless acting in self-defense. ¹¹	- Take reasonable steps to determine what means of communicating the warning would be adequate.
Generalized Warnings	- Provide advance warning before conducting an attack where protected persons may be harmed unless the circumstances do not permit. ¹²	- Take reasonable steps to determine whether the circumstances permit providing an advanced warning.
	- When warning is required, provide “effective advance warning.” ¹³	- Take reasonable steps to determine what means of communicating the warning would be adequate.
Feasible Precautions	- Take feasible measures to minimize incidental harm. ¹⁴	- Take reasonable steps to determine what precautionary measures are feasible.

	Targeting Duties (cont.)	Information Assessment Duties (cont.)
Principle of Proportionality	- Conduct proportionate attacks—the expected incidental harm must not be excessive in relation to the direct and concrete military advantage anticipated. ¹⁵	- Take reasonable steps to determine whether the incidental harm would be excessive in relation to the direct and concrete military advantage anticipated.
Command Responsibility	- Take “necessary and reasonable measures” to prevent subordinates from unlawfully harming persons and property protected by the Law of War. ¹⁶	- Take reasonable steps to monitor subordinate compliance with the Law of War. ¹⁷

c. **Need for Competent Authority to Exercise Discretion Required by the Targeting Duty.** Whether a service member is bound by a particular targeting duty will depend upon whether he or she has authority to exercise the discretion implied by the targeting duty in question. For example, command responsibility cannot arise unless the service member’s military duties provide the authority to exercise command discretion, that is, he or she must be a commander. Similarly, the duty to conduct proportionate attacks will “normally” only arise if the service member “has authority over military operations.”¹⁸ The reason being is “[l]ower level personnel may not be privy to the strategic or operational significance of a specific attack, and thus may not be competent to evaluate the expected military advantage of the attack against the expected harm to civilians and civilian objects.”¹⁹ As another example, with regard to feasible precautions, that duty may not arise if the service member does not have the “authority to direct and manage resources (e.g., allocating weapon systems and intelligence assets) or judgments about the acceptable degree of risk (e.g., to the lives of friendly forces and to mission accomplishment).”²⁰ In summary, whether a service member is bound by a particular targeting duty will depend upon his or her military responsibilities and the factual circumstances of the attack in question.

Practice Note

The United Kingdom Law of Armed Conflict Manual provides the following insight on how to assess what targeting responsibilities a particular service member may be bound by:

“Those who plan or decide upon attacks are the planners and commanders and they have a duty to verify targets, take precautions to reduce incidental damage, and refrain from attacks that offend the proportionality principle. Whether a person will have this responsibility will depend on whether he has any *discretion* in the way the attack is carried out and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative.”²¹

5. **Justification.** A death, injury, or other act caused or done in the performance of duty and in compliance with the Law of War is justified and not unlawful with respect to that body of Law.²² However, rules of engagement, standing operating procedures, and other sources of duty may

impose greater restrictions than the requirements of the Law of War.²³ Depending on the circumstances, a failure to comply with such standards could be a violation of the UCMJ, and yet not be a violation of the Law of War.

6. Errors in Judgment and the Law of War.

a. **General.** It is a centuries old notion that those who perform military duties should not be punished for a mere “error in judgment,”²⁴ a notion the Nuremberg Tribunals recognized as a principle of international law. In particular, the tribunal determined that “[w]here room for an honest *error in judgment* exists” an accused “is entitled to the benefit thereof by virtue of the presumption of his innocence.”²⁵ The tribunal also stated that an accused “[c]annot be held criminally responsible for a mere *error in judgment* as to disputable legal questions”²⁶ and determined that while an accused in a particular case “[m]ay have erred in the exercise of his judgment . . . he was guilty of no criminal act.”²⁷ The same principle is enshrined in the U.S. Manual For Court-martial at Article 110 which states “a mere *error in judgment* . . . does not constitute an offense”²⁸ under that article, and at Article 99 which states “[i]ntentional misconduct’ does not include a *mere error in judgment*.”²⁹

b. **Discretionary Duties versus Ministerial Duties.** Errors in judgment arise in the context of discretionary duties, and can never arise in the context of ministerial duties. Discretionary duties and ministerial duties are defined as follows:

(1) Discretionary Duties. Discretionary duties are mandatory legal obligations governed by no “hard and fast rule.”³⁰ What makes a duty discretionary is that there is room for “judgment and decision”³¹ on how to comply with the obligation, that is, the duty “requires judgment as to which of a range of permissible courses is the wisest.”³² The Law of War duties listed in Table 1 are examples of discretionary duties.

(2) Ministerial Duties. “Ministerial” duties are those for which “nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.”³³

c. **Error in Judgment Analysis.** Determining whether an act or omission amounts to more than a mere error in judgment requires application of an objective test, and a subjective test. Each are discussed in-turn below, and the order in which they are discussed is for clarity purposes only, and not indicative of any particular order in which they must be addressed in an investigative report.

(1) **Objective Test—Abuse of Discretion.**

(a) General. As discretionary obligations leave room for human judgment, those who make those judgments assume “quasi-judicial” power to interpret the facts and law.³⁴ As such, a judgment that a particular act of discretion is lawful is reviewed for an abuse of discretion.³⁵ The abuse of discretion test has been articulated as follows:

(i) Justified. A lawful act is one “that a reasonable person might have committed under the same circumstances.”³⁶ As such “if officers of reasonable competence could disagree on the issue, [justification] should be recognized.”³⁷ Similarly, if there were some “reasonable grounds”³⁸ for having made the decision, justification should also be recognized.³⁹

(ii) Not Justified. A judgment will not be justified if “every reasonable official would have understood that what he is doing violates” the law,⁴⁰ or if “no reasonably competent officer would have concluded”⁴¹ his or her acts were lawful.

(b) Detached Deliberation Not Required. In the context of discretionary acts during combat, a service member is not required to engage in detached deliberation to determine whether his anticipated action will comply with the law.⁴²

(c) Evaluate the Circumstances as they Reasonably Appeared at the Time. Under U.S. domestic jurisprudence, the lawfulness of discretionary acts are viewed from the “circumstances as they reasonably appeared at the time . . .”⁴³ In *United States v. Rendulic*, a Nuremberg Tribunal articulated the identical standard, stating the lawfulness of the accused’s decision would be viewed from the perspective of “the conditions as they appeared to the defendant at the time.”⁴⁴ The principle is now referred to as the “Rendulic Rule” and has achieved broad acceptance as reflective of international law.⁴⁵

Practice Note

In analyzing the “conditions as they appeared to the defendant at the time,” *Rendulic* established those conditions by analyzing what current U.S. Army doctrine would refer to as the “METT-TC” variables⁴⁶ —“mission, enemy, terrain and weather, troops and support available, time available, and civil considerations.”⁴⁷ It was only after analyzing these factors that the tribunal determined the accused “could honestly conclude” the actions taken were justified.⁴⁸ As such, when advising investigating officers familiar with military warfighting doctrine, it may be useful to explain the Rendulic Rule with reference to the METT-TC variables.

(d) Apply the Objective Test using the Unique Criteria of the Targeting Duty in Question. Each targeting duty has unique criteria that must be considered in applying the objective test. For example, in the context of precautions in attack, as indicated in Table 1, “feasible” measures must be taken to minimize incidental harm. Table 1 cites to the relevant portion of the Department of Defense (DoD) Law of War Manual for each targeting duty which provides further explanation on how the applicable criteria of each duty may apply in the circumstances as they appeared at the time. As an illustration, in the specific context of precautions in attack, the manual articulates the following non-exhaustive list of considerations that may be pertinent to assessing what precautionary measures were “feasible” in the circumstances as they appeared at the time:

- the effect of taking the precaution on mission accomplishment;

- whether taking the precaution poses a risk to one’s own forces or presents other security risks;
- the likelihood and degree of humanitarian benefit from taking the precaution;
- the cost of taking the precaution, in terms of time, resources, or money; or
- whether taking the precaution forecloses alternative courses of action.⁴⁹

In light of the relevant consideration for the targeting duty in question, if there were some “reasonable grounds” upon which the service member could have concluded his or her act was lawful, there is no criminal act.⁵⁰ On the other hand if “every reasonable official would have understood that what he is doing violates” the law, the act would not be justified.⁵¹

Practice Note

To distinguish between an “innocent error of judgment” and a dereliction in the context of military duties, an Eighteenth Century commentator articulated the following useful articulation of the objective assessment:

“There are in every Art certain *Maxims and Rules* in which all Artists agree: thus far there is *Certainty*, and no *Artist doubts*; But farther than this there may be *Doubt* and *Difficulty*; and there Artists *may* and *will*, as often as consulted, though impartial, *differ*. The *single Point* therefore is, *Has the Commander observed the plain, known Rules of his Profession?*”⁵²

This insight continues to be helpful for understanding whether a person has met his or her duties in the context of targeting and the Law of War. To understand whether a Soldier has exercised due regard to reduce the risk of harm to persons and property protected by the Law of War, we should ask whether the Soldier’s conduct has comported with the plain known standards of his or her military profession. Also, care should be taken not to judge solely in light of 20 / 20 hindsight. Actions or decisions which end poorly may not have been the best decision possible at the time, particularly when judged in hindsight, but may have been within the realm of many possible reasonable decisions at the time.

(2) **Subjective Test—Abuse of Discretion.**

(a) **General.** If the accused specifically intended to violate any aspect of a discretionary duty, the act in question cannot be considered a “mere error in judgment.”⁵³

(b) **Good Faith Requirement.** The subjective component can also be described as placing an affirmative obligation upon those who make targeting decisions to act in “good faith,” a phrase which means “the absence of malice” or “honesty of intention” and “being faithful to one’s duty or obligation.”⁵⁴ As such, if an accused “could honestly conclude” his actions were justified, he has committed “no criminal act.”⁵⁵

7. **Mens Rea and the Law of War.**

a. **Willfulness and Culpable Negligence.** In order to establish that an accused's act or omission violated the Law of War, it must be shown the alleged violation was willful,⁵⁶ or the result of culpable negligence.⁵⁷ The culpable negligence requirement also applies in the context of command responsibility,⁵⁸ though contrary international tribunal precedent does exist.⁵⁹

b. **Mens Rea and the Ignorance of Fact Defense.** The U.S. Military Judges Benchbook articulates the ignorance of fact defense as follows: “[t]he (ignorance) (mistake) cannot be based on a *negligent* failure to discover the true facts.”⁶⁰ In the context of the Law of War however, mere negligence is insufficient to prove a violation, and therefore the ignorance of fact defense must be read as incorporating the *mens rea* component applicable to the Law of War violation at issue.⁶¹

8. **Causation and the Law of War.** When a crime requires a particular result, such as harm to persons or property, there must be a sufficient causal nexus between the accused's conduct and the harm caused.⁶² In the context of command responsibility, international tribunals are split on whether “but for” causation is required, or whether a lesser nexus is required.⁶³ Under U.S. Constitutional jurisprudence, whenever an offense requires a particular result, the accused's conduct must be the “but for” cause of that result⁶⁴ which can also be shown if the accused was the “proximate” cause.⁶⁵

9. **Elements of Proof.**⁶⁶ Under long-standing U.S. policy, “ordinarily persons subject to the [UCMJ] should be charged with a specific violation of the [UCMJ] rather than a violation of the Law of War.”⁶⁷ As such, this section will articulate what elements of proof are necessary to establish individual responsibility for completed and inchoate offenses with respect to an alleged violation of a duty listed at Table 1, and provide a non-exclusive list of what UCMJ articles contain those same elements.

a. **Willful Violations.**

(1) **Elements of Proof:**

- (a) The accused had a certain duty imposed by the Law of War,⁶⁸
- (b) The accused was willfully derelict in the performance of that duty,⁶⁹
- (c) That such dereliction of duty resulted in harm to persons or property protected by the Law of War.⁷⁰

(2) **Inchoate Offenses.** The accused's acts amounted to an attempt or conspiracy to unlawfully harm persons or property protected by the Law of War.⁷¹

(3) **Applicable UCMJ Articles Include:**

- (a) Completed Offenses.

- ***In the case of a willful killing***—premeditated or unpremeditated murder under Article 118.⁷²

- ***In the case of willful harm not resulting in death***—assault consummated by a battery,⁷³ or a battery in which “grievous bodily harm is intentionally inflicted,”⁷⁴ both under Article 128.⁷⁵

- ***In the case of harm to property***—intentional harm to both real and personal property can be charged under Article 109.⁷⁶

- ***Aiding and abetting a completed offense***—Article 77.⁷⁷

(b) Inchoate Offenses.

- ***Attempts***—Article 80.⁷⁸

- ***Conspiracy***—Article 81.⁷⁹

b. Culpably Negligent Violations.

(1) Elements of Proof.

(a) The accused had a certain duty imposed by the Law of War;⁸⁰

(b) That the accused through culpable negligence was derelict in the performance of that duty;⁸¹

(c) That such dereliction of duty resulted in harm to persons or property protected by the Law of War.⁸²

(2) Applicable UCMJ Articles Include:

- ***In the case of death***—involuntary manslaughter under Article 119.⁸³

- ***In the absence of death***—Article 128, assault consummated by a battery,⁸⁴ or if applicable, a “battery”⁸⁵ type aggravated assault “with a means or force likely to produce death or grievous bodily harm.”⁸⁶

- ***In the case of harm to real property***—Article 109, “Wasting or spoiling non-military property.”⁸⁷

- ***In the case of harm to personal property***—Article 134.⁸⁸

10. Targeting and the 1949 Geneva Conventions.

a. **General.** It is generally not within the purview of an investigation to make a determination that a service member has violated the Geneva Conventions as those determinations are not pertinent to criminal liability under the UCMJ. Nonetheless, it is imperative that Judge Advocate legal advisors be able to identify violations of those conventions supported by the facts of an investigation so that proper authorities can be notified and the appropriate action can be taken.⁸⁹

b. **Applicability of the Geneva Conventions.** While a criminal violation of the Law of War violates the UCMJ, not every violation of the Law of War will amount to a violation of the Geneva Conventions. The following prerequisites must be met for a Law of War violation in the context of targeting to also amount to a violation of the Geneva Conventions.

(1) The Person or Property Harmed must be Protected by the Geneva Conventions. A breach of the Geneva Conventions occurs only when there is unlawful harm to one of the specific categories of “persons or property protected” by those conventions.⁹⁰

(2) The Targeting Duty Must be Referenced in the Geneva Conventions. With regard to the targeting duties listed at Table 1, the Geneva Conventions do not reference either command responsibility or the principle of proportionality. Similarly, the conventions do not reference the Law of War requirement that only objects meeting the definition of a “military objective” can be lawfully targeted. Therefore a violation of these Law of War obligations of themselves do violate the Geneva Conventions.

c. **Grave Breaches / Other Breaches.** The Geneva Conventions characterize certain acts of unlawful harm to persons or property protected by those conventions as “grave breaches” (GB), while all other acts of unlawful harm are characterized as “other than . . . grave breaches . . .” (OB).⁹¹ Listed below are the four types of GBs that are applicable in the context of targeting, and a non-exclusive list of UCMJ Articles that could, correspondingly, be used prosecute individuals who committed those GBs:

(1) When there is unlawful harm to protected persons:

(a) “[W]ilful killing”⁹² which, as referenced in Para 9, can be prosecuted as premeditated or unpremeditated murder under UCMJ Article 118.

(b) “[W]ilfully . . . causing serious injury to body or health”⁹³ which, as referenced in Para 9, can be prosecuted as battery in which “grievous bodily harm is intentionally inflicted” under UCMJ Article 128.

(2) When there is unlawful harm to protected property, the following are GBs:

(a) Willful harm to protected property⁹⁴ provided damage thereto is “extensive”⁹⁵ which, as referenced in Para 9, can be prosecuted as unlawful destruction of property under Article 109.

(b) Culpably negligent harm to protected property is a GB, provided the harm was the product of the “wanton” form of culpable negligence,⁹⁶ and the damage caused was “extensive.”⁹⁷ As referenced in Para 9, such conduct can be prosecuted under Article 109 when the harm occurs to real property, or under Article 134 when the harm occurs to personal property.

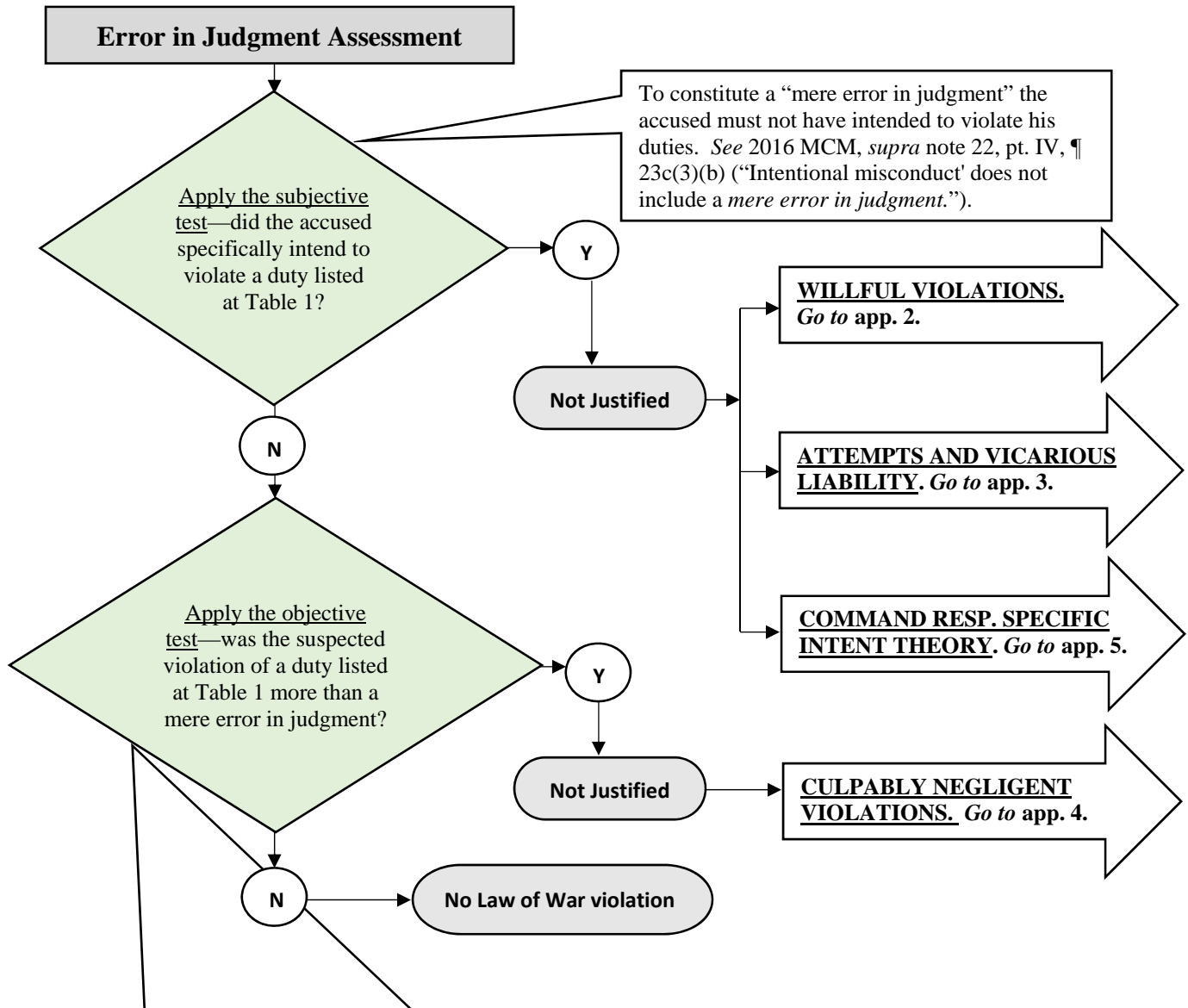
d. **Grave Breaches in Non-International Armed Conflicts (NIAC).** The GBs related to harm to protected persons mentioned in the subparagraph immediately above can also occur in NIACs, however, GBs related to harm to protected property can only occur in international armed conflicts.⁹⁸

e. **Grave Breach Classification Table.** Table 2 below depicts in graphic format the relationship between an alleged violation of the Law of War and its classification as a GB as articulated above.

Table 2

<i>Mens Rea</i>	Harm to Protected Persons	Harm to Protected Property
	GB Criteria	GB Criteria (IAC Only)
Willful	Death or serious injury must result.	“Extensive” damage must result.
Wanton	NA	<ul style="list-style-type: none"> • “Extensive” damage must result; • The attack must have been carried out “wantonly.”

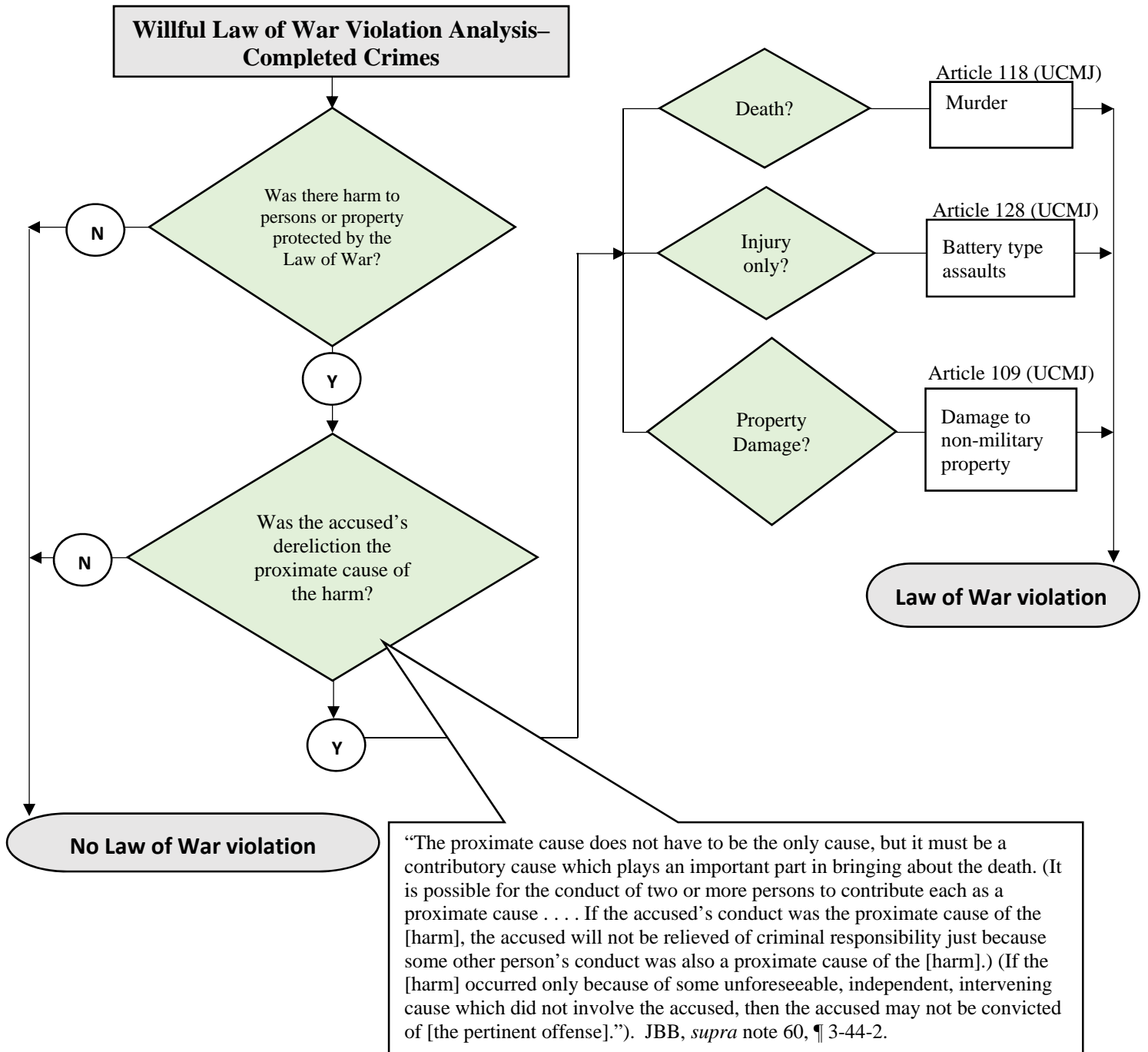
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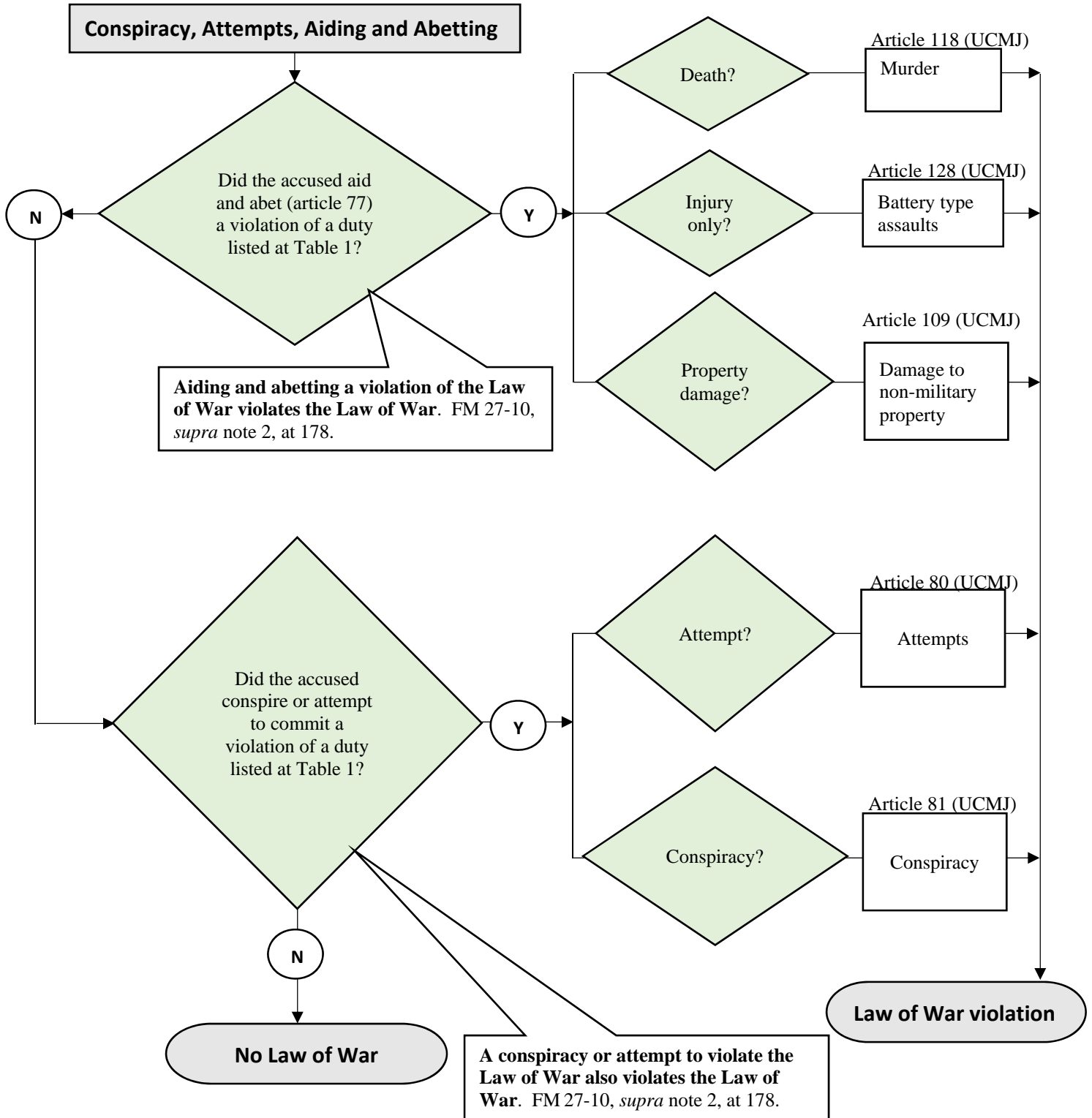


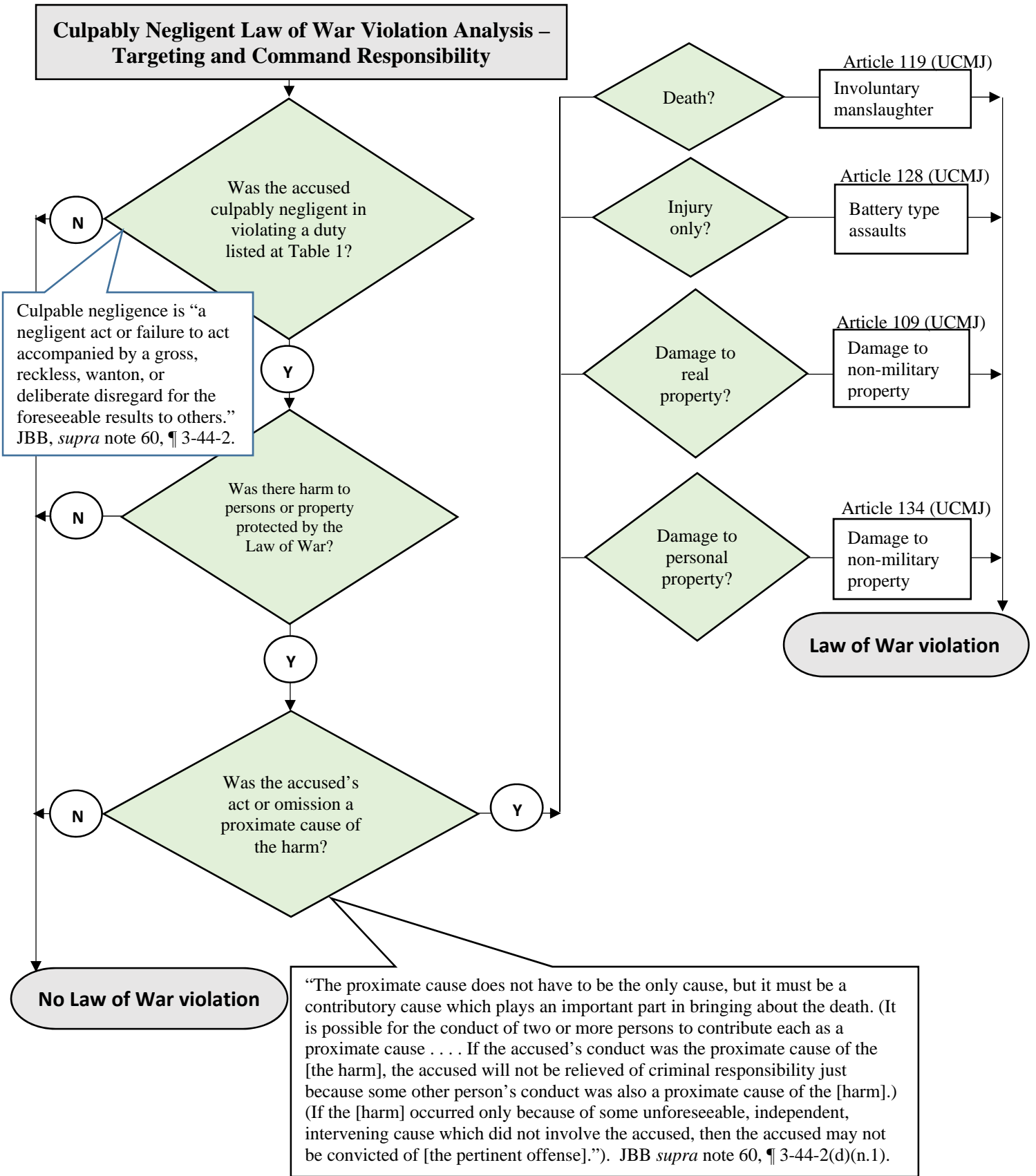
Rule: The 2016 MCM states at Article 110: “[a] mere error in judgment [is one that] that a reasonable person might have committed under the same circumstances . . .” 2016 MCM, *supra* note 22, pt. IV, ¶ 34c(3). That rule has also been interpreted as follows:

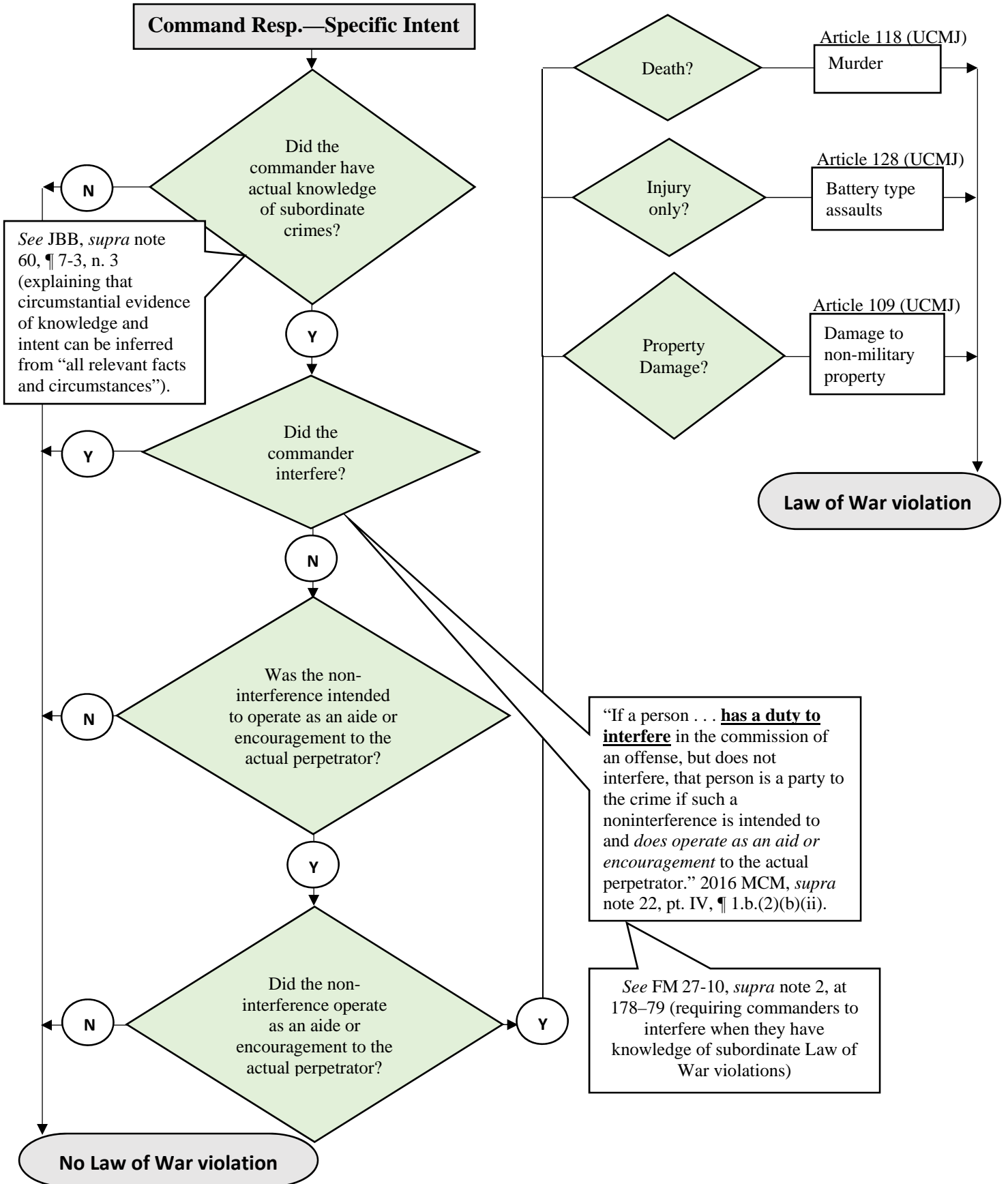
- **MERE ERROR IN JUDGMENT**—“[I]f officers of reasonable competence *could* disagree on the issue” the act is justified. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Or, if the accused had “some reasonable grounds” for having made his decision, the act is justified. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974). Similarly, “[i]f the facts were such as would justify the action by the exercise of judgment,” the act is justified. *United States v. Rendulic (The Hostage Trial)*, in 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Nuernberg, Oct 1946–Nov. 1949, at 1296–97.

- **NOT JUSTIFIED**—If “every reasonable official would have understood that what he is doing violates” the law, the act would not be justified. *Mullenix v. Luna*, 136 U.S. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 U.S. 2088, 2093 (2012)). Similarly, if “no reasonably competent officer *would have concluded*” the acts were lawful, the act would not be justified. *Malley*, 475 U.S. at 341.









¹ 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice (UCMJ)).

² U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, CHANGE NO. 1 1976, 5 (July 1956) [hereinafter FM 27-10] (“Those who plan or decide upon an attack, therefore, must take all *reasonable steps* to ensure . . . that the objectives are identified as military objectives . . .”) (emphasis added).

³ DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 2015 ¶ 5.10 (updated to December 2016) [hereinafter DOD LAW OF WAR MANUAL] (stating which persons are protected).

⁴ FM 27-10, *supra* note 2, at 5.

⁵ *Id.* at 178–79.

⁶ *Id.* (“The commander is also responsible if he . . . *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 . . .”). *Cf.* Rome Statute of the International Criminal Court, 17 July 1998 arts. 28(a)(i)-(ii), U.N. Doc. A/CONF.183/9 (2002) (“That military commander . . . knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes;”); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991 art. 7(3), May 25 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY STATUTE] (establishing a duty act if the commander “knew or had reason to know” of his subordinates crimes); Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR STATUTE] (establishing a duty act if the commander “knew or had reason to know” of his subordinates crimes) (emphasis added); 10 U.S.C. § 950q (2012) (Military Commission Act) (establishing liability if the accused “had reason to know, or should have known, that a subordinate was about to commit” war crimes).

⁷ DOD LAW OF WAR MANUAL, *supra* note 3, ¶ 5.10.2.

⁸ DOD LAW OF WAR MANUAL, *supra* note 3, ¶ 5.6.3 (criteria for determining if an object is a military objective); *id.* at ¶ 5.8.3 (criteria for determining if an individual is a member of an armed group); *id.* at ¶ 5.8.3 (criteria for determining if an individual is directly / actively participation hostilities); *id.* at ¶ 4.3 (criteria for determining if an individual is a lawful combatant or unprivileged belligerent). *See also id.* at ¶ 5.5.2 (stating which persons and property are protected from attack).

⁹ *See id.*, ¶ 7.10.3.3 – ¶ 7.10.3.6 (explaining the factors that bear upon whether an object has lost its special protection).

¹⁰ *Id.* at ¶ 7.10.3.2, ¶ 7.11.1 (explaining that “due warning” is required before attacking an object subject to special protection); *id.* at ¶ 5.11.5.2 (explaining what type of advanced warning may be “effective”).

¹¹ *Id.* at ¶ 7.10.3.2, *supra* note 3 (stating the requirement to provide warning “does not prohibit the exercise of the right of self-defense.”).

¹² *Id.* at ¶ 5.11.5 (stating advance warning must be given if “circumstances permit”); *id.* at ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

¹³ *Id.* at ¶ 5.11.1 – ¶ 5.11.1.1 (explaining that “effective warning” must be given unless “circumstances do not permit”); *id.* at ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

¹⁴ *Id.* at ¶ 5.2.3 (articulating the general rule that feasible precautions must be taken); ¶ 5.11.3 (explaining that adjusting the timing of an attack is a form of precaution); ¶ 5.11.6 (explaining that selecting the weaponing for an attack is a form of precaution); ¶ 5.2.3.2. (listing factors that bear on what precautions are feasible).

¹⁵ *Id.* at ¶ 5.12 (explaining pertinent factual considerations to be assessed in determine whether an attack would be proportionate).

¹⁶ *Id.* at ¶ 18.23.3. *See also* FM 27-10, *supra* note 5, at 178–79,

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 (emphasis added).

¹⁷ DoD Law of War Manual, *supra* note 3, ¶ 18.23.3 n. 338 (citing FM 27-10, *supra* note 5, at 178–79).

¹⁸ *Id.* at ¶ 5.10.2.1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.9 (2004) (emphasis added).

²² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(c) (2016) [hereinafter 2016 MCM] (“A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”); *Id.* at Discussion (“[k]illing an enemy combatant in battle is justified”). *Cf.* Model Penal Code § 3.03(2)(b) (1985) (proposing that criminal statutes recognize justification for a killing pursuant to a “public duty” that “occurs in the lawful conduct of war.”). *See also* United States v. Payne, 40 C.M.R. 516, 519 (A.C.M.R. 1969) (stating that a legal duty may be imposed by “the law of war, written and customary”).

²³ *See e.g.*, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT / STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (June 13, 2005).

²⁴ *See e.g.*, Letter to the Editor, *To the Citizen*, THE LONDON CHRON., Feb. 10–12, 1757, at 146 (protesting the court-martial conviction of British Admiral John Byng on the basis that an “Error in judgment can never be the same with, or form any Part of the Idea of Negligence, because the error of this judgment is not discerned by him who acts in Consequence of it at the Time of Action . . .”); T. Smollett, 2 *The History of England from the Revolution in 1688 to the Death of George II* 260 (Philadelphia, Bennett & Walton, 1827) (“Thus fell, to the astonishment of all Europe, admiral John Byng; who, whatever his errors and indiscretions might have been, seems to have been rashly condemned, meanly given up, and cruelly sacrificed to vile considerations.”); 6 *The Life and Works of Lord Macaulay* 65 (London, Longmans, Green, and Co., 1904) (“We think the punishment of the Admiral all together unjust and absurd. . . . He died for an error in judgment, an error such as the greatest commanders, Frederic, Napoleon, Wellington, have often committed . . . Such errors are not proper objects of punishment . . .”); 8 *Dictionary of National Biography* 120 (New York, MacMillan & Co. 1886),

Another statement, less sweeping but wholly incorrect, has also been often repeated, and has been accepted by even serious historians it is said that Admiral Byng was shot for 'an error in judgment,' a fault which, as Lord Macaulay has properly shown, may be a very good reason for not employing a man again, but does not amount to a crime.

²⁵ United States v. Rendulic (The Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, at 1245–46.

²⁶ United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 511 (emphasis added). *Cf.* Ashcroft v. Al-Kidd, 131 U.S. 2074, 2085 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986) (“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal

questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”).

²⁷ *Rendulic*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 at 1297.

²⁸ 2016 MCM, *supra* note 22, pt. IV, ¶ 34c(3).

²⁹ *Id.* at ¶ 23c(3)(b).

³⁰ BLACK’S LAW DICTIONARY 467 (6th ed. 1990) [hereinafter BLACK’S LAW 6TH EDITION] (defining “discretionary act”).

³¹ *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

³² *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

³³ *Mississippi v. Johnson*, 71 U.S. 475, 498 (1867). *See also* BLACK’S LAW 6TH EDITION, *supra* note 32, at 996 (defining “ministerial duty” as one for “which nothing is left to discretion—a simple definite duty, imposed by law, and arising under conditions admitted or proved to exist.”).

³⁴ *Wilkes v. Dinsman*, 48 U.S. 89, 129 (1849) (“His [the military official’s] position, in such case, in many respects, becomes quasi judicial . . . And it is well settled that all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts.”) (citations omitted). *See also* *Martin v. Mott*, 25 U.S. 19, 31–32 (1827) (“Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”).

³⁵ *United States v. Clark*, 31 F. 710, 717 (E.D. Mich. 1887) (stating a discretionary act will be deemed lawful provided it “was not so clearly illegal that a reasonable man might not suppose it to be legal . . .”).

³⁶ 2016 MCM, *supra* note 22, pt. IV, ¶ 34c(3).

³⁷ *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (addressing whether a state trooper was entitled to qualified immunity against a civil claim for damages under 42 U.S.C. § 1983 alleging the state trooper, by applying for an arrest warrant, violated of the respondent’s Fourth and Fourteenth amendment rights).

³⁸ *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (“[i]t is the existence of *reasonable grounds* for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.”) (emphasis added). *See also* Professor Albert Levitt, *The Judicial Review of Executive Acts*, 23 MICH L. REV. 588, 590 (1924-1925),

The criterion in such a case is this, *Do the existing facts justify the action as taken?* If so, there can be no power of review exerted by the courts. The point to note is that the courts in determining the validity or invalidity of executive action where the limits of power are simply implied by the function of the office, will look to the surrounding circumstances to see if the official could reasonably have acted as he did. They need not come to the same conclusion on the facts that he did. They may believe that his action was so different from what their own would have been that they themselves would not possibly have acted the same way he did. All this, however, would be immaterial. If the official had *some reasonable grounds* for doing what he did, his action will not be disturbed. (emphasis added)

³⁹ *United States v. Rendulic (The Hostage Trial)*, in 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, at 1296–97,

If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. . . . [t]he defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. (emphasis added)

⁴⁰ *Mullenix v. Luna*, 136 U.S. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 U.S. 2088, 2093 (2012)) (addressing whether a police officer was entitled to qualified immunity against a civil claim for damages under 42 U.S.C. § 1983 alleging that he had violated the Fourth Amendment rights of the decedent by using excessive force).

⁴¹ *Malley*, 475 U.S. at 341.

⁴² *Brown v. United States*, 256 U.S. 335, 353 (1921) (stating “[d]etached deliberation cannot be demanded in the presence of an uplifted knife”); *New York v. Tanella*, 374 F.3d 141, 151 (2d Cir. N.Y. 2004),

An analysis of the testimonial evidence in conjunction with the undisputed surrounding circumstances compels the conclusion that Tanella's belief was reasonable. It is undisputed that Tanella knew Dewgard to be a seasoned drug dealer and Tanella experienced first-hand his violent efforts to avoid arrest. Tanella saw Dewgard drive recklessly to evade police capture and nearly hit a pedestrian and her child in the process. Dewgard further demonstrated his criminal tenacity by fleeing from an armed police officer while carrying a large bag suspected of containing three kilograms of cocaine, as well as by choosing to engage Tanella in a fist-fight rather than submit to arrest. It is clear that the close-quarter situation was hardly conducive to detached deliberation; any reaction by Tanella was necessarily made on a split-second basis. Under these tense and perilous circumstances, Tanella's perception that Dewgard was reaching for his (Tanella's) gun was objectively reasonable as a matter of law.

⁴³ *Scheuer*, 416 U.S. at 247–48 (“[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and *all of the circumstances as they reasonably appeared at the time . . .*”) (emphasis added). *See also* *Mitchell v. Harmony*, 54 U.S. 115, 135 (1852),

In deciding upon . . . necessity, the state of the facts as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable grounds for believing that the peril is immediate and menacing, or the necessity urgent, he is justified upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser . . .

⁴⁴ *United States v. Rendulic (The Hostage Case)*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, 1297.

⁴⁵ *See* DOD LAW OF WAR MANUAL 2016, *supra* note 3, ¶ 2.2.3.3, ¶ 5.3.2 n. 67.

⁴⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-90-1, OFFENSE AND DEFENSE VOLUME I ¶ 1-6 (22 Mar. 2013) (“Subordinate forms of the attack have special purposes and include the ambush, counterattack, demonstration, feint, raid, and spoiling attack. The commander’s intent and the mission variables of mission, enemy, terrain and weather, troops and support available, time available, and civil considerations (METT-TC) determine which of these forms of attack are employed.”).

⁴⁷ *Mission*—“[t]hat the German troops withdraw from Finland.”; *Enemy*—“The Russians attacked almost immediately and caused the Germans much trouble in extricating these troops. . . . The evidence shows that the Russians had very excellent troops in pursuit of the Germans”; *Terrain and weather*—“The distance to the Norwegian border required about 1,000 kilometers of travel over very poor roads at a very inopportune time of year.”; *Troops and support available*—“[t]he four best mountain divisions were recalled to Germany, thereby reducing the strength of the army by approximately one-half.”; *Time available*—“On 3 September 1944, Finland negotiated a separate peace with Russia and demanded that the German troops withdraw from Finland within 14 days, a demand with which it was impossible to comply.”; *Civil Considerations*—“The record shows that the Germans removed the population from Finmark, at least all except those who evaded the measures taken for their

evacuation. The evidence does not indicate any loss of life directly due to the evacuation.” *Rendulic*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 at 1295–96.

⁴⁸ *Id.*

⁴⁹ DOD LAW OF WAR MANUAL, *supra* note 3, ¶ 5.2.3.2.

⁵⁰ *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974).

⁵¹ *Mullenix v. Luna*, 136 U.S. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 U.S. 2088, 2093 (2012)).

⁵² David Mallet, *Observations on the Twelfth Article Of War 27* (London, W. Owen, 1757) (emphasis in original).

⁵³ 2016 MCM, *supra* note 22, pt. IV, ¶ 23c(3)(b) (specifying “intentional misconduct” is not “a mere error in judgment.”); *Wilkes v. Dinsman*, 48 U.S. 89, 131 (1849) (“In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error”); *United States v. Rendulic (The Hostage Case)*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, at 1245–46,

In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore *obvious* facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a [legally] correct decision and, if he *willfully refrains from so doing for any reason*, he will be held criminally responsible for the wrongs committed against those entitled to the rights of a belligerent. Where room for an *honest error in judgment* exists, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence. (emphasis added)

⁵⁴ BLACK’S LAW 6TH EDITION, *supra* note 30, at 692.

⁵⁵ *United States v. Rendulic (The Hostage Trial)*, in 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, at 1297.

⁵⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (describing “willful” breaches of the Geneva Conventions); Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II] (same); Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (same); Geneva Conventions Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (same).

⁵⁷ *United States v. Schultz*, 4 C.M.R. 104, 115 (C.M.A. 1952) (holding that in the context of the “law of war” that “[i]mposing criminal liability for less than culpable negligence . . . has not, as yet, been given universal acceptance by civilized nations.”); COMMENTARY OF 2016 ARTICLE 50: GRAVE BREACHES, ¶ 2936 (“Cases of negligence do not usually support the conviction of alleged perpetrators in international criminal law”), available at <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>; Antonio Cassese et al., *Cassese’s International Criminal Law* 53 (3d. ed. 2013) (“It would seem that, given the intrinsic nature of international crimes . . . negligence operates as a standard of liability only when it reaches the threshold of gross or culpable negligence.”).

⁵⁸ *United States v. Von Leeb (High Command Case)*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct 1946–Nov. 1949, at 544 (establishing the *mens rea* for command responsibility as “a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”); *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (Int’l Crim. Trib. For

Rwanda Jun. 16, 2003) (stating that “references to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought as the Judgment of the Trial Chamber in the present case illustrates.”).

⁵⁹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 432 (Jun. 15, 2009) (establishing negligent *mens rea* standard); Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 313-33 (establishing a negligence *mens rea* standard). *But see* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 63 (Int’l Crim. Trib. For the Former Yugoslavia Jul. 29, 2004) (rejecting the trial chamber’s assertion that negligence is the appropriate level of *mens rea*).

⁶⁰ See U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK ¶ 5-11-2 n.1 (10 Sep. 2014) [hereinafter JBB] (emphasis added).

⁶¹ The 2016 MCM contemplates that the *mens rea* for the ignorance of fact defense be adjusted depending on the nature of the offense charged. See 2016 MCM, *supra* note 22, R.C.M. 916(j) discussion (stating that “[s]ome offenses require *special standards of conduct*” and that “the element of reasonableness must be applied in accordance with the standards imposed by such offenses”) (emphasis added). This result is consistent with the Model Penal Code (MPC) which adjusts the *mens rea* for ignorance of fact depending on the *mens rea* required for the offense charged. Model Penal Code, *supra* note 22, § 2.04 (stating “Ignorance or mistake as to a matter of fact or law is a defense if . . . the ignorance or mistake negatives the purpose, knowledge, belief, *recklessness* or *negligence* required to establish a material element of the offense;”).

⁶² Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute ¶ 211 (March 21, 2016) (stating “[i]t is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.”).

⁶³ Compare Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 399 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) (establishing in the context of command responsibility a “but for” causation requirement as the “necessary causal nexus” between the crimes committed by subordinates and the superior’s failure to act), with Bemba Gombo, Case No. ICC-01/05-01/08 at ¶ 211 (stating that in the context of command responsibility, there is no requirement under the Statute for the International Criminal Court to show “‘but for’ causation between the commander’s omission and the crimes committed.”).

⁶⁴ Burrage v. United States, 134 U.S. 881, 888 (2014) (stating that “but for” causation “represents *the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.”) (internal quotations omitted) (emphasis in original).

⁶⁵ United States v. Bailey, 75 M.J. 527, 532–33 (A.C.C.A. 2015) (stating the proximate cause and intervening cause instructions in the Military Judges Bench at “para. 3-44-2(d)(n.1)” sufficiently address the “but for” causation requirement the Supreme Court addressed in Burrage v. United States); JBB *supra* note 60, ¶ 3-44-2(d)(n.1),

The proximate cause does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death. (It is possible for the conduct of two or more persons to contribute each as a proximate cause to the death of another. If the accused’s conduct was the proximate cause of the victim’s death, the accused will not be relieved of criminal responsibility just because some other person’s conduct was also a proximate cause of the death.) (If the death occurred only because of some unforeseeable, independent, intervening cause which did not involve the accused, then the accused may not be convicted of involuntary manslaughter.)

⁶⁶ The elements of proof in this section for completed crimes are modeled after UCMJ Article 92 with only slight variation. See 2016 MCM, *supra* note 22, pt. IV, ¶ 16b(3),

Dereliction in the performance of duties.

(a) The accused had certain duties;

-
- (b) That the accused knew or reasonably should have known of the duties;
- (c) That the accused was (willfully)(through neglect or culpable inefficiency) derelict in the performance of those duties;

[Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following as applicable]

- (d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused. (emphasis in original)

⁶⁷ *Id.* at R.C.M. 307(c)(2).

⁶⁸ *See* Table 1.

⁶⁹ 2016 MCM, *supra* note 22, at pt. IV, ¶ 16.c.(3)(c) (“‘Willfully’ means intentionally. It refers to the doing of an act knowingly and purposely, *specifically intending* the natural and probable consequences of the act.”) (emphasis added).

⁷⁰ *See supra* notes 62–65 and accompanying text (articulating that a causal nexus is required under U.S. domestic law and international tribunal precedent when the crime requires a particular result, which, in the context of U.S. jurisprudence, is “but for” causation).

⁷¹ FM 27-10, *supra* note 2, at 178 (stating that “[c]onspiracy, direct incitement, and attempts, as well as complicity in the commission of . . . war crimes” violate the Law of War). *See also* ICTY Statute, *supra* note 6, art. 7(1) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”); ICTR Statute, *supra* note 6, art. 6(1) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”).

⁷² *See* UCMJ art. 118 (2012); 2016 MCM, *supra* note 22, pt. IV, ¶ 43.b.(1)–(2) (establishing the elements of “premeditated” murder and intentional murder respectively); *United States v. Varraso*, 21 M.J. 129, 133 (C.M.A. 1985) (“[t]here is no basis for concluding that the causation requirement for premeditated murder differs from that applicable to involuntary manslaughter.”).

⁷³ 2016 MCM, *supra* note 22, pt. IV, ¶ 54b(2) (establishing the elements for “Assault consummated by a battery.”); *id.* at pt. IV, ¶ 54c(1)(b)(ii) (explaining an “offer” type of assault is an unlawful demonstration of violence, “either by an intentional or by a culpably negligent act or omission . . .”).

⁷⁴ 2016 MCM, *supra* note 22, pt. IV, ¶ 54b(4)(b) (establishing the elements for “Assault in which grievous bodily harm is intentionally inflicted.”); *United States v. Duckett*, 15 C.M.R. 904, 910 (A.F.C.M.R. 1954) (explaining in the context of aggravated assault with a means or force likely to cause death or grievously bodily harm that the “wrongful acts of the accused must be the “proximate cause” of the injuries sustained.”).

⁷⁵ *See* UCMJ art. 128 (2012).

⁷⁶ *See id.* UCMJ art. 109 (2012); *United States v. Lane*, 34 C.M.R. 744, 751 (C.G.C.M.R. 1964) (holding there was sufficient evidence upon which to determine the accused was the “proximate cause” of the damage cause to real property).

⁷⁷ Aiding and abetting a crime is unlawful under both the UCMJ and the Law of War. *Compare* 2016 MCM, *supra* note 22, pt. IV, ¶ 1.b.(1) (“A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly . . . may be punished to the same extent”), *with* FM 27-10, *supra* note 2, at 178 (stating that “[d]irect incitement . . . as well as complicity in the commission of . . . war crimes” violates the Law of War). *See also* ICTY Statute, *supra* note 6, art. 7(1) (“A person

who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”); ICTR Statute, *supra* note 6, at 6(1) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”).

⁷⁸ See UCMJ art. 80 (2012); 2016 MCM, *supra* note 22, pt. IV, ¶ 4.a.(a) (requiring specific intent plus an act amounting to more than mere preparation for an attempt to constitute).

⁷⁹ UCMJ art. 81 (2012); 2016 MCM, *supra* note 22, pt. IV, ¶ 5.c.(2), (4) (requiring a criminal agreement plus an overt act for conspiracy to constitute).

⁸⁰ See Table 1.

⁸¹ JBB, *supra* note 60, ¶ 3-44-2 (defining culpable negligence as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”).

⁸² See *supra* note 62–65 and accompanying text (articulating that a causal nexus is required under U.S. domestic law and international tribunal precedent when the crime requires a particular result, which, in the context of U.S. jurisprudence, is “but for” causation).

⁸³ Article 119, UCMJ, criminalizes involuntary manslaughter. UCMJ art. 119 (2012). The minimum *mens rea* for that offense is “culpable negligence.” 2016 MCM, *supra* note 22, pt. IV, ¶ 44c(2)(a)(i) (defining culpable negligence in the context of involuntary manslaughter); *id.* at ¶ 44b(2)(b) (requiring that death resulted from the act or omission of the accused).

⁸⁴ UCMJ art. 128; 2016 MCM, *supra* note 22, pt. IV, ¶ 54b(2) (establishing the elements for “Assault consummated by a battery.”); *id.* at pt. IV, ¶ 54c(1)(b)(ii) (explaining an “offer” type of assault is an unlawful demonstration of violence, “either by an intentional or by a culpably negligent act or omission . . .”); *id.* at ¶ 54.c.(2)(b) (explaining that “force applied in a battery may have been . . . indirectly applied” such as through striking the horse on which the person is mounted causing the horse to throw the person . . .”).

⁸⁵ 2016 MCM, *supra* note 22, pt. IV, ¶ 54c(2)(a) (“A ‘battery’ is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm.”).

⁸⁶ See *id.* at ¶ 54c(4)(a) (establishing the elements for “Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.”); *id.* at pt. IV, ¶ 54c(1)(b)(ii) (stating an “offer” type assault requires a “culpably negligent act or omission . . .”); *United States v. Duckett*, 15 C.M.R. 904, 910 (A.F.C.M.R. 1954) (explaining that it must be shown an accused was the proximate cause of the harm in proving up aggravated assault with a means or force likely to cause death or grievously bodily harm).

⁸⁷ Note that Article 109 does not contain a “culpable negligence” *mens rea* component. UCMJ art. 109 (2012); 2016 MCM, *supra* note 22, pt. IV, ¶ 33.c.(1). However, it does contain a “reckless” *mens rea* component which is a type of culpable negligence. JBB, *supra* note 60, ¶ 3-44-2 (defining culpable negligence as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”). See also *United States v. Lane*, 34 C.M.R. 744, 751 (C.G.C.M.R. 1964) (applying a “proximate cause” analysis in the context of UCMJ art. 109).

⁸⁸ The UCMJ does not contain a provision that allows an accused to be prosecuted for the culpably negligent destruction of private property that is personal in nature. See *generally*, 10 U.S.C. §§ 801-946 (2012). However, a UCMJ article 134 offense could be crafted to encompass such an offense. *United States v. Garcia*, 29 M.J. 721, 723 (C.G.C.M.R. 1989) (“The offense of recklessly spoiling or wasting property applies exclusively to real property, not personal property . . . while an offense under Article 134 might be crafted, such was not done at trial.”); UCMJ art. 134 (2012) (criminalizing “all disorders and neglects to the prejudice of good order and discipline in the armed forces” or “all conduct of a nature to bring discredit upon the armed forces.”).

⁸⁹ For example, the 1949 Geneva Conventions specify that when a grave breach (GB) has occurred the High Contracting Parties are obligated to “bring such persons . . . before its own courts” or “may hand such persons over for trial to another High Contracting Party concerned.” GC I, *supra* note 56, art. 49; GC II, *supra* note 56, art. 50; GC III, *supra* note 56, art. 129; GC IV, *supra* note 56, art. 146. The 1949 Geneva Conventions also specify that when any other breach (OB) of those conventions occurs, the High Contracting Parties are obligated to take “measures necessary for the suppression” of those breaches. GC I, *supra* note 56, art. 49; GC II, *supra* note 56, art. 50; GC III, *supra* note 56, art. 129; GC IV, *supra* note 56, art. 146. Those actions could include “a wide range of measures, such as the promulgation or revision of policies and regulations, administrative or corrective measures, or retraining of personnel.” DoD Law of War Manual, *supra* note 3, ¶ 18.9.3.3.

⁹⁰ GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC III, *supra* note 56, art. 130; GC IV, *supra* note 56, art. 147. *Cf.* 10 U.S.C. § 950p(a)(2) (“The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including civilians not taking an active part in hostilities, military personnel placed out of combat by sickness, wounds, or detention, and military medical or religious personnel.”); 10 U.S.C. § 950p(a)(3),

The term ‘protected property’ means any property specifically protected by the law of war, including buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, but only if and to the extent such property is not being used for military purposes or is not otherwise a military objective.

⁹¹ GC I, *supra* note 56, art. 49; GC II, *supra* note 56, art. 50; GC III, *supra* note 56, art. 129; GC IV, *supra* note 56, art. 146.

⁹² GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC III, *supra* note 56, art. 130; GC IV, *supra* note 56, art. 147.

⁹³ GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC III, *supra* note 56, art. 130; GC IV, *supra* note 56, art. 147. *See also* 2016 MCM, *supra* note 22, pt. IV, ¶ 54.c.(4)(a)(ii) (“‘Grievous bodily harm’ means *serious bodily injury*. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.”) (emphasis added).

⁹⁴ The texts of the Geneva Conventions do not actually say that a grave breach results from willful destruction of protected property, rather, only “wanton” destruction is mentioned as a grave breach. GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC IV, *supra* note 56, art. 147. However, the commentary to the Fourth Geneva Convention indicates that “intentional” unlawful destruction of protected property could amount to a grave breach. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (IV): COMMENTARY 601 n.1 (Pictet gen. ed., 1958) [hereinafter GC IV COMMENTARY].

⁹⁵ The Geneva Conventions require that harm to protected property be “extensive” to amount to a grave breach. GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC IV, *supra* note 56, art. 147. The commentary to the Fourth Geneva Convention provides the following context for the meaning of “extensive”: “To constitute a grave breach, such destruction and appropriation must be extensive: an isolated incident would not be enough.” GC IV COMMENTARY, *supra* note 94, at 601. However, the commentary also specifies, “It might be concluded from a strict interpretation of this provision that the bombing of a single civilian hospital would not constitute a grave breach [for want of being “extensive”], but this would be an inadmissible inference to draw if the act were intentional.” *Id.* at 601 n.1.

⁹⁶ GC I, *supra* note 56, art. 50; GC II, *supra* note 56, art. 51; GC III, *supra* note 56, art. 130; GC IV, *supra* note 56, art. 147. *See also* JBB, *supra* note 60, ¶ 3-44-2 (defining culpable negligence as “a negligent act or failure to act accompanied by a gross, reckless, *wanton*, or deliberate disregard for the foreseeable results to others.”) (emphasis added); 2016 MCM, *supra* note 22, pt. IV, ¶ 100a.c.(4) (“‘Wanton’ includes ‘Reckless’ but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.”).

⁹⁷ See *supra* note 95 (explaining the meaning of the term “extensive”)

⁹⁸ Common Article 3 (CA3) to the 1949 Geneva Conventions prohibits certain acts in the context of a non-international armed conflict (NIAC). See, e.g., GC IV, *supra* note 56, art. 3 (prohibiting “violence to life and person,” “taking hostages,” “outrages upon personal dignity,” and other acts in a conflict “not of an international character . . .”). Those specified prohibitions may amount to grave breaches (GBs) to the extent they are classified as GBs in the penal sanction provisions. DoD Law of War Manual, *supra* note 3, ¶ 18.9.3.2 (“Since Common Article 3 of the 1949 Convention protects persons against some of the acts described as grave breaches, the United States took the position that the obligations created by the grave breaches provisions of the 1949 Geneva Conventions could also apply to violations of Common Article 3.”). In the context of targeting, the GBs related to harm of protected persons meet this criteria. Compare GC IV, *supra* note 56, art. 147 (classifying as a grave breach “wilful killing” and “willfully . . . causing serious injury to body or health . . .”), *with id.* at art. 3 (prohibiting in pertinent part “violence to life and person, in particular murder of all kinds . . .”). By contrast, the GBs related to harm of protected property do not meet this criteria. Compare GC IV, *supra* note 56, art. 147 (classifying as a grave breach “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly.”), *with id.* at art. 3 (not articulating the causing of harm to property as a violation of CA3.). Therefore, while GBs related to protected persons can occur in NIACs, GBs related to protected property can only occur in IACs.