## What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib:

# Time for the United States to Adopt a Standard of Command Responsibility Towards its Own

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Soldiers of any army invariably reflect the attitude of their general. The leader is the essence. Isolated cases of rapine may well be exceptional but widespread and continuing abuse can only be a fixed responsibility of highest field authority. Resultant liability is commensurate with resultant crime. To hold otherwise

would prevaricate the fundamental nature of the command function. This imposes no new hazard on the commander, no new limitation on his power. He has always, and properly, been subject to due process of law. Powerful as he may become in time of war, he still is not an autocratic or absolute, he still remains responsible before the universal bar of justice.<sup>1</sup>

General Douglas MacArthur

#### I. INTRODUCTION

General MacArthur's understanding of this fundamental aspect of command came from his years as a military commander and from his role as the convening authority over the Yamashita tribunal. At the conclusion of World War II, Japanese General Tomoyuki Yamashita was tried by a military tribunal for his failure to exercise proper command and control over his subordinates who committed numerous war crimes during the Japanese occupation of the Philippines.<sup>2</sup> The principle of law that emerged from the Yamashita tribunal and other post-World War II war crimes tribunals is that a commander can be held criminally liable for the law of war violations committed by his forces.<sup>3</sup> This legal doctrine is known as command responsibility.<sup>4</sup>

Over the years the command responsibility doctrine has obtained the status of customary international law.<sup>5</sup> The United States was one of the strongest proponents for the adoption of this doctrine under international law at the conclusion of World War II.<sup>6</sup> However, under domestic law, as reflected in the Uniform Code of Military

- 1. DOUGLAS MACARTHUR, REMINISCENCES 298 (1st ed. 1964).
- 2. In re Yamashita, 327 U.S. 1, 13-14 (1946).

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<sup>3.</sup> See id. at 16 (International law imposes "an affirmative duty [on a commanding officer] to take such measures as within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.").

<sup>4.</sup> Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 Am. J. COMP. L. 455, 455 (2001).

<sup>5.</sup> See Anthony D'Amato, Superior Orders vs. Command Responsibility, 80 Am. J. Int'l L. 604, 607 (1986); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS VOL. II: THE LAW OF ARMED CONFLICT 462 (Stevens & Sons 1968). WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS at 910, 947-49, 990 (2nd ed. 1896) (describing the dictates of command responsibility). Customary international law consists of rules of law derived from the consistent conduct of states acting on the belief that the law requires them to conduct themselves in a certain way. See BLACK'S LAW DICTIONARY 835 (8th ed. 2004).

<sup>6.</sup> Damaska, *supra* note 4, at 487 (arguing that "the United States was the dominant accusatorial presence at and behind the military courts"). *See* 4 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, (William S. Hein & Co. 1997) (1948) [hereinafter U.N.

Justice ("UCMJ"), the United States has no clear or adequate standard by which to judge and affix responsibility on its own military leaders for command failures that lead or contribute to law of war<sup>7</sup> violations by subordinates.

The need to establish clear standards to evaluate and affix criminal responsibility on military commanders at all levels of command is evidenced by recent world events. One need look no further then the United States' response to the detainee abuse at Abu Ghraib to see the necessity of establishing a standard of accountability. The United States government responded to the detainee abuse at Abu Ghraib in several ways. First, both the administration and the military leadership denounced the conduct of the individual soldiers involved as aberrant behavior that is not in keeping with the values of the U.S. or its military. Second, the Department of Defense and other military agencies investigated the allegations of abuse and the possible causes for the abuse. Third, a number of the enlisted soldiers and non-

WAR CRIMES, *Yamashita*]; 12 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, 1 (William S. Hein & Co. 1997) [hereinafter U.N. WAR CRIMES, *von Leeb*]; 8 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, 34 (William S. Hein & Co. 1997) (1949) [hereinafter U.N. WAR CRIMES, *List*]; THE TOKYO MAJOR WAR CRIMES TRIAL XXVI (R. John Pritchard ed., 1981).

- 7. For the purposes of this article, law of war violations are defined by various treaties and protocols. First, conduct violates the law of war if it is defined as a grave breach of any of the international conventions signed at Geneva of August 12, 1949, or any other protocol or convention of the United States is a party to. Specifically, conduct that violates common Article 3 of the international Geneva conventions is considered a law of war violation. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Second, conduct violates the law of war if it is prohibited by Article 23, 25, 27, or 28 of the Hague Convention. See Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277. Finally, when individuals willfully kill or cause serious injury to civilians in violation of restrictions on the use of certain conventional weapons, there is a law of war violation. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices, May 3, 1996, 35 I.L.M. 1206.
- 8. It is not the purpose of this article to discuss or explore the possible criminal liability of any current or former military member or leader related to the events at Abu Ghraib or any other location. The author takes no position on the potential criminal liability of any current or former member of the military. The Abu Ghraib situation is discussed to illustrate the current gap that exists in this important area of the law.
- 9. See CBS News, Abuse of Iraqi POWs By Gis Probed, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml (Dan Rather interviews Brigadier General Mark Kimmit regarding POW abuse at the hands of American troops). The question of whether the abuse at Abu Ghraib was an aberration or part of a more systematic plan to torture detainees is a topic that is very much in debate. The scope of the detainee abuse issue does play into the discussion of command responsibility later in the paper. However, the various causes and actual extent of detainee abuse is beyond the scope of this article and it is a subject for future discussion.
- 10. See CBS News, Iraqi POW Probe Widens, May 4, 2004, http://www.cbsnews.com/stories/05/04/iraqi/main615363.shtml. As of the date of this article, the author is aware of 10 investigations conducted by the Department of Defense and the Department of

commissioned officers who were directly involved in the abuse at Abu Ghraib have been tried and criminally convicted in military courts-martial for their criminal actions. To date, with the exception of the charges that have been preferred against Lieutenant Colonel Stephen Jordan, no criminal proceedings have yet been initiated against any commander at the battalion level or higher for the detainee abuse that occurred at Abu Ghraib. See the control of the charges that have been preferred against any commander at the battalion level or higher for the detainee abuse that occurred at Abu Ghraib.

This focus on criminal prosecutions for only the lower ranking soldiers involved in detainee abuse has been subjected to criticism from members of the public, the media, and several members of Congress.<sup>14</sup> In particular, criticism has focused on the

the Army into the abuse at Abu Ghraib and at other locations. This number does not include criminal investigations or possible classified investigations. None of these investigations have been conducted by individuals outside of the Department of Defense or purely independent from the Department of Defense. There is an important debate surrounding whether these internal investigations are sufficient and whether there is a need for independent investigations. While this is an important issue, it is beyond the scope of this paper.

- James W. Smith III, A Few Good Scapegoats: The Abu Ghraib Courts Martial and the Failure of the Military Justice System, 27 WHITTIER L. REV. 671, 708-22 (2006). Some of the cases that have gone to trial included: United States v. Specialist Jeremy Sivits, United States v. Specialist Armin Cruz, United States v. Staff Sergeant Ivan Frederick, United States v. Specialist Charles Graner, United States v. Sergeant Javal Davis, United States v. Specialist Roman Krol, United States v. Specialist Megan Ambuhl, United States v. Specialist Sabrina Harman, United States v. Specialist Lynndie England. Smith, supra, at 708-22. The Fay Report also cites dog handlers who used their animals inappropriately and should be dealt with appropriately by their chain of commander. See GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND THE 205TH MILITARY INTELLIGENCE BRIGADE 129-30 (2004). Some of the dog handler cases that have gone to trial include: United States v. Sergeant Michael J. Smith and United States v. Sergeant Santos See Adam Zagaorin, Whose Idea Was This? TIME, Nov. http://www.time/magazine/article/09171,1555126,00.html (discussing Sergeant Cordona's conviction and sentence); CBS News, Abu Ghraib Dog Handler Gets 6 Months, Mar. 22, 2006. http://www.cbsnews.com/stories/2006/03/22/iraa/main1430842.shtml (discussing Sergeant Smith's conviction and sentence).
- 12. Eric Schmitt, *Abuse Charge Set for a U.S. Colonel*, N.Y. TIMES, Apr. 26, 2006, at A1. Under the military system, when a commander initiates criminal charges against a service member, he or she prefers the charge. *See* RULES FOR COURTS-MARTIAL, Rule 307, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES II-27 (2005).
- 13. LTC Jordan was not serving in a command position at Abu Ghraib, but rather. served as the deputy director of the Joint Detention and Interrogation Center. See Tom Shanker & Dexter Filkins, Army Punishes 7 with Reprimands for Prison Abuse, N.Y. TIMES, May 4, 2004, at A1 (stating that the Taguba report recommended that LTC Jordan should be relieved of duty). Two senior officers, Colonel Thomas Pappas and Brigadier General Janis Karpinski have been sanctioned for their involvement related to detainee abuse, but these punishments are administrative sanctions, not criminal punishment. See Lisa Burgess, Colonel in charge of interrogators is punished in Abu Ghraib scandal, STARS AND STRIPES, May 12, 2005, http://www.estripes.com/article.asp?section=104&article=28220&archive=true. Josh White; General Demoted, but Cleared in Abuse Probe, WASH. POST, May 6, 2005, at A8.
  - 14. See Editorial, No Accountability on Abu Ghraib, N.Y. TIMES, Sept. 10, 2004, at A24

military's lack of any attempt to initiate criminal proceedings against officers at higher levels of command for any role they may have played in detainee abuse. <sup>15</sup> This apparent inequity and the criticisms that followed have generated much heat but shed very little light as to the methods and legal principles by which military commanders, who had no direct involvement in the criminal actions of a subordinate, can still be held criminally liable for the crimes of their subordinates.

The lack of any significant understanding of the principle of command responsibility is not only evidenced in the media and in the public discourse, it is even evidenced in the deliberations of Congress. <sup>16</sup> In September, 2004, both the Senate and House Armed Services Committees held hearings into the abuses at Abu Ghraib. <sup>17</sup> Both committees questioned the lead investigators of two Department of Defense investigations concerning detainee abuse at Abu Ghraib. <sup>18</sup> A persistent line of questioning during these hearings concerned the alleged failings of commanders at all levels up to, and including, the commander of all the U.S. forces in Iraq, Lieutenant General Ricardo Sanchez. <sup>19</sup> During questioning on this issue, members of Congress and the investigators often attempted to draw distinctions between "command responsibility" and "command culpability" in describing the failings of the chain of command. <sup>20</sup> These distinctions were drawn seemingly in an effort to explain why military commanders in Iraq were not facing criminal liability for the law of war violations committed by their forces. The problem with this supposed distinction is that it is inconsistent with the legal doctrine of command responsibility

(Senators Kennedy and McCain both called for accountability at the higher echelons of the government and the editorial staff at N.Y. Times criticized the hearings of the Armed Services Committee on Abu Ghraib); Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21; Editorial, *A Failed Investigation*, WASH. POST, Sept. 10, 2004, at A28 (calling for an independent investigation). *See also* Josh White & Thomas E. Ricks, *Top Brass Won't Be Charged Over Abuse*, WASH. POST, Aug. 27, 2004, at A17.

- 15. See Investigation of the 205<sup>th</sup> Military Intelligence Brigade at Abu Ghraib Prison, Hearing Before the S. Armed Services Comm., 108th Cong. (2004) (statement of Sen. Edward Kennedy) (questioning Gen. Kern who is being held accountable for the actions of the armed forces actually in the prisons); id. (statement of Lindsey Graham) (stating "I think we will have failed the privates and sergeants if the only people that are court-martialed here are privates and sergeants") [hereinafter Hearing].
- 16. *Id.* This is particularly troubling since under the Constitution it is Congress that has the responsibility to establish the rules governing the armed forces. *See* U.S. CONST. art.1, § 8, cl. 14; *see also supra* note 15, which indicates an unfamiliarity with the concept of command responsibility.
  - 17. See id.
- 18. See Hearing, supra note 15 (the statement of Sen. Pryor questioning Gen. Fay and the statement of Sen. Levin questioning Dr. Schlesinger).
  - 19. Id.
- 20. See id. (questioning of Gen. Kern by Senator Bill Nelson; responses by Gen. Kern to Senator Warner where he distinguished culpability under the UCMJ from responsibility; Gen. Kern's responses to questions from Senator Reed; exchange of questions between Senator Lieberman and Secretary Schlesinger and Secretary Brown).

that exists as part of the law of war. Furthermore, during the hearings there were few attempts either by the investigators or by members of Congress to set out the contours or the parameters of such a distinction or how it would fit into the doctrine of command responsibility.<sup>21</sup>

Yet regardless of these misconceptions, those involved in the hearings seemed to readily accept the proposition that such a distinction does indeed exist. This ready acceptance evidences a lack of understanding by even members of Congress and senior Department of Defense officials about the legal doctrine of command responsibility. More importantly, these exchanges highlight the fact that there is no sufficient legal standard or mechanism under U.S. domestic law as reflected in the UCMJ for holding military commanders criminally liable for the law of war violations committed by their forces.

To better understand this deficiency, a brief explanation of the UCMJ structure follows. The UCMJ serves as the criminal penal code for members of the armed forces. The Code was created at the conclusion of World War II and signed into law by President Truman in 1950 and became effective in 1951.<sup>23</sup> Over the subsequent

21. The only real attempt to articulate this supposed legal distinction came in an exchange between Senator Lieberman and former Secretaries of Defense Harold Brown and James Schlesinger:

Senator Lieberman: "... people have said there have been more accountability here than on other cases so far, but a lower level. How do you decide when the interest of holding people accountable is outweighed by other public interests? I guess that's the general question that I raise."

Secretary Brown: "I don't think that's ever the case. I don't think the interest of holding people accountable is outweighed by the public interest. I think, at many levels, it's a question of criminal prosecution. And that, presumably, that is in chain, that is in process. At higher levels, it's a question of failure to perform duty. And you deal with that differently. At still another level, at a still higher level, you raise the question of: Well, what kind of atmosphere was produced?"

Senator Lieberman: "Right"

Secretary Brown: "But it seems to me that's a different kind of accountability. And that's where you can, perhaps, separate it from culpability."

Secretary Schlesinger: "If one is not aware, that is, even though one might have had the opportunity to be aware, that is not culpable in my judgment.

See id. (emphasis added).

The distinctions that Secretary Brown and Secretary Schlesinger attempt to draw are hardly a model of clarity, but more important, as will be discussed in this paper, they are an inaccurate statement of the law of command responsibility.

- 22. *Id.* In the case against Admiral Yamashita, the United States rejected this very distinction. In closing arguments the prosecution argued that under the law of war, there was no distinction between criminal responsibility and administrative responsibility. *See* U.N. WAR CRIMES, *Yamashita*, *supra* note 6, at 30.
- 23. See James B. Roan & Cynthia Buxton, The American Military Justice System in the New Millennium, 52 A.F. L. REV. 185, 188 (2002).

years the Code has undergone a number of amendments and modifications.<sup>24</sup> Service members who commit offenses enumerated in the punitive articles of the UCMJ are tried by military courts-martial for violations of those enumerated offenses.<sup>25</sup> Under the UCMJ, there are three levels of courts-martial: summary courts-martial, special courts-martial, and general courts-martial.<sup>26</sup> Each level of courts-martial may try any offense under the UCMJ.<sup>27</sup> However, summary and special courts-martial have limits on the maximum punishment that can be imposed, and these courts-martial are typically reserved for minor offenses.<sup>28</sup> General courts-martial, on the other hand, can impose any punishment authorized under the UCMJ.<sup>29</sup>

Offenses under the UCMJ include a number of common law offenses. Several crimes codified under the UCMJ are analogous to various law of war violations. These UCMJ offenses include: dereliction of duty, failure to obey a lawful order, cruelty or maltreatment, unlawful detention, riot, murder, manslaughter, rape, maiming, assault, kidnapping, and negligent homicide.<sup>30</sup>

In addition to these punitive articles, the UCMJ also codifies the criminal law doctrines of accomplice liability and accessory liability.<sup>31</sup> These doctrines as codified in the UCMJ are very similar to their common law counterparts. Accomplice liability requires that the accomplice share in the criminal purpose of the actual perpetrator of the crime.<sup>32</sup> Likewise, an accessory must know that the perpetrator committed a criminal offense under the UCMJ and must assist the perpetrator for the purpose of hindering or preventing the apprehension, trial, or punishment of the perpetrator.<sup>33</sup> These two doctrines apply to any offense enumerated under the UCMJ.<sup>34</sup> However,

<sup>24.</sup> See Benjamin v. Madison, Trial by Jury of by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principals that Transcend the U.S. Constitution, 17 U. Fla. J.L. & Pub. Pol'y 347, 420 (2006).

<sup>25.</sup> See Unif. Code of Military Justice § 802 art. 2, reprinted in Manual for Courts-Martial United States A2-1 (2005).

<sup>26.</sup> See Unif. Code of Military Justice § 816 art. 16, reprinted in Manual for Courts-Martial United States A2-6 (2005).

<sup>27.</sup> See Unif. Code of Military Justice § 817 art. 17, reprinted in Manual for Courts-Martial United States A2-6 (2005).

<sup>28.</sup> See Unif. Code of Military Justice § 819 art. 19, § 820 art. 20, reprinted in Manual for Courts-Martial United States A2-6 (2005).

<sup>29.</sup> See Unif. Code of Millitary Justice § 818 art. 18, reprinted in Manual for Courts-Martial United States A2-6 (2005).

<sup>30.</sup> See UNIF. CODE OF MILITARY JUSTICE § 897 art. 97, § 916 art. 116, § 918 art. 118, § 919 art. 119, §924 art. 124, §928 art. 128, and §934 art. 134, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES A2-26, A2-29, A2-31, A2-32 (2005).

<sup>31.</sup> Unif. Code of Military Justice § 877 art. 77, § 878 art. 78, reprinted in Manual for Courts-Martial United States A2-24 (2005).

<sup>32.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 1b(2)(b). at IV-1.

<sup>33.</sup> *Id.* para. 2b. at IV-2.

<sup>34.</sup> Id.

as will be discussed in detail below, these two doctrines are too narrow to incorporate the concept of command responsibility as it has developed under international law, primarily because they require the accomplice or accessory to have actual knowledge of the crime, and either share in the perpetrator's criminal purpose or assist the perpetrator with the specific intent to prevent the perpetrator from being brought to justice.

The UCMJ also sets out the jurisdiction over the offenses and offenders that may be tried by courts-martial. Specifically, Article 18 of the UCMJ establishes that a general court-martial has jurisdiction to try any enumerated crime under the UCMJ as well as "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." <sup>35</sup>

Some have contended that this provision of the UCMJ does in fact incorporate the doctrine of command responsibility into U.S. domestic law.<sup>36</sup> The argument goes that the doctrine of command responsibility is an offense under the law of war and because there is an established history of applying the doctrine of command responsibility in military tribunals, Article 18 makes that doctrine applicable to U.S. commanders as well.<sup>37</sup>

As will be demonstrated in greater detail below, this contention fails for several reasons. First, the doctrine of command responsibility as it currently exists under international law and as part of the law of war, is too vague and uncertain to be successfully applied domestically without running afoul of constitutional provisions. Second, if the prosecution were to assert jurisdiction under Article 18's law of war provision, the government is limited to prosecuting only law of war violations. The punitive articles enumerated under the UCMJ and the accompanying case law would not apply and the prosecution would be required to apply law of war offenses whose elements, definitions, and applications are not only much less certain and precise, but also raise constitutional concerns. Finally, it is against U.S. policy to try our own service members for law of war violations. U.S. policy is to try service members for violations of the punitive articles enumerated in the UCMJ.<sup>38</sup> Therefore. for constitutional, practical, and policy reasons, the contention that Article 18 incorporates the doctrine of command responsibility into U.S. domestic law fails. Thus, the UCMJ as it currently exists does not have an effective means or standard for holding commanders criminally liable when they fail to prevent, suppress, or punish the law of war and analogous UCMJ violations committed by their subordinates.

<sup>35.</sup> See Unif. Code of Military Justice § 818 art. 18, reprinted in Manual for Courts-Martial United States A2-6 (2005).

<sup>36.</sup> See, e.g., Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 156, 212 (2000).

<sup>37.</sup> See id. at 233-34.

<sup>38.</sup> See DEPARTMENT OF THE ARMY, FM 27-10 DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OD LAND WARFARE para. 507(b) at Appendix A–120 (1956).

A lack of a clear standard for affixing criminal responsibility on senior commanders has serious consequences for the military. It creates the perception, and the reality, that military members are treated inequitably based upon rank and position, and only lower ranking soldiers are held accountable for their criminal conduct. It undermines discipline in a military system since lower ranking service members are held to one criminal standard but there is no corresponding criminal standard for their superiors. Furthermore, without a clear legal standard of command responsibility, commanders and other senior leaders themselves will continue to have difficulty conforming their conduct and the conduct of their subordinates to the requirements of the law, and they might not place the proper emphasis on law of war compliance.

Failure to incorporate the doctrine of command responsibility into domestic law also adversely affects the United States' credibility and effectiveness on the world stage. Our rigorous and aggressive application of the law of command responsibility against our former enemies and others, while failing to apply any standard for our own leaders, is unfair and unjustified. This gap cuts at the very essence of a military organization. If the United States has no clear mechanism by which to hold commanders responsible for their leadership failings when those failings cause, or contribute to law of war violations by their soldiers, we have given our commanders all of the authority to execute their duties without affixing appropriate responsibility on them when their command failures contribute to violations of the laws of war.

To better understand and resolve this issue, this paper will address the following questions: What is the doctrine of command responsibility? How has it developed and what is its current status under international law? What is the status of the doctrine under U.S. domestic law? Why is it important for the United States to adopt a standard under domestic law? What should that standard be? Ultimately, this paper proposes the adoption of clear and specific changes to Article 92 of the UCMJ in order to establish a clear standard of command responsibility under domestic law.<sup>39</sup>

Part I of this article discusses various legal doctrines that have been used to support the imposition of criminal liability on a superior based on the criminal conduct of a subordinate. This section will suggest the best theoretical basis on which the doctrine of command responsibility rests.

Part II will explore the history and origins of the doctrine of command responsibility. Attention will focus on several post-World War II tribunals that represent the most important modern development and applications of the doctrine. From this examination the components and elements of command responsibility as an aspect of international law will become apparent.

Part III of the paper will discuss the current state of the international law relating to the doctrine of command responsibility and the most recent applications of this doctrine in international laws, treaties, and war crimes tribunals. This section will

<sup>39.</sup> See Unif. Code of Military Justice § 892 art. 92(3), reprinted in Manual for Courts-Martial United States A2-26 (2005).

also examine how some elements of command responsibility have been defined and applied.

Part IV of the article will examine the gap that currently exists between U.S. domestic law and international law on the doctrine of command responsibility and why the gap must be closed. The section will explain why the current system under the UCMJ is inadequate for judging and imposing criminal sanctions on commanders whose failure to adequately command and control their forces has contributed to law of war violations.

Part V will propose a comprehensive solution to this lack of a domestic standard of command responsibility. It will offer a new punitive article under the UCMJ that specifically addresses command responsibility. This section will explain why the proposed article will best address a commander's potential criminal liability, while at the same time preserving the commander's ability to exercise command authority within the boundaries of the law.

#### II. THE DOCTRINAL UNDERPINNINGS OF COMMAND RESPONSIBILITY

The point of departure for any analysis on the doctrine of command responsibility must begin with a discussion of what the term means and which legal doctrines under the substantive criminal law best support the doctrine. Unfortunately, much of the discussion within legal literature is unclear on exactly this point and the term "command responsibility" has been applied to a broad range of conduct. <sup>40</sup> Some scholars argue that command responsibility is a version of imputed liability. Others suggest that because command responsibility relates to the personal involvement of the commander, it is not a form of imputed liability. <sup>42</sup> Some scholars

<sup>40.</sup> Scholars have associated the term "command responsibility" with concepts of direct liability, liability as a principal, and derivative liability. See Yuval Shany & Keren R. Michaeli, The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility, 34 N.Y.U. J. INT'L L. & Pol. 797, 883 (2002) (stating that Article 43 of the Hague Relations should be construed as a direct liability form of command responsibility); Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 120 (2005). For use of the term 'command responsibility' when discussing liability as a principal (Conspiracy), see Richard P. Barrett & Laura E. Little, Lessons of Yugoslavia Rape Trials: A Role of Conspiracy Law in International Tribunals, 88 MINN. L. REV. 30, 32 (2003).

Using derivative liability being a basis of 'command responsibility', see David Marcus, Famine Crimes in International Law, 97 Am. J. INT'L L. 245, 276 (2003); Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 COLUM. L. REV. 2259, 2283 (1999); Timothy Wu & Yong-Sung Kang, Recent Development: Criminal liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law, 38 HARV. INT'L L. J. 272, 279 (1997).

<sup>41.</sup> See, e.g., Ilias Bantekas, The Contemporary Law of Superior Responsibility, 93 AM. J. INT'L L. 573, 574-75 (1999).

<sup>42.</sup> See, e.g., William G. Eckhardt, Command Criminal Responsibility: A Plea for a

contend that command responsibility is a form of vicarious liability.<sup>43</sup> Still others suggest that command responsibility should apply only to situations in which the commander specifically ordered, encouraged, advised, or took some other direct role in assisting his forces in the commission of law of war violations.<sup>44</sup>

To best understand the definition of command responsibility used in this article, it may be helpful to describe what it is not. Command responsibility as used in this article does not refer to direct liability. Direct liability cases are those where the commander is somehow directly involved in the commission of war crimes. Examples of direct liability include: a commander who *orders* his forces to attack a protected target; a commander who *encourages* his forces to kill or otherwise mistreat prisoners of war;<sup>45</sup> or a commander who *assists* his subordinates in covering up evidence of a war crime.<sup>46</sup> In all these situations, the commander may not have been the person actually committing the offense. However, in each case he shares in the criminal intent of his subordinates to either commit war crimes or prevent their detection by outside authorities. Furthermore, in each of these cases the commander has taken some affirmative action or refrained from fulfilling a legal duty in order to assist his subordinates in the commission of a war crime.<sup>47</sup>

Workable Standard, 97 MIL. L. REV. 1, 4-5 (1982).

- 44. Arthur T. O'Reilly, Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice, 40 Gonz. L. Rev. 127, 154-155 (2004).
- 45. See Model Penal Code § 2.06(3)(a)(i)-(iii) (Proposed Official Draft 1962). In this instance the commander would be acting as an accomplice. For example, the Model Penal Code states that a person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense:

A person is an accomplice of another in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it; or (ii) aids or aggress or attempts to aid such other person in planning or committing it; or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

Id.

- 46. See id. at § 242.3(3). The Model Penal Code codifies the offense of hindering apprehension or prosecution. The elements are that a person with the purpose to hinder the apprehension, prosecution, conviction, or punishment of another for a crime "conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence." Id.
- 47. See, e.g., Shany & Michaeli, supra note 40, at 883-84 (an example of direct liability is a commander who refuses to supply food to an occupied population). Cases involving this type of direct liability of senior officers are fairly rare in American military history, but examples do exist. One of the most blatant examples involves the court-martial of Army Brigadier General Jacob A.

<sup>43.</sup> See William K. Lietzau, Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court, 32 CORNELL INT'L L.J. 477, 485 (1999). See also Barrett & Little, supra note 40, at 51; Michele Brandt, Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute, 79 MINN. L. REV. 1413, 1435 (1995); Shany & Michaeli, supra note 40, at 802-03.

In these situations the liability of the commander is readily apparent and the criminal law doctrines of accomplice liability,<sup>48</sup> accessory liability,<sup>49</sup> and perhaps co-conspirator liability<sup>50</sup> can adequately address the commander's criminal conduct. This kind of direct liability is one form of command responsibility, but it is just one subset. These cases do not raise the more complicated doctrinal issues which are the focus of this article.

Additionally, command responsibility does not refer to situations involving strict vicarious liability. "Vicarious liability denotes instances where the defendant is held liable for an offense committed by another even though the defendant lacked the culpability required for the offense and did not satisfy the objective elements of the offense." Strict liability is liability without fault. Strict vicarious liability would exist if the commander is held liable for the conduct of his subordinates merely because of his position of authority as the commander. No proof is required that the commander was in any way derelict in his duties to impose criminal sanctions on the commander. Likewise, no evidence is required to show that the commander knew or even could have known about the crimes being committed by his subordinates. The commander is liable simply by virtue of the position he holds.

Many legal scholars and others commenting on the various post-World War II war crimes tribunals have concluded that the standard of command responsibility that emerged from these tribunals was one of strict liability.<sup>55</sup> However, this conclusion is erroneous. Every post-World War II international tribunal that has addressed the issue of command responsibility has specifically rejected strict vicarious liability as a

Smith, commander of U.S. forces in the Philippines during the Philippine insurrection in 1901. See ELIHU ROOT, TRIALS OR COURTS-MARTIAL IN THE PHILIPPINE ISLANDS IN CONSEQUENCE OF CERTAIN INSTRUCTIONS, S. Doc. No. 213, at 1-17 (2nd Session 1903). During the insurrection, Brigadier General Smith ordered his subordinate officer, Major L.W.T. Waller, as follows, "I want no prisoners and I wish you to kill and burn. The more you kill and burn, the more you will please me, and the interior of Samar must be made a howling wilderness." Id. at 2. Because of this order, Brigadier General Smith was convicted of conduct prejudice to the good order and discipline of the military. Id. at 2-3.

- 48. See Unif. Code of Military Justice § 877 art. 77, reprinted in Manual for Courts-Martial United States, A2-24 (2005).
- 49. See Unif. Code of Military Justice  $\S$  878 art. 78, reprinted in Manual for Courts-Martial United States A2-24 (2005).
- 50. See Unif. Code of Military Justice  $\S$  881 art. 81, reprinted in Manual for Courts-Martial United States A2-25 (2005).
  - 51. Paul H. Robinson, Imputed Criminal Liability, 93 YALE L.J. 609, 618 n.26 (1984).
  - 52. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 469 (1978).
- 53. Akayesu: Case No. ICTR-96-4-I (Prosecutor v. Akayesu) para. 488 (Sept. 2, 1998), reprinted in 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION 316 (S. De. Haardt & W. Van Der Wolf eds., 2000) (One view is that command responsibility derives from strict liability).
  - 54. *Id.*
  - 55. This issue will be discussed more fully in Part II of the article.

basis for imposing criminal liability on military commanders.<sup>56</sup> Strict vicarious liability has subsequently been rejected by every international law and treaty that has addressed command responsibility since World War II.<sup>57</sup>

Command responsibility instead refers to the principle of derivative imputed liability. This notion of criminal liability most accurately reflects the doctrine of command responsibility as it currently exists. The term derivative liability refers to liability that is derived by a causal link between the actor and the independent process for which the actor is held accountable.<sup>58</sup> In other words, the commander's liability is derived from his relationship to his subordinates and the link between his act or omission and the crimes committed by his subordinates. If a derivative relationship can be established, the criminal liability of the subordinate can be imputed onto the commander.

Derivative imputed liability has both a mens rea and an actus reus component.<sup>59</sup> The mens rea component focuses on what the commander was aware of, or failed to be aware of, regarding the crimes about to be committed, being committed, or that had been committed by forces under his command.<sup>60</sup> The actus reus component focuses on the commander's failure to act where he had the duty and an ability to prevent forces from committing future war crimes, stop his forces from committing on-going war crimes, or to punish his forces for their commission of past war crimes.<sup>61</sup>

Under derivative imputed liability the commander does not have to share a common criminal purpose with the subordinates who actually engaged in the

<sup>56.</sup> See U.N. WAR CRIMES, von Leeb, supra note 6, at 76-77; U.N. WAR CRIMES, List, supra note 6, at 75-76.

<sup>57.</sup> See, e.g., Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), reprinted in 72 Am. J. Int'll. 457, 496-97 (1978) [hereinafter Diplomatic Conference]. S.C. Res. 995, U.N. Doc. S/RES/955 (November 8, 1994), reprinted in 2 The International Criminal Tribunal for Rwanda 5 (1998) [hereinafter S.C. Res. 995]; The Rome Statute of the International Criminal Court (July 17, 1998), reprinted in The Rome Statute of the International Criminal Court: Materials 3 (2002) [hereinafter The Rome Statute].

<sup>58.</sup> FLETCHER, supra note 52, at 583.

<sup>59.</sup> See Danner & Martinez, supra note 40, at 122.

<sup>60.</sup> *Id.* The discussion in the following sections will address at length what that standard of awareness on the part of the commander is and what it should be. For our purposes here, it is simply important to recognize that a mens rea component does exist and that this component is a key factor that distinguishes it from strict vicarious liability. The discussion in the following sections will address at length the source of the legal duty as well as the commander's ability to act. For our purposes here, it is simply important to recognize that an actus reus component does exist and that this component is a key factor that distinguishes it from strict vicarious liability.

<sup>61.</sup> See Bing Bing Jia, The Doctrine of Command Responsibility Revisited, 3 CHINESE J. INT'L L. 1, 33 (2004).

commission of the war crimes.<sup>62</sup> What is required is that the commander had some level of awareness or failed to become aware of the criminal conduct of his subordinates, that he had a duty to act, and failed to fulfill that legal duty.<sup>63</sup>

If these mens rea and actus reus components can be established, then the law will impute liability on the commander for the war crimes committed by his soldiers and the commander can be punished as if he had committed the underlying offenses. The application of derivative imputed liability is a middle ground approach between the principles of direct liability and strict vicarious liability. This is the doctrine of command responsibility that has been adopted in international law, and this is the doctrine that currently does not exist as part of the U.S. domestic law.

#### III. HISTORICAL DEVELOPMENT OF THE COMMAND RESPONSIBILITY DOCTRINE

#### A. Pre-World War II History

Command responsibility was firmly established as a legal doctrine in the war crimes tribunals following World War II.<sup>64</sup> However, the idea of holding a commander responsible for the criminal and law of war violations of his subordinates has much earlier origins in foreign, domestic, and international law and has on occasion been reflected in military codes.<sup>65</sup> One of the most frequently cited examples of a foreign law establishing a commander's responsibility for the conduct of his subordinates is the Ordinance of Orleans, issued in 1439 by Charles the VII of France.<sup>66</sup> The ordinance provided:

The King orders that each Captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the Captain shall be deemed responsible for the offence as if he had committed it

<sup>62.</sup> See Marcus, supra note 40, at 275-76.

<sup>63.</sup> See id. at 276.

<sup>64.</sup> Theodor Meron, Reflections on the Prosecution of War Crimes by International Tribunals, 100 Am. J. INT'L L. 551, 558-59 (2006).

<sup>65.</sup> See RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45 (Precedent Publishing, Inc. 1983); THEODORE MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 149 (Clarendon Press 1993); WINTROP, supra note 5, at 990.

<sup>66.</sup> See Smidt, Yamashita, supra note 36, at 169 n.55 (citing the ordinance at Orleans).

himself and shall be punished in the same way as the offender would have been.<sup>67</sup>

While the current UCMJ is void of any specific provision pertaining to command responsibility, that was not always the case for U.S. domestic law. In fact, there are several early examples of U.S. military codes that contained provisions dealing with a type of command responsibility. One of the earliest examples is the Massachusetts Articles of War, adopted by the Provisional Congress of Massachusetts Bay in April 1775.<sup>68</sup> Article 11 states:

Every Officer commanding in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by an Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any persons, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he the said Commander, who shall refuse or omit to see Justice done to the offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished, as ordered by a General Court Martial, in such manner as if he himself had committed the crime or disorders complained of.<sup>69</sup>

Subsequent versions of the American Articles of War over the next 100 years contained similar provisions to these early military codes.<sup>70</sup>

<sup>67.</sup> MERON, *supra* note 65, at 149 n.40 (emphasis added). A similar statute is found in the Articles of War issued by Gustavas Adolphus of Sweden in 1621. This statute provided that "No Colonel or Capitan shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges." *See* Winthrop, *supra* note 5, at 910. In some cases tribunals were also established to punish leaders for crimes committed by subordinates. One such recorded case is the prosecution of Peter von Hagenbach in 1474. William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. Rev. 1, 4-5 (1973). He was the appointed ruler of the town of Breisach, Austria. Hagenbach was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire on charges of murder, rape, perjury and other crimes against the "Laws of God." *Id.* at 4. Hagenbach was convicted for failing to perform his duty as a knight to prevent these crimes from being committed by his soldiers. *Id.* at 5.

<sup>68.</sup> The Massachusetts Articles of War (Apr. 5, 1775), reprinted in WILLIAM WINTHROP, MILITARY LAWAND PRECEDENTS 948-949 (Amo Press 1979) (1896).

<sup>69.</sup> *Id.* at 948-49 (emphasis added). The exact language of Article 11 can also be found in Article XII of the American Articles of War enacted in June 1775. *Id.* at 954.

<sup>70.</sup> The most significant difference between later versions of the American Articles of War and Article XII was the punishment that a commander could suffer for violating these provisions. Rather than being punished as if "he himself had committed the offense," later codes provided that the commander could be cashiered, dismissed from the service, or otherwise punished as a court-martial may direct. American Articles of War of 1806 art. 32 (April 10, 1806), reprinted in William Wintrop, Military Laws and Precedents 979, 990 (1896). "Cashiered" means to be dishonorably dismissed from military service. American Heritage College Dictionary 224 (4th

During the Civil War, the United States promulgated general order 100 titled "Instructions for the Government of Armies of the United States," more commonly referred to as the Lieber Code of 1863. Article 71 of the code states:

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or *who orders or encourages* soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.<sup>73</sup>

The promulgation of the Lieber Code was a significant modern development, and the Code served as one of the primary sources of law that the international community referred to as it began to codify the law of war in the early twentieth century.<sup>74</sup>

The Fourth Hague Convention of 1907 respecting the laws and customs of war on land<sup>75</sup> was one of the first modern treaties to address the doctrine of command responsibility internationally. Article 3 states: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Also, Chapter 1, Article 1, established what has been recognized as a key characteristic of an army or other organized militia: that the military organization is "commanded by a person responsible for his subordinates."

These historical foreign, domestic, and international laws, tribunals, and treaties have a number of points in common as they relate to the doctrine of command responsibility. First, in one form or another all of these examples recognize the unique position that a commander holds in a military organization. A commander has both the legal authority and the legal obligation to control the conduct of his forces such that they can achieve military objectives without causing or committing unnecessary suffering to non-combatants or prisoners of war. These examples also

ed. 2002).

<sup>71.</sup> See Francis Lieber, General Orders No. 100 (1863), reprinted in RICHARD SHELLY, HARTIGAN. LIEBER'S CODE AND THE LAW OF WAR 45 (1983).

<sup>72.</sup> See HARTIGAN, supra note 65, at 1.

<sup>73.</sup> See id. at 58 (emphasis added).

<sup>74.</sup> Id. at 1.

<sup>75.</sup> Hague Convention Respecting the Laws and Customs of War on Land, *supra* note 7.

<sup>76.</sup> Id. at art. 3 (emphasis added).

<sup>77.</sup> Id. at 2295.

<sup>78.</sup> Id. at 2290. See also John W. Brooker, Ford v. Garcia: A Puzzling Fusion of the Command Responsibility Doctrine with the Torture Victim Protection Act, 28 N.C. J. INT'L L. & COM. REG. 701, 702 (2003) (discussing the unique power of a commander over his soldiers); Smidt, supra note 36, at 156-67 (discussing the role of the commander in the prevention of war crimes).

<sup>79.</sup> See Hague Convention Respecting the Laws and Customs of War on Land, *supra* note 7, at 2290. See generally, Smidt, *supra* note 36, at 166-68 (discussing the legal liability of a commander in modern military operations and his duty to prevent atrocities by his soldiers).

tacitly recognize that without placing responsibility on the commander, the risk is great that soldiers will violate the laws of war. Furthermore, these examples to one degree or another recognize that a commander can be held accountable for the law of war violations of his forces if he was directly involved in those violations, or even in some cases in which the commander's involvement was less direct or less obvious.

It is from this background that the modern doctrine of command responsibility developed. The first 20th century attempts to impose liability on senior leaders for the conduct of those under their authority came at the conclusion of World War I.<sup>81</sup> At the end of that war a multinational Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was formed.<sup>82</sup> This commission prepared a report recommending that an international tribunal be formed to try "violations of the laws and customs of war."<sup>83</sup> On the question of command responsibility, the commission concluded that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."<sup>84</sup>

This proposal represented some of the most specific and detailed provisions on the doctrine of command responsibility up to that time. Under this recommendation the doctrine of command responsibility could be applied to both civilian and military leaders. <sup>85</sup> Direct liability could attach to those who ordered violations of the law of war. <sup>86</sup> Furthermore, liability could also attach to those who knew of the law of war violation and failed to prevent or repress the violation although they possessed the

Id. at 143.

<sup>80.</sup> Command Responsibility for War Crimes, 82 YALE L.J. 1274, 1283 (1973).

<sup>81.</sup> See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference March 29, 1919, reprinted in 14 Am. J. INT'LL. 95 (1920) [hereinafter Peace Conference].

<sup>82.</sup> Id. at 95.

<sup>83.</sup> See id. at 137.

<sup>84.</sup> *Id.* at 135. Among other charges the commission recommended charges against: [A]ll authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war, it being understood that no such abstention should constitute a defence for the actual perpetrators[.]

<sup>85.</sup> The doctrine as it has developed modernly has been applied to both military and civilian leaders. See generally Greg R. Vetter, Command Responsibility of Non-Military Superiors in the International Criminal Court, 25 Yale J. Int'l L. 89 (2000) (discussing the extension of the command responsibility doctrine to civilian leaders). While the applicability to both types of leaders is similar, some differences have emerged. The scope of this article is limited to the doctrine's applicability to military leaders.

<sup>86.</sup> See supra text accompanying note 84.

power to intervene.<sup>87</sup> This latter point represents a significant progression in the scope of the doctrine of command responsibility by holding that liability could attach even in cases in which the commander did not take part in the violations of the "law and customs of war" and did not share in his subordinates' criminal purposes.<sup>88</sup>

Interestingly, the American delegation to the commission objected to the commission's recommendations to try the former Keiser, Keiser Wilhelm, under the auspices of an international tribunal. The reasons for the objection was the "unprecedented proposal of creating an international criminal tribunal and to the doctrine of negative criminality." These objections were all the more interesting given the position taken by the United States during the war crimes prosecutions following World War II. 91

#### B. Command Responsibility and the Post-World War II Tribunals

During World War II, at the Moscow Conference in October 1943, the United States, the Soviet Union, and the United Kingdom agreed that German officers who were responsible for "atrocities" committed throughout the occupied areas would be "deliver[ed] . . . to their accusers in order that justice may be done." At the conclusion of the war the United States, the Soviet Union, France, and the United Kingdom signed the London Charter<sup>93</sup> which established the International Military Tribunal ("IMT"), for the trial of German war criminals.<sup>94</sup>

It was from the IMT and other post-World War II war crimes tribunals that the doctrine of command responsibility fully developed. This section examines four major tribunals from this era which applied the doctrine of command responsibility. These include the military tribunal of General Tomoyuki Yamashita; the Nuremburg trial of *United States v. Wilhelm von Leeb* (High Command Case); the

<sup>87.</sup> See Peace Conference, supra note 81, at 143.

<sup>88.</sup> See id.

<sup>89.</sup> See id. at 129.

<sup>90.</sup> See id.

<sup>91.</sup> See infra Part III.B for a discussion of the United States' position on the establishment of international tribunals at the conclusion of World War II.

<sup>92.</sup> THE TRIPARTITE CONFERENCE IN MOSCOW: DECLARATION OF GERMAN ATROCITIES (November 1, 1943), reprinted in 9 DEP'T ST. BULL 307, 311 (1943).

<sup>93.</sup> Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of Major War Criminals of European Axis, 59 stat. 1544 (1945).

<sup>94.</sup> Id. at art. 1.

<sup>95.</sup> For a more complete discussion of these trials, see Parks, *supra* note 67.

<sup>96.</sup> U.N. WAR CRIMES, Yamashita, supra note 6, at 1.

<sup>97.</sup> U.N. WAR CRIMES, von Leeb, supra note 6, at 1.

Nuremburg Trial of United States v. William List 98 (Hostage Case); and the International Japanese War Crimes Trial in the International Military Tribunal for the Far East<sup>99</sup> (Tokyo Trials).

### 1. The Yamashita Military Tribunal

The trial of General Yamashita was the first and the most well-known post-World War II tribunal relevant to the doctrine of command responsibility. 100 At the end of World War II, General Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. 101 On September 3, 1945, General Yamashita surrendered his command and became a prisoner of war of the United States. On September 25, 1945, the United States drafted the following charge against General Yamashita:

Tomoyuki Yamashita, General Imperial Japanese Army, between 9th October, 1944 and 2nd September, 1945, at Manila and at other places in the Philippine Islands, while a commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies. particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."103

U.N. WAR CRIMES, List, supra note 6, at 34. 98.

<sup>99.</sup> See THE TOKYO MAJOR WAR CRIMES TRIAL, supra note 6.

<sup>100.</sup> The trial of General Yamashita was not an international military tribunal. See U.N. WAR CRIMES COMMISSION, Yamashita, supra note 6, at 1. General Yamashita was tried by a United States military commission established under the provisions of the Pacific Regulations of September 24, 1945, governing the trial of war criminals. *Id.* at 2. The commission acted under the authority of General MacArthur, Commander-in-Chief, United States Army Forces, Pacific Theatre, and General Styer, Commanding General, United States Army Forces, Western Pacific. Id. at 2-3. The commission was convened on October 8, 1945. Id. at 3. The members of the tribunal were American military general officers. Id. at 2-3, 40.

<sup>101.</sup> Id. at 3.

<sup>102.</sup> Id.

<sup>103.</sup> Id. at 3-4 (emphasis added). Over the next several weeks two bills of particulars were filed totaling 123 paragraphs, setting out the factual allegations against General Yamashita. Id. The allegations against General Yamashita fell into three broad categories:

<sup>(1)</sup> Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate

According to the prosecution's theory, these violations were "so flagrant and so enormous," that they must have been known to General Yamashita if he had made any effort to fulfill his responsibilities as a commander. Furthermore, if General Yamashita did not know of these acts it was because he "took affirmative action not to know."

The defense did not attempt to deny the commission of widespread atrocities by Japanese forces. Rather, it claimed that General Yamashita had never ordered the commission of any crime or atrocity; that he never gave permission to anyone to commit any crimes or atrocities; that he had no knowledge of the commission of the alleged crimes or atrocities; and that he had no actual control over the perpetrators of the atrocities at the time the atrocities were committed. Additionally, the defense also attempted to show that General Yamashita was doing the best he could under extremely difficult circumstances, with inadequate support, and under constant attack from U.S. forces. The control of the commission of the atrocities at the time the atrocities were committed.

General Yamashita testified in his own defense. He claimed to have had few experienced officers under his command and that he was short of critical supplies. According to him, his control over many of the Japanese forces was solely for operational control and he had no authority to discipline these forces or even assign their commanders. He further denied issuing orders to his forces for the "ill-treatment or torture of captives." Additionally, he claimed that he had not received any reports of law of war violations and that he was unaware of the atrocities being committed by the forces under his command.

As for the prosecution's expansive theory of liability, the defense claimed that the United States did not recognize criminal responsibility based solely upon the

military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon.

Id. at 4.

104. Id. at 17.

105. *Id.* The evidence brought before the Commission established that hundreds of atrocities had occurred. *Id.* at 18. "These offences were widespread [in] both space and time." *Id.* All of these acts were committed by members of the Japanese forces under the command of General Yamashita. *Id.* 

- 106. Id. at 23.
- 107. Id. at 21-22.
- 108. Id. at 23-24.
- 109. Id. at 22.
- 110. Id.
- 111. *Id*.
- 112. Id.
- 113. Id.

individual's status as a commander. According to the defense, a commander who did not order, authorize, encourage, or even know of the war crimes committed by a subordinate, could not be held criminally responsible for their conduct. 115

In their summation, the prosecution contended that General Yamashita did in fact have good communications with his subordinate commanders. The presence of systematic and wide spread atrocities went against General Yamashita's claim of ignorance. Most importantly, General Yamashita's claimed ignorance was the result of negligence or even culpable conduct, and thus was not a defense recognized under international law, particularly Article 1 of the Hague Convention, which they claimed imposes liability on a commander for the acts of subordinates. <sup>117</sup>

While the positions of the prosecution and defense were fairly and clearly established, the findings of the commission were much less clear, and this lack of clarity has spawned a great deal of dispute within the international legal community and among scholars. However, what does seem clear from the decision is that the commission did not believe General Yamashita's claims that he took no part in the crimes committed by his troops, and that he did not know what was occurring. <sup>118</sup> According to the commission, the evidence showed that the "crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by [Yamashita], or secretly ordered by [him]."

Despite this, the commission did not rest its judgment solely on the belief that General Yamashita was lying about his role in the atrocities. Speaking on the treatment of prisoners of war and civilian internees, the commission stated that the proof alleged "criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards." In summation, the President of the commission stated that command responsibility was necessary where:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally

<sup>114.</sup> Id. at 28-29.

<sup>115.</sup> Id. at 29.

<sup>116.</sup> Id. at 30.

<sup>117.</sup> Id. at 32.

<sup>118.</sup> Id. at 34-35.

<sup>119.</sup> Id. at 34.

<sup>120.</sup> Id. (emphasis added).

liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.

•••

General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances. <sup>121</sup>

Most scholars agree that the judgment represented an expansion of the doctrine of command responsibility. Some have contended that Yamashita created a strict liability standard, while others have contended that the Yamashita standard is that a commander may be held criminally liable if he knew or should have known of the commission of war crimes by his forces. Still other scholars have contended that the Yamashita standard is that liability should attach if the commander knew or must have known of the war crimes. Finally, others contend that the real issue for the tribunal was General Yamashita's "total ignorance and complete delegation of authority" which created an unacceptable risk of future harm; these future crimes

<sup>121.</sup> Id. at 35 (emphasis added).

<sup>122.</sup> See Danner & Martinez, supra note 40, at 124; Matthew Lippman, Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War, 15 DICK. J. INT'L L. 1, 75 (1996); Gregory A. McClelland, A Non-Adversary Approach to International Criminal Tribunals, 26 SUFFOLK TRANSNAT'L L. REV. 1, 6-7 (2002); Smidt, supra note 36, at 180-81.

<sup>123.</sup> Lippman, supra note 122, at 89-90. See also Ann B. Ching, Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia, 25 N.C. J. INT'L L. & COM. REG. 167, 182, 184 (1999); Matthew Lippman, Humanitarian Law: The Uncertain Contours of Command Responsibility, 9 TULSA J. COMP. & INT'L L. 1, 17, 19, 24, 39, 51 (2001) [hereinafter Lippman, Humanitarian Law]; McClelland, supra note 122, at 6-7; Avi Singh, Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws, 28 HASTINGS INT'L & COMP. L. REV. 267, 270-71 (2005); Wu & Kang, supra note 40, at 279.

<sup>124.</sup> Sean D. Murphy, Doctrine of Command Responsibility in U.S. Human Rights Cases, 96 Am. J. Int'l L. 719, 720 (2002). See also Lieutenant Commander Weston D. Burnett, Contemporary International Legal Issues: Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra, 107 MIL. L. REV. 71, 187 (1985); Carlos X. Colorado, Justice and the Generals: Holding Foreign Military Officers Accountable for Rape and Extrajudicial Killing; The Case of the U.S. Churchwomen Killed in El Salvador, 12 S. CAL. REV. L. & WOMEN'S STUD. 107, 128 and 129 (2002); Howard S. Levie, Command Responsibility, 8 USAFA J. LEG STUD. 1, 6, 10, (1998); Smidt, supra note 36 at 184, 187, 193, 198.

<sup>125.</sup> Michael Stryszak, Command Responsibility: How Much Should a Commander be Expected to Know?, 11 USAFA J. LEG STUD. 27, 43-44 (2001).

being immediately chargeable against General Yamashita following their commission. 126

Given the confusing and somewhat contradictory language by the commission, it is impossible to conclude definitively which of the aforementioned interpretations is completely valid and which are completely invalid. For the purpose of this article, what is important to understand is that the "elements" of the command responsibility doctrine begin to take shape as a result of this case, regardless of the lack of clarity in the commission's decision. The elements of command responsibility that emerged from the Yamashita include: (1) the existence of command authority and responsibility between the superior and subordinate, i.e. some form of command and control; (2) information that triggers an affirmative duty on the part of the commander to act and to seek out this information; (3) if the duty to act is triggered, the commander must take some action regarding the law of war violations by his subordinates; (4) a causal relationship between any omitted actions of the commander and the war crimes committed by his subordinates; and (5) if all of the above elements are met then criminal liability can be imputed on the commander for the war crimes committed by his subordinates.

#### a. Scope of Authority

The scope of a commander's responsibilities for purposes of the doctrine of command responsibility is broad. In the Yamashita decision, General Yamashita's claim that he had only operational control over many of the forces under his command, without the ability to discipline them or assign their officers, was of no consequence to the commission. According to the commission, there was no doubt that General Yamashita was the legally appointed commander of these forces. Additionally, one commentator has noted that as the military governor of

Parks, supra note 67, at 30-31.

<sup>126.</sup> Command Responsibility for War Crimes, supra note 80, at 1283.

<sup>127.</sup> In his exhaustive review of the history of command responsibility, Major Parks states that the opinion represents four possible theories of command responsibility which the Commission could have used to reach its decision:

<sup>(1)</sup> that General Yamashita ordered the offenses committed; (2) that, learning about the commission of the offenses, General Yamashita acquiesced in them; (3) that, learning about the commission of the offenses General Yamashita failed to take appropriate measures to prevent their reoccurrence or to halt them; (4) the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

<sup>128.</sup> See U.N. WAR CRIMES, Yamashita, supra note 6, at 35; Murphy, supra note 124, at 720.

<sup>129.</sup> See U.N. WAR CRIMES, Yamashita, supra note 6, at 22, 35.

<sup>130.</sup> Id. at 35.

the Philippines, General Yamashita's command responsibility was established over all Japanese forces in the Philippines, because as "military governor all trust, care, and confidence . . . were reposed in him." <sup>131</sup>

#### b. Mens Rea of Command Responsibility

Along with requiring the establishment of a command relationship, the Yamashita decision stands for the proposition that the law of war impose a duty on the commander to act. 132 Any inaction by the commander where action is required is no defense.<sup>133</sup> Beyond this, Yamashita is unclear, leaving several questions unanswered. At what point is the duty to act, with respect to war crimes, triggered? Must the commander actually know of the war crimes being committed by his subordinates before he is required to take action? What punishment befits a commander who remains willfully blind to the actions of his subordinates? Can knowledge be imputed to such a commander? What of a commander who was culpably negligent or reckless in his failure to be aware of his troops conduct? Does the law require a commander to act if the commander did not know but should have known of his subordinate's war crimes? What if the commander did not know but had the means and the opportunity to discover the law of war violations being committed by his forces? Irrespective of these questions, what does seem clear from Yamashita is that the standard is not strict liability. 134 Likewise, a commander cannot remain willfully blind to the conduct of his troops and then claim that he had no duty to act or that the duty to act had not yet been triggered. 135 Between these two ends of the spectrum there is significant grey area that was left unsettled by Yamashita.

#### c. Actus Reus of Command Responsibility

The next broad element established by the Yamashita decision is that once the duty to act is triggered, the commander must act.<sup>136</sup> The question raised is what specifically the commander must do once the duty is triggered? The commission in Yamashita did not address this point directly other than to say that during the period in question General Yamashita "failed to provide effective control of [his] troops as was required by the circumstances." Failing to provide effective control under the circumstances is a broad standard for command responsibility considering that the

<sup>131.</sup> Parks, supra note 67, at 38.

<sup>132.</sup> See U.N. WAR CRIMES, supra note 6, at 35; In re Yamashita, 327 U.S. 1, 16 (1945).

<sup>133.</sup> See Lippman, Humanitarian Law, supra note 123, at 12-14.

<sup>134.</sup> See supra note 124 for authority arguing Yamashita is not a strict liability standard. But see supra note 123 for authority arguing Yamashita is a strict liability standard.

<sup>135.</sup> U.N. WAR CRIMES, Yamashita, supra note 6, at 34-35.

<sup>136.</sup> Yamashita, 327 U.S. at 16.

<sup>137.</sup> U.N. WAR CRIMES, Yamashita, supra note 6, at 35.

commission did not indicate specifically what a commander in Yamashita's position could or should have done.

This lack of clarity raises several additional questions. At what point in the conflict must the commander take some action? Does he, for example, have to cease all other combat operations in order to prevent or stop his soldiers from committing war crimes, or can he continue to pursue combat operations and address possible war crimes violations at a later date? Does he have the duty to prevent future war crimes before they occur? Does he have the duty only to stop on-going war crimes? Does he have a duty to investigate and punish past war crimes? How much effort must he place on the detection, prevention, and prosecution of war crimes? By what standard are his efforts to be judged?<sup>138</sup> The language of the Yamashita decision fails to provide precise guidance even if it does establish that the commander must do something.<sup>139</sup>

#### d. Causation

The Yamashita decision further fails to address directly the question of what causal link, if any, must be established between the commander's failures and the war crimes committed by his troops? Must the government establish both cause-in-fact and proximate cause in order to impute liability on the commander? Can causation be assumed by the mere fact that the subordinates engaged in war crimes? What if the commander was able to establish that he knew of the law of war violations being committed or about to be committed by his subordinates and did everything in his power to stop them, but the war crimes occurred none the less? Should he still be held liable? Alternatively, if a commander has a duty to punish past violations but fails to do so, should liability be imposed for the underlying offense even though no causal link can be established?

#### e. Imputed Liability

Despite the foregoing ambiguities, the last element of the command responsibility doctrine that emerged from Yamashita is very clear. If the prosecution can meet its burden and establish liability, the commander can suffer the same punishments as if he actually committed the crimes. Based upon this, the

<sup>138.</sup> According to the language in the judgment that states, "Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted," it would seem that the Japanese commanders were judged on what a reasonable American Commander would do in that situation. *Id.* 

<sup>139.</sup> Id.

<sup>140.</sup> Id.

commission found General Yamashita guilty and sentenced him to death by hanging.<sup>141</sup>

#### f. In Re: Yamashita

General Yamashita appealed this decision to the United States Supreme Court in a petition for a writ of habeas corpus. The petition attacked the military commission on three grounds. First, he contended that the military commission was not lawfully created. Second, he claimed that the charges he was convicted of failed to state law of war violations. Third, that the commission lacked the authority and jurisdiction to try the offenses. This article will focus on the second complaint, since this complaint relates to the doctrine of command responsibility applied by the Commission.

The Supreme Court noted that in order for the commission to have jurisdiction to properly try General Yamashita, the charges against him had to state violations of the law of war. <sup>147</sup> The Court then framed the issue as follows:

[T]he gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal liability for his failure to take such measures when violations result.<sup>148</sup>

In assessing this issue, the majority had little difficulty concluding that the law of war does impose an affirmative duty on the commander to control his forces, and because of this the charges against General Yamashita stated an offense under the law

<sup>141.</sup> *Id*.

<sup>142.</sup> In re Yamashita, 327 U.S. 1, 4 (1946).

<sup>143.</sup> Id. at 6.

<sup>144.</sup> *Id*.

<sup>145.</sup> Id.

<sup>146.</sup> Because this was a petition for habeas corpus, the Court did not evaluate the evidence on which General Yamashita was convicted. *Id.* at 17. The Court also did not consider any efforts that General Yamashita may have undertaken to prevent the war crimes and whether these measures would have been sufficient under the circumstances. *Id.* According to the Court, these issues fell within the preview and expertise of the military officers of the commission. *Id.* 

<sup>147.</sup> Id. at 7-8.

<sup>148.</sup> Id. at 14-15.

of war.<sup>149</sup> The Court cited to language from Article I of the Annex to the Fourth Hague Convention of 1907, noting that the first criteria of any armed force is that it is under the command of someone who is responsible for his subordinates.<sup>150</sup> Likewise, the Court noted that Article 43 of the Annex to the Fourth Hague Convention of 1907 requires that commanders of occupied territory take all measures within their power to restore and ensure public safety and order.<sup>151</sup> Having considered these treaties, the Court concluded that the law of war imposed an affirmative duty on General Yamashita to control his forces in order to prevent or stop them from committing war crimes.<sup>152</sup>

Justices Murphy and Rutledge wrote impassioned dissents. Justice Murphy said of the charge against General Yamashita, "The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge." Justice Rutledge, in his dissent, pointed to the "vagueness" and "vacuity" of the Commission's findings. According to Justice Rutledge, the commission's finding was unclear as to whether General Yamashita was convicted for a willful and intentional failure to restrain his forces, known by him to be committing war crimes, or if he was convicted of a negligent failure to discover what his forces were doing and to take appropriate action. This lack of clarity, it was argued, both undermined the majority's opinion and was an insufficient basis on which the commission could impose a capital sentence.

Post-Yamashita, the opinions of Justices Murphy and Rutledge have been criticized as emotion-laden responses which have more to do with their frustrations with the lack of due process afforded to General Yamashita, rather than a thoughtful critique of the doctrine of command responsibility that emerged from the case. <sup>157</sup> This criticism, however, is misplaced. Certainly the dissenting opinions do highlight the inconsistencies in the commission's holding and in the Supreme Court's majority

<sup>149.</sup> Id. at 16.

<sup>150.</sup> Id. at 15.

<sup>151.</sup> Id. at 16.

<sup>152.</sup> *Id.* A final point of interest and a source of confusion in the majority opinion is worth noting. The Court stated that the "charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, *by permitting them to commit the specified atrocities.*" *Id.* at 17 (emphasis added). If the charge is as the Court asserts, that General Yamashita *permitted* his forces to commit the widespread atrocities, then Yamashita's liability is more direct and should be based on his actual knowledge of the conduct of his subordinates. The majority fails to further clarify this point and it certainly adds confusion to their ultimate opinion and to the question of what mens rea standard is applicable.

<sup>153.</sup> Id. at 28.

<sup>154.</sup> Id. at 51.

<sup>155.</sup> Id. at 51-52.

<sup>156.</sup> Id. at 53.

<sup>157.</sup> Parks, *supra* note 67, at 36.

opinion.<sup>158</sup> The dissents further highlight the fact that the doctrine of command responsibility that emerged from Yamashita was to some degree cobbled together from a variety of international sources and that it was not based on the long established criminal law doctrines of personal responsibility and accountability.<sup>159</sup>

### 2. High Command Case

Some post-World War II cases following Yamashita refined and clarified the Yamashita decision, while other cases rejected or confused the elements of command responsibility. One of the former cases involved the trial of Wilhelm von Leeb and thirteen other high ranking German officers during the Nuremberg proceedings. <sup>160</sup> This became known as the "High Command Case."

The judgment of the tribunal dealt with a number of legal issues. For the purposes of this article, the primary focus is on the tribunal's analysis of the responsibility of commanders for offenses committed by their subordinate and associated units. In this regard, the tribunal addressed the criminal responsibility of the officers relating to four orders issued by the German High Command and pertaining to operations on the Eastern Front. The tribunal also addressed command responsibility in regards to the officers' responsibility for the murder and ill treatment of prisoners of war and the civilian population. The tribunal also addressed command responsibility in regards to the officers' responsibility for the murder and ill treatment of prisoners of war and the civilian population.

<sup>158.</sup> See generally Yamashita, 327 U.S. at 26-81.

<sup>159.</sup> Id. at 35-40 (Murphy J., dissenting).

<sup>160.</sup> U.N. WAR CRIMES, von Leeb, supra note 6, at 1.

<sup>161.</sup> The High Command case proceeded under the authority of Law no. 10 of the Allied Control Council, which authorized the prosecution of any leader that was a principal, accessory, aider, or abettor, or any leader that took a consenting part in the commission of war crimes. *Id.* at 59-60. Four broad counts were brought against these officers for the role they played in the commission of war crimes. These counts were: 1) "Crimes against Peace;" 2) "War Crimes and Crimes against Humanity: Crimes against Enemy Belligerents and Prisoners of War;" 3) "War Crimes and Crimes against Humanity: Crimes against Civilians;" and 4) "Common Plan or Conspiracy." *Id.* at 2-5. The tribunal dismissed counts 1 and 4 against all thirteen defendants, and then focused their judgment on counts 2 and 3. *Id.* at 1.

<sup>162.</sup> Briefly, the four orders were as follows. First, the Commissar Order ordered the extermination of all "Bolshevist Commissars and of the Communist intelligentsia." *Id.* at 23. Second, the Barbarossa Jurisdiction Order provided that civilians in occupied areas would be subjected to arbitrary punishment and that there was no obligation to prosecute members of the military who committed crimes against enemy civilians. *Id.* at 31. Third, the Commando Order provided that no quarter would be given to captured enemy commandos. *Id.* at 34. Finally, the Night and Fog Decree provided that trials against civilians charged with crimes against the Reich in occupied territories would only be conducted if it was probable that death sentences would be passed and carried out without delay. *Id.* at 37. All of these orders had been issued by Hitler and passed to these officers in the field.

<sup>163.</sup> Id. at 82.

#### a. Scope of a Commander's Responsibility (Command and Control)

In the High Command case, the tribunal noted that the facts involved a different issue than Yamashita on the question of command authority. According to the tribunal, Yamashita's authority in his field of operations had not been restricted by either a higher military authority or the State. However, in the High Command cases, the crimes committed by these commander's subordinate forces were mainly committed at the insistence of [the] higher military and Reich authorities. It is difference, however, did not absolve a commander of his responsibility to ensure compliance with the law of war. According to the tribunal, the commander had certain obligations under international law which he could not set aside or ignore by reason of his own state's activities or orders. Thus, the tribunal found that the scope of a commander's authority and responsibility, related to forces under his command, is very broad and the commander cannot avoid that responsibility by claiming that he was merely passing or obeying the orders issued to him from a higher authority.

#### b. Information which Triggers a Duty to Act

Like Yamashita, the High Command case recognized that commanders have a duty to act.<sup>170</sup> However, the tribunal was much more precise in defining the amount of information that a commander must have before the duty is triggered. According to the tribunal, in order to find a commander criminally responsible for the transmittal of a criminal order, he must have "passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have *known was criminal*."<sup>171</sup>

Throughout the tribunal's judgment, they discuss this requirement of knowledge as it relates to command responsibility. Significantly, the tribunal states, that:

We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offences and

<sup>164.</sup> Id. at 76.

<sup>165.</sup> Id.

<sup>166.</sup> Id.

<sup>167.</sup> Id. at 76-77.

<sup>168.</sup> Id. at 77.

<sup>169.</sup> See id. at 76 (suggesting commanders have a duty to properly supervise subordinates).

<sup>170.</sup> Id. at 76-77.

<sup>171.</sup> Id. at 74 (emphasis added).

acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal.<sup>172</sup>

According to the tribunal, the commander must have actual knowledge that his forces have or are committing war crimes.<sup>173</sup> Once the commander has this information, if he acquiesces or participates in the war crimes then criminal liability will attach.<sup>174</sup>

This mens rea standard of actual knowledge adopted by the tribunal is clearer and more precise then the standard set forth in Yamashita. Applying the actual knowledge standard to individual officers, the tribunal acquitted some of the officers of charges because there was no evidence to establish that the officers knew of the crimes being committed by their subordinates.<sup>175</sup>

#### c. Actions Required of the Commander (actus reus)

The High Command case did follow Yamashita's precedent in holding that the laws of war impose a duty on commanders to take some action to prevent or stop their forces from engaging in further war crimes. According to the tribunal, there must be a personal dereliction on the part of the commander, "where his failure to properly supervise his subordinates constitutes criminal negligence on his part." It must be a personal neglect "amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." Under this standard, the prosecution need not prove that the commander shared in the criminal purpose of his subordinates or that his failure to act amounts to intentional conduct, but rather that the commander's failure to act amounted to more than simple negligence or inefficiency; it must reach the level of acquiescence.

The application of this standard is exemplified in the case against General von Kuechler relating to the execution of Russian prisoners of war.<sup>180</sup> According to the tribunal, there was insufficient evidence that von Kuechler had transmitted illegal orders from the German High Command regarding the execution of these prisoners.<sup>181</sup> However, regardless of the lack of transmission of the orders, the tribunal did find sufficient evidence that subordinate units had relayed several reports

<sup>172.</sup> Id. at 77.

<sup>173.</sup> Id. at 110.

<sup>174.</sup> Id.

<sup>175.</sup> See, e.g., id. at 110-11.

<sup>176.</sup> Id. at 76-77.

<sup>177.</sup> *Id.* at 76.

<sup>178.</sup> Id.

<sup>179.</sup> *Id*.

<sup>180.</sup> Id. at 41.

<sup>181.</sup> Id. at 94-95.

of the execution of prisoners to General von Kuechler's command post. The tribunal also found that von Kuechler had visited all of the prisoner of war camps within his command, and that he had admitted that he was aware of Russian prisoner executions. As a result, his failure to take action in spite of this awareness amounted to criminal neglect. See the command of the prisoner o

The High Command case also provides some specific examples of commanders who met their duty to act. According to the tribunal's judgment, General von Leeb fulfilled his duty with respect to the Commissar Order. Upon receipt of the order General von Leeb expressed to his superiors his opposition to it. Further, when he passed the order to his subordinate commanders, General von Leeb again expressed his disagreement with it and reminded his subordinates of the Maintenance of Discipline order. Due to these actions, the tribunal did not find von Leeb guilty, because he "protested against the order in every way short of open and defiant refusal to obey it." 188

These examples provide some illustrations of the steps a commander must take to meet his duty to act under the doctrine of command responsibility. In the context of illegal orders, while a commander is not expected to openly defy his superiors and risk his own life in opposing the order, he must do more than simply state his own personal objections and then pass the order on to his subordinates. <sup>189</sup>

#### d. Imputed Liability

Once the elements of command responsibility were met, the tribunal in the High Command cases, like the commission in Yamashita, had no difficulty punishing the senior officers as if they had personally committed the actual offenses.<sup>190</sup>

#### 3. The Hostage Case

The Hostage case is another important post-World War II case tried at the same time as the High Command case under the authority of Law No. 10 of the Allied Control Council. <sup>191</sup> The case involved the prosecution of twelve senior German

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182. Id. at 41.
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<sup>183.</sup> *Id*.

<sup>184.</sup> Id.

<sup>185.</sup> Id. at 27.

<sup>186.</sup> *Id*.

<sup>187.</sup> *Id*.

<sup>188.</sup> Id.

<sup>189.</sup> See id. (discussing von Leeb's protest against the Commission order).

<sup>190.</sup> See id. at 94-95 (holding defendants guilty and applying lengthy sentences).

<sup>191.</sup> U.N. WAR CRIMES, List, supra note 6, at 35.

military officials by the United States.<sup>192</sup> The charges against the defendants consisted of four counts alleging that the defendants willfully and knowingly committed war crimes against the populations of Greece, Yugoslavia, Norway, and Albania.<sup>193</sup> With regard to the doctrine of command responsibility itself, the Hostage case is significant for numerous reasons.

#### a. Scope of a Commander's Responsibility (Command and Control)

The Hostage case took an expansive view of the scope of a commander's responsibility. The tribunal specifically laid out the extent of a commanding general's responsibility of an occupied territory. According to the tribunal, commanders of occupied territories have a duty to maintain order, punish crime, and protect lives and property. The tribunal further stated that:

The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility.<sup>197</sup>

The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. <sup>198</sup>

The tribunal also examined the scope of responsibility of a military officer who did not hold a command position. Hermann Foertsch served as a Chief of Staff to General List and others. The tribunal noted that in his position he lacked command authority in the field. Because of this, the tribunal ruled that "his mere knowledge of the happening of unlawful acts" was not sufficient to impose liability. The sufficient to impose liability.

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192. Id. at 34.
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<sup>193.</sup> Id. at 35.

<sup>194.</sup> See infra notes 195-203 and accompanying text.

<sup>195.</sup> Id. at 69-71.

<sup>196.</sup> Id. at 69.

<sup>197.</sup> Id. at 69.

<sup>198.</sup> Id. at 71.

<sup>199.</sup> See id. at 75-76 (discussing the case against Hermann Foertsch).

<sup>200.</sup> Id. at 75.

<sup>201.</sup> Id. at 76.

<sup>202.</sup> Id.

These judgments are consistent with the holdings in Yamashita and the High Command cases in that the doctrine of command responsibility does not apply to all officers or military officials, but rather is focused on those officers who have command authority. It is that special status a commander possesses by having command authority that makes him different from other military officers and imposes a duty to act under the doctrine of command responsibility. If an officer is in a command position, then the scope of his responsibility over his subordinates can be quite broad, and it is at its broadest when the officer is in command of occupied territory.

## b. Information which Triggers a Duty to Act (mens rea)

The tribunal in the Hostage cases also addressed the mens rea of command responsibility.<sup>204</sup> In these cases there was ample evidence showing that the headquarters of these commanders had been receiving regular reports regarding the illegal treatment of civilians and other war crimes being committed by their troops.<sup>205</sup>

In their defense, many of the commanders claimed that they did not know of the reports received and because of this, they had no duty to act. On this point the tribunal stated:

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein.... As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.<sup>206</sup>

#### Elsewhere the tribunal stated that:

Want of knowledge of the contents of reports made to him is not a defence. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.<sup>207</sup>

<sup>203.</sup> See id.

<sup>204.</sup> Id. at 71.

<sup>205.</sup> See generally id. at 38-48.

<sup>206.</sup> Id. at 70-71.

<sup>207.</sup> Id. at 71.

The tribunal's judgment adopts a knowledge standard similar to the standard adopted in the High Command cases. Knowledge can be imputed to a commander who clearly had the information regarding the commission of war crimes available to him but chose to ignore this information. In other words, willful blindness equates to knowledge.

Beyond actual knowledge and willful blindness, where knowledge is imputed, the tribunal's judgment also imposes a "should have known" mens rea standard. The tribunal stated that a commander would ordinarily not "be permitted to deny knowledge of happenings within the area of his command while he [was] present therein." This judgment is premised on the duty that a commander has to know about the events occurring within his area of responsibility, especially when he was physically present in the area at the time the events occurred. Unlike the High Command cases, the Hostage cases also apply a mens rea standard that does not require the prosecution to prove actual knowledge. Instead, the prosecution can satisfy its burden by showing that the commander should have known of his subordinate's actions, which would then trigger a duty on his part to take some countering action.

#### 4. The Tokyo Trials

The other important post-World War II tribunal that considered the doctrine of command responsibility were the Tokyo Trials. These trials, like the international military trials conducted at Nuremburg, were composed of jurists from several countries. This tribunal considered charges against 28 former Japanese civilian and military leaders for crimes against peace, murder and conspiracy to commit murder, war crimes, and crimes against humanity. Counts 54 and 55 of the indictment were primarily the charges relating to command responsibility. These counts alleged that the leaders ordered, authorized, and permitted conduct in violation of the law of war, and deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to

<sup>208.</sup> Id. at 70-71.

<sup>209.</sup> Id. at 70.

<sup>210.</sup> Id. at 89.

<sup>211.</sup> Id. at 70.

<sup>212.</sup> See id. (outlining a commander's responsibilities and authority).

<sup>213.</sup> See id. at 89 (applying the "should have known" standard).

<sup>214.</sup> See 2 THE TOKYO MAJOR WAR CRIMES TRIAL: THE TRANSCRIPTS OF THE COURT PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard ed., 1998).

<sup>215.</sup> See id.

<sup>216.</sup> See id. at 1 of The Indictment.

<sup>217.</sup> Id. at 13.

prevent their breach.<sup>218</sup> In setting out the duties these leaders owed to prisoners of war and in discussing how these leaders should discharge their duties, the tribunal added further clarifications to the mens rea and actus reus elements of command responsibility.

#### a. Information which Triggers a Duty to Act (mens rea)

According to the mens rea element applied by the Tokyo tribunal in the context of the treatment of enemy prisoners of war, a person is responsible for the mistreatment of prisoners of war if they:

- (1) . . . had knowledge that such crimes were being committed and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
- (2) They are at fault in having failed to acquire such knowledge. If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. . . . [I]t is not enough for . . . him to show that he accepted assurances from others more directly associated with the control of prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue.

If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

This standard announced by the tribunal adds significant depth to the mens rea standard and helps clarify a point that remained unclear after Yamashita. According to the Tokyo tribunal, the duty to act is clearly triggered by a commander who knows that war crimes are being committed by his subordinates. In addition, the duty to act is imposed on a commander who should have known of the crimes being committed by forces under his command. Further, commanders must actively

<sup>218.</sup> Id.

<sup>219.</sup> See The Official Transcript at 48,444-46, reprinted in 101 The Tokyo Major War Crimes Trial: The Judgment, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East (R. John Pritchard ed., 1998).

<sup>220.</sup> Id. at 48,446.

<sup>221.</sup> Id.

seek out information on which to obtain knowledge.<sup>222</sup> Therefore, a commander who negligently fails to obtain information or a commander who relies on questionable information without further inquiry cannot avoid a duty to act.

## b. Actions Required of the Commander (actus reus)

The tribunal in the Tokyo Trials discussed in some detail the necessary actions a commander must take in order to satisfy his duty to act in preventing war crimes. <sup>223</sup> The tribunal recognized that not every level of command has the same requirements and obligations in regards to the treatment of prisoners of war. <sup>224</sup> The responsibility of senior commanders is two fold: first, they must establish a system that "secures the proper treatment of prisoners;" second, they must take steps to "secure [the system's] continued and efficient working." In setting out these duties, the tribunal recognized that there are limits to what can be expected of a commander. <sup>226</sup> For example, a senior commander cannot be expected to be intimately familiar with all the day-to-day operations of his subordinate units. <sup>227</sup> Rather, it is his responsibility to establish systems that will ensure law of war compliance and then provide command oversight of those systems.

# C. The Command Responsibility Doctrine Following the Post-World War II Tribunals

The post-World War II tribunals represent a significant advancement of the doctrine of command responsibility in international law. It was through these tribunals that the doctrine matured and obtained the status of customary international law. It was also from these tribunals that the elements of the doctrine were more fully developed and refined.

<sup>222.</sup> Id. at 48,445-446

<sup>223.</sup> Id. at 48,444-446.

<sup>224.</sup> See id. at 48,445-447 (discussing duties of cabinet members, commanders, and department officials).

<sup>225.</sup> Id. at 48,444.

<sup>226.</sup> Id.

<sup>227.</sup> See id. at 48,446. (stating the commander is only culpable for crimes committed against P.O.W.s if the crimes were likely to have occurred, if they had advance knowledge, or knew or should have known, of those crimes being committed; it does not entail a commander have absolute knowledge of the actions of every soldier under his command).

<sup>228.</sup> Id. at 48,444-45.

# 1. Scope of a Commander's Responsibility (Command and Control)

All of the cases begin with the requirement that in order for command responsibility to exist, there must be a command relationship between the commander and subordinate forces. This requirement forms the very essence of the doctrine. The scope of a commander's responsibility can be quite broad.

# 2. Information which Triggers a Duty to Act (mens rea)

The mens rea element of command responsibility was refined by these cases, but differences still remain. All of the cases rejected the notion that a commander was criminally responsible by the mere fact that he held the mantle of command. All the tribunals also agreed that if a commander knew of war crimes being committed by his forces, he had a duty to act. Further, the tribunals addressing this issue all held that a commander cannot remain willfully blind to this information and that if he does so, knowledge will be imputed to him.

The High Command tribunal limited liability to situations where the commander had actual knowledge of war crimes violations. The Hostage tribunal and the Tokyo tribunal determined that the duty to act can be triggered if the commander should have known or if he ought to have known about the war crimes being committed by his forces. 234

Several of the cases also discussed circumstances where the commander has the responsibility to seek out information.<sup>235</sup> In this regard, commanders may have a duty to make further inquiry beyond the initial reports they have received, particularly if the initial reports give some indication that there is a risk of law of war violations.<sup>236</sup>

## 3. Actions Required of the Commander (actus reus)

Once the duty to act is triggered, the commander must take some action.<sup>237</sup> Commanders are required to take appropriate measures that are within their power to prevent, suppress, or punish law of war violations.<sup>238</sup> The appropriate measures can

<sup>229.</sup> See supra notes 92-228 and accompanying text.

<sup>230.</sup> Id.

<sup>231.</sup> See supra notes 126-128 and accompanying text.

<sup>232.</sup> See supra notes 135, 209 and accompanying text.

<sup>233.</sup> See supra notes 171-175 and accompanying text.

<sup>234.</sup> See supra notes 136-139, 170-189, 219-228 and accompanying text.

<sup>235.</sup> See supra notes 128, 222 and accompanying text.

<sup>236.</sup> See supra notes 209-213, 220-222 and accompanying text.

<sup>237.</sup> See supra notes 61-179 and accompanying text.

<sup>238.</sup> See supra notes 61-179 and accompanying text.

differ depending on whether the commander is preventing future crimes, stopping current crimes, or punishing past crimes.<sup>239</sup>

#### 4. Causation

None of the tribunals discussed the necessity to establish a causal link between a commander's failure or dereliction and the war crimes that are committed by his subordinate forces. This causal link, however, is certainly implied at least in cases where a commander either fails to prevent future crimes or fails to stop ongoing law of war violations.

# 5. Imputed Liability

Finally, all of the cases support the concept that if command responsibility is established, liability for the actual war crime can be imputed onto the commander.<sup>240</sup> A commander is not simply guilty of dereliction of duty or some lesser offense, he is guilty of the actual war crimes and can be punished accordingly.<sup>241</sup>

# IV. INTERNATIONAL LAW DEVELOPMENTS OF THE COMMAND RESPONSIBILITY DOCTRINE AFTER WORLD WAR II

In spite of the significant developments in the doctrine of command responsibility at the end of World War II, the 1949 Geneva Conventions do not make any direct references to the doctrine. Following the Geneva Conventions, for almost thirty years the international legal community did not make any further attempts to codify, refine, or clarify points of the doctrine.<sup>242</sup> The situation changed in 1977 with the promulgation of Additional Protocol I to the 1949 Geneva Convention (Protocol I).<sup>243</sup> Following Protocol I, the Statute of the International Criminal Tribunal for Rwanda ("ICTY"),<sup>244</sup> the Statute for the International Criminal Tribunal for Rwanda ("ICTR"),<sup>245</sup> and the Rome Statute of the International Criminal Court

<sup>239.</sup> Other military tribunals at the time did address some of these issues. For example, the Abbaye Ardenne case was tried by a Canadian War Crimes Tribunal. Bantekas, *supra* note 41, at 593. The accused was found guilty for inciting and tolerating the mistreatment of prisoners of war. *Id.* The Tribunal noted that the commander failed to take into consideration factors such as the age, training, and experience of their forces, which would have led him to obvious conclusions. *Id.* 

<sup>240.</sup> See supra notes 140-141, 190 and accompanying text.

<sup>241.</sup> See supra notes 140-141, 190 and accompanying text.

<sup>242.</sup> Bantekas, supra note 41, at 574.

<sup>243.</sup> Diplomatic Conference, supra note 57.

<sup>244.</sup> S.C. Res. 995, supra note 57.

<sup>245.</sup> S.C. Res. 808, U.N. Doc. S./RES/808 (May 3 1993), reprinted in 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 3 (Virginia Morris & Michael P. Scharf eds., 1998) [hereinafter S.C. Res. 808].

("ICC")<sup>246</sup> all codified some form of the doctrine of command responsibility.<sup>247</sup> This section will discuss these statutes, as well as some relevant international criminal tribunals that have applied these statutes, in an effort to better understand the most current aspects of the doctrine in international law.

#### A. Protocol I

Articles 86 and 87 represent the codification of the command responsibility doctrine under Protocol I. The articles state:

## Article 86.-Failure to Act

- 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
- 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

#### Article 87.-Duty of Commanders

- 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
- 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
- 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this

<sup>246.</sup> THE ROME STATUTE supra note 57.

<sup>247.</sup> See supra notes 244-246.

Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.<sup>248</sup>

These two articles must be read together in order to best understand their full import. Article 86 codifies the doctrine of command responsibility by recognizing that violations of the law of war can occur through a failure to act when a duty to act exists. <sup>249</sup> It further recognizes that a commander has a special responsibility and can be criminally responsible for war crimes committed by his subordinates. <sup>250</sup> Understanding that commanders have unique responsibilities to ensure their troops' observance of the law of war, Article 87 sets out in general terms what a commander must do to meet those obligations. <sup>251</sup>

## 1. Scope of a Commander's Responsibility (Command and Control)

Article 86, Paragraph 1 affirms the proposition that liability for a failure to act is predicated on a duty to act.<sup>252</sup> Paragraph 2 states that superiors have a duty to act in certain circumstances.<sup>253</sup> The Protocol does not further define what a superior or commander is, and leaves the issue to the national law of the Parties to the Protocol.<sup>254</sup> The commentary to Protocol I does, however, state that a command relationship is not dependent upon rank.<sup>255</sup>

Article 87, paragraphs 1 and 3 establish the scope of a commander's responsibility. The article ensures a broad scope of responsibility and notes that commanders have authority for "forces under their command" and "other persons under their control."

It is important to note that the term "other persons under their control" recognizes that a command relationship and a duty to act is not necessarily limited just to members of the armed forces. One circumstance in which a broader responsibility may arise involves a commander of an occupied territory, where indirect

<sup>248.</sup> Diplomatic Conference, supra note 57, at 496-97.

<sup>249.</sup> Id. at 496.

<sup>250.</sup> PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 8 JUNE 1977 para. 3524, http://www.icrc.org/ihl.nsf/COM/470-750112?OpenDocument [hereinafter PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS].

<sup>251.</sup> See id. at para. 3550.

<sup>252.</sup> See Diplomatic Conference, supra note 57, at 496.

<sup>253.</sup> Id.

<sup>254.</sup> See Protocol Additional to the Geneva Conventions, supra note 250, para. 3537.

<sup>255.</sup> Id. para. 3549, 3553.

<sup>256.</sup> See Diplomatic Conference, supra note 57, at 496-97.

<sup>257.</sup> Id.

subordination may be created because of the occupying commander's additional responsibilities to preserve life and protect the property of all inhabitants in the occupied territory.<sup>258</sup>

# 2. Information which Triggers a Duty to Act (mens rea)

Article 86, paragraph 2 addresses the Geneva Convention's view of the mens rea element of command responsibility.<sup>259</sup> The language ultimately adopted in Article 86 states that a commander's duty to act is triggered either by direct knowledge, or by "information which should have enabled them to conclude in the circumstances at the time" that their forces were committing or going to commit breaches of the law of war. <sup>260</sup> The second prong states that a commander's duty to act can be triggered by "information which should have enabled them [the superior] to conclude" that his forces were committing or about to commit a breach of the Conventions. <sup>261</sup> This is a different formulation of the element than was used by any of the post-World War II tribunals and warrants closer examination.

At first blush this sounds like the "should have known" standard found in the Hostage case and the Tokyo trials. However, such a reading would be inaccurate. In fact, the International Committee of the Red Cross' ("ICRC") proposed language—"knew or should have known"—was rejected, as was the United States' proposed language of "knew or should have reasonably known." The language adopted in Article 86—"information which should have enabled them to conclude"—suggests that the mens rea requirement for command responsibility under Protocol I is an attempt to impute knowledge on the commander if the available information warrants this imputation. <sup>263</sup>

The mens rea standard that triggers a commander's duty to act under Article 86 is either actual knowledge or a type of imputed knowledge that is justified by the facts. This conclusion is supported by the official commentary to Protocol I which noted that under the French translation of Article 86, the mens rea standard is "information enabling them to conclude." This slight change is significant and

<sup>258.</sup> See PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS, supra note 250, at para. 3555. (By way of example, the commentary suggests that a commander of an occupied territory would have responsibility to protect one group of civilians from the aggressions of another civilian group, even if neither group fell under his military chain of command in any way).

<sup>259.</sup> Id. at para. 3541.

<sup>260.</sup> See Diplomatic Conference, supra note 57, at 496.

<sup>261.</sup> Id. at 496-97.

<sup>262.</sup> Smidt, *supra* note 36, at 204-205. *See also* PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS, *supra* note 250, at para. 3545 n.31.

<sup>263.</sup> See Diplomatic Conference, supra note 57, at 496.

<sup>264.</sup> Id.

<sup>265.</sup> See Protocol Additional to the Geneva Conventions, supra note 250, at para. 3545.

seems to connote the necessity of a requirement that actual knowledge, or something very close to it, is the mens rea standard under Protocol I.

In discussing a commander's duty to prevent and punish subordinates for law of war violations, Article 87, paragraph 3 states that the contracting parties to Protocol I require commanders who are aware that subordinates are going to commit or have committed a breach of the conventions to take steps to prevent violations and punish violators. <sup>266</sup>

The contracting parties' responsibility to ensure that a commander fulfills his duties is triggered by a commander's awareness or knowledge that his subordinates are committing war crimes.<sup>267</sup> It is reasonable to conclude that the mens rea standard under Article 86 is similar to the actual knowledge standard established in the High Command cases, and is certainly a stricter standard than the "should have known" standard applied in the Hostage cases, the Tokyo Trials, and arguably in Yamashita.<sup>268</sup>

# 3. Actions Required of the Commander

A significant contribution to the command responsibility doctrine made by Articles 86 and 87 is the development of the specific duties of a commander to ensure law of war compliance. Under Article 86, paragraph 2, the commander has the duty to prevent and repress breaches of the Conventions. Article 87, paragraph 1 imposes a duty on commanders to prevent, suppress, and report breaches to the Convention. Article 87, paragraph 3 requires that a commander who is aware that his forces are going to commit, or have committed a breach, to prevent the violations or take penal or disciplinary action against past breaches. Taken together, the commander's duties are to prevent future war crimes, suppress or stop on-going crimes, and report and punish past crimes.

Not only does Protocol I delineate a commander's duties, the articles provide specific guidance to the commander regarding what he is required to do to accomplish these duties.<sup>274</sup> This specific guidance helps to close the gap between general legal requirements in the abstract and the actual behavior required of troops in the field.<sup>275</sup>

- 266. See Diplomatic Conference, supra note 57, at 496-97.
- 267. Id.
- 268. See supra notes 132-135, 170-175, 204-220 and accompanying text.
- 269. Diplomatic Conference, supra note 57, at 496-97.
- 270. Id. at 496.
- 271. Id. at 496-97.
- 272. Id. at 497.
- 273. Id. at 496-97.
- 274. See supra notes 269-273 and accompanying text.
- 275. See Protocol Additional to the Geneva Conventions, supra note 250, at para. 3550.

Under Article 87, paragraph 2, all commanders have the general obligation to "ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol." This duty has no specific triggering mechanism. Commanders have a general responsibility to disseminate information to their forces about their obligations under the Conventions regardless of whether or not the commander has information that his forces are about to engage in or are engaging in breaches of the Conventions. 277

Article 87, paragraph 3 sets out additional requirements on what a commander must do to fulfill his duties.<sup>278</sup> If commanders are aware that forces under their command are going to commit breaches of the Conventions, they must "initiate such steps as are necessary to prevent such violations."<sup>279</sup> The text does not clarify what specific steps the commander must take, but when read in conjunction with Article 86, paragraph 2, the commander must take all feasible measures or steps within his power to prevent the breach.<sup>280</sup> This requirement to take all feasible measures within his power is a realistic requirement that takes into consideration the circumstances in which the commander is operating.

For past breaches, Article 87 requires commanders to "initiate disciplinary or penal action against violators" where necessary.<sup>281</sup> This requirement should be read in conjunction with the commander's duty to report past breaches set forth in Paragraph 1. This obligation to punish may also apply to subsequent commanders.<sup>282</sup> If the breaches occurred under a former commander's watch and the current commander only learns of the breaches after taking command, Article 87 still seems to impose a duty on the current commander to act, by punishing troops for past actions.<sup>283</sup> The article leaves open the question: Would a failure to punish past actions subject the new commander to liability for crimes that occurred prior to his assumption of command?<sup>284</sup>

<sup>276.</sup> Diplomatic Conference, supra note 57, at 497.

<sup>277.</sup> See Protocol Additional to the Geneva Conventions, supra note 250, at para. 3558.

<sup>278.</sup> Diplomatic Conference, supra note 57, at 496-97.

<sup>279.</sup> Id. at 497.

<sup>280.</sup> *Id.* at 496. The commentary lists several examples, such as a noncommissioned officer preventing a subordinate from killing a civilian, a lieutenant marking off a protected area, and a company commander sheltering prisoners of war from gun fire. *See* Protocol Additional to the Geneva Conventions, *supra* note 250, at para. 3561.

<sup>281.</sup> Diplomatic Conference, supra note 57, at 497.

<sup>282.</sup> Id. at 496-97.

<sup>283.</sup> Id.

<sup>284.</sup> For a discussion of this question and the obligation of successor commanders to punish past law of war violations, see Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, 55 CASE W. RES. L. REV. 443 (2004).

## 4. Imputed Liability

Neither Article specifically states that a commander who fails in his duties is criminally liable for the underlying war crimes committed by his subordinates. However, Article 86, paragraph 2 states that the "fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility." This language is certainly broad enough to impute liability on to the commander for the crimes committed by his subordinates.

### B. The ICTY and ICTR and Command Responsibility

The statutes of the ICTY and ICTR, promulgated in 1993 and 1994 respectively, were the next codifications of the command responsibility doctrine within the international context. The statutes are not only virtually identical, but also similar in many respects to Articles 86 and 87 in Protocol I. Article 7(3) of the ICTY states:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute [Grave Breaches of the Geneva Conventions of 1949 and Crimes Against Humanity] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>287</sup>

# Article 6(3) of the ICTR states:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute [Genocide and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>288</sup>

<sup>285.</sup> Diplomatic Conference, supra note 57, at 496. One author has suggested that additional language was not necessary on this point because the concept is already accepted as part of the customary international law. L. C. Green, Command Responsibility in International Humanitarian Law, 5 TRANSNAT'L. & CONTEMP. PROBS. 319, 342 (1995).

<sup>286.</sup> See supra notes 244-245 and accompanying text.

<sup>287.</sup> See S.C. Res. 995, supra note 57, at 515.

<sup>288.</sup> See S.C. Res. 808, supra note 245, at 5.

## 1. Scope of a Commander's Responsibility (Command and Control)

The language of both statutes is not limited in application to just military commanders. The statutes, like Protocol I, use the term "superior" which reflects the fact that command responsibility can apply to both military and civilian leaders.<sup>289</sup> Indeed, many of the reported cases of both the ICTY and ICTR have discussed, at length, the application of this statute to civilian leaders who have *de facto* command and control of military subordinates.<sup>290</sup> Because this article focuses on the doctrine's application to military leaders, these cases will not be discussed. Suffice it to say, the ICTY and ICTR, like the post-World War II tribunals, read the scope of a commander's responsibility broadly.

# 2. Information which Triggers a Duty to Act (mens rea)

The ICTY and ICTR had the opportunity to adopt the mens rea requirements set forth in Protocol I, however, neither statute reflects that language. Instead, they used the term "know or had reason to know" to reflect the mens rea standard. The question then is what does this term "had reason to know" mean. Not surprisingly, the tribunals called to interpret its meaning have not all reached the same conclusion. 293

One of the most significant pronouncements by the ICTY on this issue came in what is commonly referred to as the Celebici case. This case involved the prosecution of four individuals for various grave breaches and crimes against humanity relating to the mistreatment of prisoners of war at the Celebici prison camp. The prosecution asserted that where actual knowledge could not be proven

<sup>289.</sup> Prosecutor v. Delalic, Celebici: Case No. IT-96-21-A para. 195 (Feb. 20, 2001), reprinted in 2L GLOBAL WAR CRIMES TRIBUNAL COLLECTION 57 (S. De. Haardt & W. Van Der Wolf eds. 2001).

<sup>290.</sup> See Prosecutor v. Delalic et al., Celebici: Case No. IT-96-21-T (Nov. 16, 1998), available at http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf. See also Prosecutor v. Akayesu, Case No. ICTR-96-4-I (Sept. 2, 1998), reprinted in 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION 119 (S. De. Haardt & W. Van Der Wolf eds., 2000); Jose E. Alvarez, Lessons form the Akayesu Judgment, 5 ILSA J. INT'L & COMP. L. 359, 359 (1999); Bantekas, supra note 41, at 574; Ching, supra note 123, at 182-84. The notion of de facto command and control is a potentially important concept for military leaders who, for example, may be utilizing civilian contractors to perform activities once reserved for uniformed soldiers. One can imagine a scenario where a duty to control the conduct of these civilian contractors may be imposed on a military commander, subjecting the commander to potential liability if he neglects that duty.

<sup>291.</sup> See S.C. Res. 996, supra note 57, at 515; S.C. Res. 808, supra note 245, at 5.

<sup>292.</sup> See id.

<sup>293.</sup> See infra notes 294-313 and accompanying text.

<sup>294.</sup> See Prosecutor v. Delalic, supra note 290.

<sup>295.</sup> Id. at para. 3.

it could be presumed by the court when the crimes committed by the subordinates are wide spread, prolonged, or received public notoriety.<sup>296</sup> The tribunal rejected this argument, but did rule that if knowledge could not be proven by direct evidence it could be proven by circumstantial evidence.<sup>297</sup>

On the meaning of the term "had reason to know" the tribunal noted that a commander could not remain willfully blind in an attempt to avoid a duty to act.<sup>298</sup> In making this finding, the tribunal rejected the prosecution's argument that "had reason to know" equated to "should have known."<sup>299</sup> The tribunal instead held that "had reason to know" meant that a commander's duty to act would only be triggered if he had specific information available to him which would put him on notice about the conduct of his subordinates.<sup>300</sup> This information itself need not compel the conclusion that war crimes were being committed, so long as it put the commander on notice that further inquiry was needed.<sup>301</sup>

The finding of the Celebici tribunal regarding the issue of actual knowledge and the potential to prove knowledge through circumstantial evidence was affirmed by another ICTY tribunal in the Blaskic case. This tribunal, however, took a different view of the term "had reason to know." In reaching its judgment, the tribunal in the Blaskic case reviewed the post-World War II cases, Protocol I, and the Celebici opinion. From these sources the tribunal concluded that "ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of his duties." Accordingly, the tribunal held that the mens rea standard under customary international law and the ICTY statute was ordinary negligence, and thus was more akin to a "know or should have known" standard.

Three tribunals of the ICTR also reached differing conclusions about mens rea. In one case, the Akayesu tribunal failed to clearly differentiate between a commander's duty to obtain information and a commander's duty to act on that

<sup>296.</sup> Id. at para. 384.

<sup>297.</sup> *Id.* at para. 386. The tribunal listed several factors that may prove knowledge by circumstantial evidence. These factors include: 1) the number of crimes committed, 2) the type of crimes, 3) the scope of the crimes, 4) the number and types of troops involved, 5) the geographic location of the crimes, 6) the location of the commander at the time, and 7) the operational tempo at the time. *Id.*.

<sup>298.</sup> Id. at para. 387.

<sup>299.</sup> Id. at para, 390-95.

<sup>300.</sup> Id. at para. 393.

<sup>301.</sup> Id.

<sup>302.</sup> Prosecutor v. Blaskic, para. 332 (March 3, 2000), reprinted in 2J GLOBAL WAR CRIMES TRIBUNAL COLLECTION 90 (S. De. Haardt & W. Van Der Wolf eds., 2001).

<sup>303.</sup> *Id*.

<sup>304.</sup> *Id*.

<sup>305.</sup> Id.

<sup>306.</sup> Id.

information.<sup>307</sup> The tribunal instead lumped both duties together and held that "it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."<sup>308</sup> This language, which is very similar to the phraseology used by the High Command tribunal, indicates that the commander's failure to obtain information or "have reason to know" of this information must amount to more than just ordinary negligence, reaching a level closer to knowledge or at least acquiescence.<sup>309</sup> This standard was also adopted by the Musema tribunal.<sup>310</sup>

The ICTR took a different view of the term "had reason to know" in the Bagilishima case regarding the mens rea standard. This tribunal primarily focused its opinion on the mens rea necessary to trigger a superior's duty to act to prevent, suppress, or punish war crimes.<sup>311</sup> The tribunal stated that the mens rea element could be met in one of three ways:

It is the Chamber's view that a superior possesses or will be imputed the *mens* rea required to incur criminal liability where:

he or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or,

he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,

the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.<sup>312</sup>

<sup>307.</sup> For the tribunal's analysis of individual criminal responsibility see Prosecutor v. Akayesu, Case No. ICTR-96-4-I para. 471-91 (Sept. 2, 1998), *reprinted in* 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION 312-17 (S. De. Haardt & W. Van Der Wolf eds., 2000).

<sup>308.</sup> Id. para. 489.

<sup>309.</sup> Id. para. 488-90.

<sup>310.</sup> Prosecutor v. Musema, Case No. ICTR-96-13-I para. 131 (Jan. 27, 2000), reprinted in 1D GLOBAL WAR CRIMES TRIBUNAL COLLECTION 76 (S. De. Haardt & W. Van Der Wolf eds., 2001).

<sup>311.</sup> Prosecutor v. Bagilashma, Case No. ICTR-95-IA-T para. 45, 48 (June 7, 2001), reprinted in 1E GLOBAL WAR CRIMES TRIBUNAL COLLECTION 18 (J. Oppenheim et al. eds. 2001).

<sup>312.</sup> Id. para. 46.

According to this opinion, the mens rea standard can be met if the commander's lack of knowledge was due to his negligence. Thus, the term "had reason to know" equates to the standard of "should have known." <sup>313</sup>

Considering all of these cases, the one clear conclusion that can be drawn is that there is no generally accepted standard on what "know or had reason to know" means. Likewise, when the mens rea standard of the ICTY and ICTR are compared with the standard under Protocol I, it is clear that there is no international agreement on the mens rea standard under international law or the law of war.

#### 3. Causation

Few tribunals have directly addressed the issue of causation as an element of command responsibility. The Celebici case is the exception. In the Celebici tribunal, the defense contended that in order to hold a superior liable for the crimes of subordinates, the superior's failure to act or act sufficiently had to be the cause of the offense. The tribunal found no support for the argument that it was a necessary element for the prosecution to establish. In the context of a commander's failure to prevent future crimes, however, the tribunal did note that conceptually such a link does exist. As such, "a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them." 17

With respect to a commander's responsibility to punish past crimes, the tribunal specifically rejected any requirement to prove a causal connection. The tribunal reasoned that even though there often is a link between a commander's failure to punish past crimes and an increased likelihood that his subordinates will commit crimes in the future, it is not possible to establish a causal link between a failure to punish past crimes and the commission of those past crimes. 319

The Celebici judgment is the clearest articulation on the issue of causation and its applicability to the doctrine of command responsibility. According to the judgment, while causation is not a separate element that must be established, it is certainly a factor that can be used in evaluating whether the commander has done everything feasible to prevent or suppress war crimes.<sup>320</sup>

<sup>313.</sup> THE ROME STATUTE, supra note 57, at art. 28.

<sup>314.</sup> Prosecutor v. Delalic, Case No. IT-96-21-T para. 396 (November 16, 1998), available at http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf.

<sup>315.</sup> Id. at para. 398.

<sup>316.</sup> Id. at para. 399.

<sup>317.</sup> Id.

<sup>318.</sup> Id. at para. 400.

<sup>319.</sup> Id.

<sup>320.</sup> Id. at para. 396, 398-400.

## C. The International Criminal Court and the Rome Statute

The most recent international codification of command responsibility is the ICC. This court has jurisdiction to hear cases involving genocide, crimes against humanity, war crimes, and the crime of aggression. Article 28 of the Rome Statute entitled "Responsibility of Commander's and Other Superiors" states:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

<sup>321.</sup> THE ROME STATUTE, supra note 57, art. 1.

<sup>322.</sup> Id. at art. 5.

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>323</sup>

To date there have been no tribunals conducted to add further depth to the meaning of the statute.<sup>324</sup> It is certainly possible that, like the ICTY and ICTR tribunals, different ICC tribunals may define and apply the same terms differently.

## 1. Scope of a Commander's Responsibility (Command and Control)

The statute uses the terms "military commander" and a person "effectively acting as a military commander" to describe the applicability of the statute. <sup>325</sup> In defining subordinates, the statute uses the terms "forces under his or her effective command and control, or effective authority and control as the case may be. <sup>326</sup>

The use of these terms is consistent with prior precedent, because it takes an expansive view of the scope of a commander's responsibility.<sup>327</sup> Furthermore, the statute specifically recognizes the possibility of a *de facto* commander.<sup>328</sup> Clearly, the actions and responsibilities of the officer are more important than the officer's rank or title when determining who is a commander. Consistent with prior cases and statutes, the ICC recognizes that an important aspect of a commander's responsibility is tied to his ability to control the subordinates under him whether those subordinates are under his executive authority or his tactical authority.<sup>329</sup>

# 2. Information which Triggers a Duty to Act (mens rea)

The mens rea adopted by the ICC for military commanders is a "know or should have known" standard. The specific rejection of the language used in Article 86 of Protocol I, as well as the language used in the ICTY and ICTR statutes, was undoubtedly intentional. Arguably the term "should have known" is more akin to a

<sup>323.</sup> Id. at art. 28.

<sup>324.</sup> On August 28, 2006, the ICC announced the first criminal charges by the court. Press Release, International Criminal Court, Child Soldiers in the First International Criminal Court Case (Aug. 28, 2006), available at http://www.icc-cpi.int/press/pressreleases/174.html. The charges were against Thomas Lubanga Dyilo, a former leader of a militia group at war in the North Eastern Ituri district of the Democratic Republic of the Congo, for enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. *Id.* 

<sup>325.</sup> THE ROME STATUTE, supra note 57, at art. 28.

<sup>326.</sup> Id.

<sup>327.</sup> Kai Ambos, Superior Responsibility, in 1 The Rome Statute of the International Criminal Court: Commentary 823, 856 (Antonio Cassese et al. eds. 2002).

<sup>328.</sup> Id. at 856-57.

<sup>329.</sup> THE ROME STATUTE, *supra* note 57, at art. 28; Ambos, *supra* note 327, at 856-57.

<sup>330.</sup> THE ROME STATUTE, supra note 57, art. 28, at 17.

negligence standard similar to the standard used in the Hostage case and the Tokyo trials.<sup>331</sup> The statute requires consideration to be given to the circumstances that existed at the time the war crimes were committed in determining what the commander should have known.<sup>332</sup>

#### 3. Actions Required of the Commander

The requirement for a commander who knows or should know that his subordinates are about to commit, are committing, or have committed war crimes, is to take all "necessary and reasonable" steps to prevent, suppress or report and punish. This language is identical to the requirements in the ICTY and the ICTR. The terms "necessary and reasonable" connote a flexible approach that recognizes that a commander should not be required to do the impossible, which is consistent with prior cases and precedent. Use of the term "reasonable" by these three statutes also creates a clearly objective standard by which to judge a commander's efforts.

## 4. Imputed Liability

Unlike any of the previous statutes, the Rome Statute explicitly states that the commander can be punished as if he had actually committed the war crimes. The statute provides that a commander "shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control . . . ." Even though this concept has been a key part of the doctrine since Yamashita, this is the first specific codification in an international statute. 338

- 333. THE ROME STATUTE, supra note 57, at art. 28.
- 334. Ambos, *supra* note 327, at 861.
- 335. *Id.* at 861-62; see generally supra notes 176-177, 223-228, 237-239 and accompanying text.
  - 336. Ambos, supra note 327, at 850.
  - 337. THE ROME STATUTE, supra note 57, at art. 28.
  - 338. Fox, supra note 284, at 490-91.

<sup>331.</sup> See supra notes 210-213, 220-222 and accompanying text.

<sup>332.</sup> THE ROME STATUTE, *supra* note 57, at art. 28. The statute creates a higher mens rea standard for civilian superiors. Ambos, *supra* note 327, at 870. For civilians the standard is "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes." THE ROME STATUTE, *supra* note 57, at art. 28. This standard is actual knowledge and it states that actual knowledge will be imputed if the civilian superior remained willfully blind to the information regarding war crimes being committed by subordinates. Ambos, *supra* note 327, at 870. The Rome Statute is the first codification of command responsibility that draws this clear of a distinction between the mens rea that is applied to civilian leaders than the standard applied to military leaders. *Id.* at 848.

The codification of the command responsibility doctrine with Protocol I, the ICTY and ICTR, and the Rome Statute have in many ways added clarification and depth to the doctrine. In spite of this, it would be inaccurate to conclude that all aspects of the doctrine have reached the status of customary international law. The mens rea of the doctrine is still a matter of varying formulations and interpretation. Nevertheless, the doctrine has continued to mature and develop and is regularly applied in various international tribunals. Given the fact that the United States was one of the leading proponents of this doctrine after World War II, one would expect that the doctrine would have developed domestically in a similar course. That has not been the case. A domestic equivalent to the command responsibility doctrine in U.S. domestic law under the UCMJ does not exist. The next section will discuss this lack of development and the problems that have resulted.

#### V. COMMAND RESPONSIBILITY UNDER THE UCMJ

#### A. The UCMJ Structure

The end of World War II not only ushered in many developments in international law, but also changed domestic military law significantly, partly due to the problems with the various services' criminal codes.<sup>341</sup> As a result of these problems and the lack of uniformity between the services, Congress held numerous hearings from which the Uniform Code of Military Justice was established and signed onto law in 1951.<sup>342</sup> Inexplicably, the doctrine of command responsibility was not included within the UCMJ.<sup>343</sup>

The failure to include any codification of this doctrine cannot be attributed to the military's lack of familiarity with the command responsibility doctrine. In fact, the U.S. military fully recognized the doctrine as a part of international law at about the time that the UCMJ was promulgated.<sup>344</sup> Army Field Manual 27-10 (FM 27-10) titled "The Law of Land Warfare" was written in 1956. <sup>345</sup> This field manual represents the U.S. Army's view of the customary and treaty law applicable to the

<sup>339.</sup> See O'Reilly, supra note 44, at 139-40.

<sup>340.</sup> See Ambos, supra note 237, at 866.

<sup>341.</sup> James B. Insco, *Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMP. & INT'L L. 389, 404 (2003). *See also* Walter T. Cox III, *The Twenty-Seventh Annual Kenneth J. Hodson Lecture: Echoes and Expectations: One Judge's View*, 159 MIL. L. REV. 183, 187 (1999).

<sup>342.</sup> Michael E. Klein, United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?, 1999-FEB ARMY LAW. 3, 5 (1998).

<sup>343.</sup> Smidt, *supra* note 36, at 233.

<sup>344.</sup> See supra note 6 and accompanying text.

<sup>345.</sup> FM 27-10, published in July of 1956, is still the current manual in publication and includes an explanation of the doctrine of command responsibility. *See* DEPARTMENT OF THE ARMY, *supra* note 38, at para. 498.

conduct of warfare.<sup>346</sup> On the doctrine of command responsibility, paragraph 501 of FM 27-10 states:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. 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.<sup>347</sup>

# 1. Punitive Articles Related to Command Responsibility

Article 77 of the UCMJ titled "Principals," sets out the well-recognized criminal law doctrine of accomplice liability. This article serves an umbrella-like function, applying the doctrine of accomplice liability to other punitive articles within the code. Since Article 77 is a reflection of the recognized criminal law doctrine on this issue, in order for liability to attach, the accomplice must share in the criminal purpose or design of the perpetrator and take some action or fail to perform some legal duty that aids, abets, counsels, or commands the perpetrator to commit the

<sup>346.</sup> Id. at para. 488.

<sup>347.</sup> *Id.* at para. 501. "However, FM 27-10 is not a penal code and does not in and of itself create any basis for criminal liability in domestic courts-martial." Smidt, *supra* note 36, at 186. Some scholars have erroneously concluded that this statement in FM 27-10 is the domestic law on command responsibility. This conclusion is incorrect. The purpose of FM 27-10

is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States. . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war.

DEPARTMENT OF THE ARMY, *supra* note 38, at para. 1. Thus, the field manual does not have the efficacy of a statute. It is not a punitive statute on which a criminal prosecution can be based. One must look to the UCMJ itself to determine if the doctrine of command responsibility has been incorporated into U.S. law.

<sup>348.</sup> UNIF. CODE OF MILITARY JUSTICE § 877 art. 77, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES A2-24 (2005).

<sup>349.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 1b(1) (2005).

act.<sup>350</sup> Accordingly, Article 77 is too narrow to allow for the incorporation of the doctrine of command responsibility.<sup>351</sup>

Article 78 establishes the elements for an accessory to the crime.<sup>352</sup> Similar to Article 77, to be guilty under Article 78, an accessory must know that the perpetrator committed a criminal offense under the UCMJ and must assist the perpetrator "for the purpose of hindering or preventing the apprehension, trial, or punishment of the [perpetrator]."<sup>353</sup> Thus, Article 78 is also too narrow to allow for the incorporation of the command responsibility doctrine.

There are several punitive articles within the UCMJ that recognize offenses that are comparable to law of war violations. These articles include: Article 93 Cruelty or Maltreatment; Article 97 Unlawful Detention; Article 116 Riot; Article 118 Murder; Article 119 Manslaughter; Article 120 Rape; Article 124 Maiming; Article 128 Assault; Article 134 Kidnapping; and Article 134 Negligent Homicide. The doctrines of accomplice liability and accessory liability apply to these offenses. However, there is no similar umbrella-like provision for the doctrine of command responsibility. Thus, there is no adequate standard that applies to a commander who fails to prevent, suppress, or punish his troops when they commit these offenses during war or other military operations.

## 2. Involuntary Manslaughter and Negligent Homicide

In two limited cases, involuntary manslaughter and negligent homicide, it may be possible to establish a commander's liability because of his failure to prevent or suppress unlawful killings by his subordinates. The elements of one form of involuntary manslaughter under Article 119 UCMJ are: "(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That this act or omission of the

<sup>350.</sup> Unif. Code of Military Justice  $\S$  877 art. 77, reprinted in Manual for Courts-Martial United States A2-24 (2005).

<sup>351.</sup> In his article on command responsibility, Major Parks argues that a commander's negligence or failure to act must be so great that it equates to the conduct of an accomplice or accessory. See Parks, supra note 67, at 78-82. This conclusion, however, is not an accurate statement of the doctrine. If the commander's negligence/culpability must equate to that of an accomplice or an accessory, then there would have been no need to create a separate doctrine of command responsibility, since accessory and accomplice liability have enjoyed long standing acceptance in both domestic and international law.

<sup>352.</sup> UNIF. CODE OF MILITARY JUSTICE § 877 art. 77, reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES A2-24 (2005).

<sup>353.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 2b. (2005).

<sup>354.</sup> See Unif. Code of Military Justice § 893 art. 93, § 897 art. 97, § 916 art. 116, § 918 art. 118, § 919 art. 119, § 920 art. 120, §924 art. 124, §928 art. 128, and §934 art. 134, reprinted in Manual for Courts-Martial United States A2-26-32 (2005).

<sup>355.</sup> See id. § 877 art. 77, § 878 art. 78.

The elements of negligent homicide are:

(1) that a certain person is dead; (2) that this death resulted from the act or failure to act of the accused; (3) that the killing by the accused was unlawful; (4) that the act or failure to act of the accused which caused the death amounted to simple negligence; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.<sup>359</sup>

One can envision a situation, for example, where a commander was either culpably negligent or simply negligent regarding information that his forces were going to kill innocent civilians while on a combat patrol. If the prosecution could establish all of the requisite elements, the commander could be prosecuted for involuntary manslaughter or negligent homicide for those killings.

This limited means of imposing liability on a commander for the unlawful killings committed by his forces, however, is not a complete or thorough incorporation of the command responsibility doctrine. In fact, it is unsatisfactory for several reasons. First, assuming that the commander's liability for involuntary manslaughter can be established, the maximum punishment for that offense is 10 years for each specification. The maximum punishment for each specification of negligent homicide is three years confinement. These potential punishments are significantly lower than the penalties his forces may face for their conduct, which in some cases could include death. These are also much lower punishments than

Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence.

Id. at para. 85c(2).

<sup>356.</sup> See United States v. Cowan, 39 M.J. 950, 954-55 (N-M.C.M.R. 1994), aff 'd 42 M.J. 475 (C.A.A.F. 1995). See also Unif. Code of Military Justice § 919 art. 119(b), reprinted in Manual For Courts-Martial United States A2-29 (2005).

<sup>357.</sup> MANUAL FOR COURTS MARTIAL UNITED STATES para. 44c(2)(a)(i) (2005).

<sup>358.</sup> Id. See also Cowan, 39 M.J. at 950.

<sup>359.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 85b(1)-(5).

<sup>360.</sup> See id. at para. 44e(2).

<sup>361.</sup> See id. at para. 85e.

<sup>362.</sup> See id. at para. 43e(1) (note that the maximum punishment for premeditated murder is

those imposed on commanders by the post-World War II tribunals and other more recent international tribunals.<sup>363</sup> Second, neither Article 119 nor Article 134 sets out the scope of a commander's responsibility on which the duty to act is predicated.<sup>364</sup> Last, cases that have discussed a commander's liability under Article 119 and 134 have also imposed a much higher mens rea standard than the standard argued by the United States and accepted in the international law context. The two cases that follow illustrate these problems.

United States v. Flaherty<sup>365</sup> was decided soon after the adoption of the UCMJ.<sup>366</sup> In Flaherty, the senior ranking soldier in a military vehicle was convicted of negligent homicide when the driver of the vehicle he was "commanding" lost control and crashed into a bridge, killing 6 soldiers.<sup>367</sup> The United States Army Board of Review reversed the conviction.<sup>368</sup> The court noted that the vehicle's commander did not have a driver's license and had never driven a car in his lifetime.<sup>369</sup> Under these facts, the court stated, "[w]e cannot say beyond a reasonable doubt that the accused at this time knew that the truck was being driven negligently."<sup>370</sup> Later, in discussing the vehicle commander's responsibility to take preventive measures, the court said, "[i]t must be remembered that for all the accused knew, Jenkins [the driver] was a competent and qualified driver, as he (the accused) could honestly assume . . . ."<sup>371</sup> According to this court, before the commander's duty to act is triggered, the commander must know that his subordinate is acting in a criminal (or in this case negligent) manner.<sup>372</sup> The mens rea of even this very limited form of command

death).

- 364. See UNIF. CODE OF MILITARY JUSTICE, supra note 39, § 919 art. 119, § 934 art. 134, reprinted in Manual for Courts-Martial United States A2-29,-32 (2005).
  - 365. United States v. Flaherty, 12 C.M.R. 466 (A.B.R. 1953).
- 366. John S. Cooke, Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition, 165 MIL. L. REV. 1, 8 (2000).
  - 367. Flaherty, 12 C.M.R. at 467-69.
  - 368. Id. at 471.
  - 369. Id. at 468.
  - 370. Id. at 470 (emphasis added).
  - 371. Id. (emphasis added).
  - 372. Id.

<sup>363.</sup> See Prosecutor v. Musema, Case No. ICTR-96-13-I para. 1008 (Jan. 27, 2000), reprinted in 1D GLOBAL WAR CRIMES TRIBUNAL COLLECTION 237 (S. De. Haardt & W. Van Der Wolf eds., 2001) (sentenced to life imprisonment); Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998), reprinted in 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION 394 (S. De. Haardt & W. Van Der Wolf eds., 2000) (sentenced to life imprisonment); Prosecutor v. Blaskic, Case No. IT-95-14 (March 3, 2000), reprinted in 2J GLOBAL WAR CRIMES TRIBUNAL COLLECTION 204 (S. De. Haardt & W. Van Der Wolf eds., 2001) (sentenced to forty-five years in prison); Prosecutor v. Delalic et al., IT-96-21-T. 441-50 Case No. (Nov. 16. http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf (Zdravko Mucic sentenced to seven years in prison; Hazim Delic sentenced to twenty years in prison; Esad Landzo sentenced to fifteen years in prison).

responsibility under negligent homicide requires actual knowledge on the part of the commander before a duty to act is triggered.<sup>373</sup>

Later, in a much more serious and well-publicized incident occurring during the Vietnam War, questions regarding the scope of a commander's responsibility and his mens rea were once again raised. The incident, most commonly referred to as the My Lai Massacre, involved the killing of several hundred unarmed non-combatants by members of Charlie Company, Task Force Barker of the 11th Brigade of the Americal Division.<sup>374</sup> Among those prosecuted for the murder of these non-combatants was the Charlie Company Commander, Captain Ernest Medina.<sup>375</sup> The evidence established that Captain Medina was within a few hundred yards of the village where his subordinates were killing unarmed civilians and had been at this location for some three hours during which time the killings occurred.<sup>376</sup> There was no evidence, however, that Captain Medina either took part in the killings or issued direct orders to his soldiers to kill unarmed civilians.<sup>377</sup>

The U.S. government charged Captain Medina with intentional murder under Article 118 of the UCMJ. The government's theory was that Captain Medina knew exactly what his soldiers were doing, he had the means to stop or prevent the killing, and he chose not to do so. Accordingly, his knowledge of the crimes being committed, his ability to stop or prevent the crimes, and his unwillingness to do so, made him a principal to the murders under Article 77 of the UCMJ. 380

At trial, however, the military judge rejected the prosecution's theory on the grounds that it was not supported by the facts or the law and reduced the charges to involuntary manslaughter under Article 119 of the UCMJ. Under an involuntary manslaughter charge, the prosecution had to first prove that Captain Medina had a legal duty to take some action to prevent the unlawful killings. Such a legal duty

<sup>373.</sup> See id.

<sup>374.</sup> See William R. Peers, The Peers Report Ch. 2 (1974), reprinted in The My Lai Massacre and its Cover-Up: Beyond The Reach of Law? 44-46 (Joseph Goldstein et al. eds., 1976).

<sup>375.</sup> Medina v. Resor, 43 C.M.R. 243, 244 (C.M.A. 1971).

<sup>376.</sup> See Peers, supra note 374, at Ch.6.

<sup>377.</sup> There is evidence that the evening before the operation, Captain Medina gave his troops a "pep talk," but nothing in that talk evidenced orders or directions to kill unarmed civilians. *Id.* at Ch.5. The Peers Report states that although he didn't say to kill all civilians after the pep talk, all the soldiers knew to kill anything that moved. *Id.* 

<sup>378.</sup> Smidt, supra note 36, at 195 n.167.

<sup>379.</sup> Eckhardt, supra note 42, at 12.

<sup>380.</sup> Unif. Code of Military Justice  $\S$  877 art. 77, reprinted in Manual for Couris-Martial United States A2-24 (2005).

<sup>381.</sup> See Editor's Note to Kenneth A. Howard, Command Responsibility for War Crimes, 21 J. Pub. L. 7, 8 (1972).

<sup>382.</sup> Id. at 8-10.

was not clearly established under military law at the time.<sup>383</sup> According to the lead prosecutor, "no clear articulation of the principle" was found in the UCMJ, thus forcing them to "bootstrap" this duty from "isolated portions from dated military field manuals."<sup>384</sup>

The prosecution was further required to prove that Captain Medina possessed actual knowledge of his soldier's law of war violations when he failed to stop their killings. The military judge gave the following instruction to the panel:

In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to inure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus, mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities. 386

Not surprisingly, under this actual knowledge standard, Captain Medina was acquitted of the charges of involuntary manslaughter.<sup>387</sup>

These two cases had the opportunity to apply some of the command responsibility concepts to the offenses of involuntary manslaughter and negligent homicide under the UCMJ. In both instances the courts rejected the mens rea

<sup>383.</sup> Eckhardt, *supra* note 42, at 13-14.

<sup>384.</sup> *Id.* Nothing in the UCMJ has changed in the past thirty-plus years to further clarify or articulate the scope and nature of the commander's legal duty to act to prevent, suppress, or punish soldiers for committing war crimes. *See also* UNIF. CODE OF MILITARY JUSTICE § 892 art. 92, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES A2-26 (2005).

<sup>385.</sup> See Eckhardt, supra note 42, at 13-14.

<sup>386.</sup> See Editor's Notes to Howard, supra note 381, at 8, 10-11 (emphasis added) (The elements of Article 119 in the Medina case have remained unchanged).

<sup>387.</sup> *Id.* at 8. The outcome of the Medina case and the Army's treatment of other more senior officers stemming from the My Lai Massacre brought on a chorus of criticism not unlike the criticism following the revelations at Abu Ghraib. *Id.* at 13, 17, 19-20. One of the most common criticisms was that enlisted soldiers bore the brunt of the responsibility while officers and other senior officials were not held accountable for their roles. *See infra* note 417.

standard advocated by the United States immediately following World War II and during the drafting of Protocol I—instead requiring actual knowledge. This double standard is inexplicable. Furthermore, in the Medina case the prosecution was forced to establish the scope of a commander's responsibility by bootstrapping from sources outside the UCMJ because no clear standard of command authority and responsibility was contained in the UCMJ. These cases demonstrate why the current provisions of the UCMJ, even in the limited context of involuntary manslaughter and negligent homicide, are inadequate codifications of the command responsibility doctrine.

## B. Article 92 Dereliction of Duty

What, then, can a commander be held accountable for if he fails to perform his duties or performs them inadequately, and this failure is then connected to the commission of war crimes by his subordinates? Article 92 of the UCMJ sets forth the elements for dereliction of duty as follows: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and (c) that the accused was (willfully) (through neglect or culpable inefficiency) "derelict in the performance of those duties." This language seems to incorporate the doctrine of command responsibility. However, a closer examination reveals why, for several reasons, Article 92 as currently formulated fails to incorporate this doctrine.

The Manual for Courts-Martial ("MCM") sets out the key aspects and definitions of Article 92.<sup>391</sup> According to the MCM, and established military case law, the source of the legal duty can come from a "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." Even though the elements for dereliction of duty do not explicitly mention the special legal duties imposed on a commander, the MCM definition is certainly broad enough to include a commander's duties and responsibilities over his subordinates.

However, because the duties of a commander are not separately articulated under Article 92, it leaves this issue open to unnecessary questions and potential litigation. What, for example, is the scope of a commander's authority? Should distinctions be drawn between tactical authority and executive authority? Should commanders of occupied territory have a broader scope of responsibility as is recognized under international law? Does the duty attach only to those holding the position of a commander? How should the position of a commander be defined? Can the duties under Article 92 also apply to *de facto* commanders? Since none of these questions

<sup>388.</sup> Editors' Notes to Howard, supra note 381, at 8; Flaherty, 12 C.M.R. at 470.

<sup>389.</sup> See Eckhardt, supra note 42, at 14-15.

<sup>390.</sup> See Unif. Code of Military Justice  $\S$  892 art. 92 reprinted in Manual for Courts-Martial United States A2-26 (2005) A2-26.

<sup>391.</sup> Id.

<sup>392.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 16c(3)(a) (2005).

are currently addressed by treaties to which the United States is a signatory,<sup>393</sup> or addressed in statutes or regulations, we have to look to the custom of the service for these answers. However, as shown previously, the custom of the service on these questions was not easily determined by the prosecution in *Medina*.<sup>394</sup> Even now, more than 30 years after Captain Medina's trial, a prosecutor would still have to "bootstrap" this duty from sources outside of the UCMJ. This bootstrapping leads to unclear and inconsistent applications of the law.

Not only is a commander's legal duty unclear under Article 92, the mens rea element is unclear and inconsistent with the international standard. Article 92 adopts the "know or reasonably should have known" mens rea standard in order to trigger a commander's duty to act.<sup>395</sup> This formulation seems consistent with the position put forth by the United States to the drafters of Article 86 of Protocol I.<sup>396</sup> It also seems consistent with the U.S. position in many of the post-World War II tribunals, the mens rea standard applied by several of the ICTY and ICTR tribunals, and Article 28 of the Rome Statute.<sup>397</sup>

Despite this, military cases interpreting Article 92 have frequently imposed a higher mens rea standard. For example, in *United States v. Ferguson*, the Navy-Marine Court of Military Review held that in order to prove that a service member's dereliction was willful, the prosecution had the burden of proving that the accused had actual knowledge of his duty. The court reasoned that because a charge of willful dereliction carries with it a higher punishment, a higher mens rea standard than set out in Article 92 was required. This requirement for actual knowledge is consistent with both the *Flaherty* case—discussed above for negligent homicide—and the judge's instructions in the *Medina* case—for involuntary manslaughter—but is inconsistent with the U.S. position internationally and mens rea under international law.

Another problem with Article 92 relates to what actions a commander must take to prevent, suppress, or punish law of war violations. As codified, the doctrine of command responsibility under international law speaks of a commander's duty to act

<sup>393.</sup> Note that the U.S. did not sign on to Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1997: State Signatories, available at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S.

<sup>394.</sup> See Eckhardt, supra note 42, at 14-15; Editor's Note to Howard, supra note 381, at 11.

<sup>395.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 16c(3)(b) (2005).

<sup>396.</sup> Eugenia Levine, *Command Responsibility: The Mens Rea Requirement*, GLOBAL POLICY FORUM, Feb. 2005, http://www.globalpolicy.org/intljustice/general/2005/command.htm.

<sup>397.</sup> *Id.* (regarding the U.S. position of the post World War II tribunals, Article 7(3) of the ICTY tribunal, and Article 28 of the Rome Statute). *See also* S.C. Res. 808, *supra* note 245, at 515; S.C. Res. 995, *supra* note 57, at 5.

<sup>398.</sup> United States v. Ferguson, 40 M.J. 823, 832-33 (N.M.C.M.R. 1994).

<sup>399.</sup> Id.

<sup>400.</sup> Diplomatic Conference, supra note 57, at 496-97.

in affirmative terms such as taking all "feasible measures within their power" and "taking the necessary and reasonable measures" to prevent, suppress, and punish law of war violations. 401 Article 92, however, takes the opposite approach. 402 It does not set out what is expected of a service member. Instead, it defines dereliction as either willful, negligent, or culpably inefficient conduct.<sup>403</sup> The difference in Article 92's formulation is subtle but important. Under the international law codifications, the commander must do more than the minimum to avoid criminal liability for the law of war violation of his subordinates.<sup>404</sup> He must do everything in his power that is reasonable to prevent, suppress, or punish law of war violations. By contrast. under Article 92 all that a service member must do is avoid willful failures and achieve a level of competency that is somewhere above simple negligence or culpable inefficiency. 406 A service member is not liable and will not be held accountable even if he did not do everything feasible or even reasonable to prevent. suppress, or punish law of war violations as long as those failures were not negligent. culpably inefficient, or willful. 407 While it can be argued that a commander who has the ability to prevent the commission of a war crime but fails to do so is the very definition of dereliction, this conclusion is neither obvious nor required by the current formulation of Article 92. Thus, the United States not only requires a higher standard of actual knowledge before a duty to act is triggered, but also expects less of its commanders in the performance of their duties than the standard of performance required under international law. 408

For these reasons alone, Article 92 fails to adequately incorporate the doctrine of command responsibility into the UCMJ. However, there are two more glaring reasons why Article 92 is an inadequate incorporation of the doctrine. First, there is no mechanism under Article 92 to allow for the imputation of liability on the commander for the underlying war crimes committed by his forces. As such, even if a commander is guilty of dereliction under Article 92 for failing to prevent, suppress, or punish war crimes, all that a commander can be criminally liable for is a violation of Article 92.

Second, the maximum punishment a commander can face for willful dereliction of duty under Article 92 is "confinement for 6 months." The maximum punishment for a negligent or culpably inefficient performance of duty is

<sup>401.</sup> See id.; S.C. Res. 808, supra note 245, at 515; S.C. Res. 995, supra note 57, at 5.

<sup>402.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 16 (2005).

<sup>403.</sup> Id. at para. 16b(3)(c).

<sup>404.</sup> See Diplomatic Conference, supra note 57, at 496-97.

<sup>405.</sup> Id.

<sup>406.</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES para. 166(3)(c).

<sup>407.</sup> Id. at para. 16c(3)(d).

<sup>408.</sup> See generally id.

<sup>409.</sup> Id.

<sup>410.</sup> Id. at para. 16e(3)(B).

"confinement for 3 months." Even if all of the elements of dereliction can be met, these hardly seem to be appropriate punishments for a commander who has failed to properly prevent, suppress, or punish serious law of war violations by his subordinates. 412

One prominent commentator, Major William Parks, has suggested that the current system under the UCMJ adequately incorporates the doctrine of command responsibility.413 Parks contends that under both the international standard for command responsibility and domestic standard under the punitive articles of the UCMJ "the duty is well established, the responsibility well-defined." A14 unfortunately, is not the case. The international standard that developed after World War II has since been codified, refined, and applied. No such developments have occurred within the domestic law under the UCMJ. Command responsibility still remains to be codified as a legal doctrine domestically. In cases where the commander did not share in the criminal intent of his subordinates, the criminal law doctrines of accomplice and accessory liability remain too narrowly drawn to impose liability on commanders for the conduct of their subordinates. The few cases that have attempted to hold a commander liable using charges of negligent homicide and involuntary manslaughter have been unsuccessful, in large part because courts have been unwilling to adopt a mens rea standard of anything less than actual knowledge, even though the U.S. has advocated for and applied a much lower mens rea standard in the international context. 415 Additionally, Article 92 remains inadequate both in its formulation and punishments for purposes of incorporating the doctrine of command responsibility into domestic law. Such failures on the domestic side have caused a serious gap between U.S. domestic law and the international standard on command responsibility.

## C. Why the Gap Must be Closed

To this point the article has defined the doctrine of command responsibility, tracked its development in international law, and demonstrated why this doctrine has not been adequately incorporated into U.S. domestic law under the UCMJ. Before

<sup>411.</sup> Id. at para. 163(3)(A).

<sup>412.</sup> In reality, the punishments that senior commanders actually receive, even if they are derelict, is even much less. Warren Richey, *Suit By Iragis and Afghans Claims Rumsfeld Ordered Torture*, CHRISTIAN SCIENCE MONITOR, Dec. 8, 2006, at 2. It is a rare case indeed where a general officer is court-martialed for dereliction of duty. In the Abu Ghraib cases, for example, General Karpinsky, the commander of the military police unit at Abu Ghraib, was given administrative sanctions for her derelictions. *See* White & Ricks, *supra* note 14.

<sup>413.</sup> See Parks, supra note 67, at 104.

<sup>414.</sup> *Id* 

<sup>415.</sup> United States v. Ferguson, 40 M.J. 823, 832-33 (N.M.C.M.R. 1953); United States v. Flaherty, 12 C.M.R. 466, 470 (A.B.R. 1953); UNIF. CODE OF MILITARY JUSTICE, *reprinted in Manual For Courts-Martial United States A2-26* (2005).

discussing the specific proposal to amend the UCMJ, it is important to explore why this gap in U.S. domestic law must be closed.

A lack of a clear standard for affixing criminal responsibility on senior commanders has serious consequences for the military. First, there is the potential for the perception that members of the armed forces are treated inequitably based on rank and position, with only lower ranking soldiers being held accountable for their criminal conduct. Most of the criticism about the military's recent handling of the abuse cases has centered on this concern. This perceived inequality can lead to further problems for the military. Support for a war or other military operations may diminish if the public continues to believe that the military justice system is unfair. Recruitment may also suffer. Parents may be unlikely to encourage or support their son or daughter's decision to join the military, particularly if they perceive their child's enlisting as placing them in extraordinarily difficult and dangerous situations and where they will bear the burden of being criminally sanctioned while their military superiors go unpunished.

Military operations are further adversely impacted with regard to good order and discipline within the military. Discipline is undermined in a military system in which lower ranking service members are held to one criminal standard, while no corresponding criminal standard is imposed on military commanders. In such a system, soldiers may be less willing to follow the orders of their superiors and may be increasingly more distrustful of those in command positions. This loss of confidence is devastating for an organization based on trust, responsibility, and accountability.

The lack of a clear legal standard also negatively impacts senior leaders themselves who have difficulty conforming their conduct, and the conduct of their subordinates, to the requirements of the doctrine of command responsibility. Although it is unlikely that many U.S. military commanders set out to violate the law of war, the unfortunate reality is that such violations do occur, and not always in an isolated manner—as Abu Ghraib clearly demonstrated. The failings at higher levels of command often stem from the commander failing to properly prioritize law of war compliance, respond appropriately to allegations of law of war violations, properly train subordinates on the requirements of the law of war, and to adequately resource forces to accomplish their assigned tasks in a manner that minimizes the risk of law of war violations.<sup>417</sup> If the standard that commanders will be held to for these failings continues to be unclear, and the consequences commanders will suffer as a result of

<sup>416.</sup> See generally Smith, supra note 11.

<sup>417.</sup> For a list of all these failings as underlying causes for detainee abuse see Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 4–6 (2004); George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 8–10 (2004); James R. Schlesinger, The Independent Panel to Review Department of Defense Detention Operations 10–13 (Aug. 2004).

these failings is unknown or non-existent, it is unlikely that commanders will place appropriate emphasis on ensuring law of war compliance.

The lack of a clear standard for command responsibility also adversely affects the United States' credibility and effectiveness on the world platform. Our continued aggressive and rigorous application of the command responsibility doctrine against the leaders of our former enemies and others, while failing to apply any standard to our own leaders, smacks of "victor's justice." This double standard makes it difficult for us to fulfill our roles as a world leader and a model for other countries to follow in complying with the law of war. This double standard also gives little incentive for leaders in other countries to comply with the law of war should they believe the application of the law is arbitrary, and just one more tool that a victor has to punish the vanquished.

Finally, the lack of a clear standard of command responsibility cuts at the very essence of a military organization. The key characteristic that distinguishes any military organization from a mob, a criminal gang, or a terrorist group, is the establishment of a command system. This command system invests the military commander with significant authority and responsibility to command and control his forces and ensure their compliance with the law of war. If the United States has no clear mechanism by which to hold commanders responsible for their leadership failings when those failings cause or contribute to law of war violations by their soldiers, then we have in essence recognized only half of the equation of what it means to be a commander. We have given our commanders the authority to execute

<sup>418.</sup> *In re* Yamashita, 327 U.S. 1, 34–36 (1946) (Murphy, J., dissenting) (the dissent of this case believe that the judgment was nothing more than a victor's justice); William Bradford, *Barbarians at the Gates: A Post-September 11<sup>th</sup> Proposal to Rationalize the Laws of War*, 73 Miss. L.J. 639, 819 n.559 (2004) (stating that the legacy of Axis War Crimes Tribunals were that of a victor's justice); O'Reilly, *supra* note 44, at 132-33 (O'Reilly makes a similar claim about the Yamashita verdict); Gred R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 112 (2000) (World War II trials are often criticized as a victor's justice that other tribunals, like the ICTR, have tried to avoid being labeled as).

<sup>419.</sup> See Geneva Convention I art. 3, August 12, 1949, reprinted in COMMENTARY I GENEVA CONVENTION: FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 37-38 (Jean de Preux et. al eds., International Committee of the Red Cross 1952); Geneva Convention II art. 3, August 12, 1949, reprinted in COMMENTARY II GENEVA CONVENTION: FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK, AND SHIPWRECKED MEMBER OF ARMED FORCES AT SEA 32 (Jean de Preux et. al eds., International Committee of the Red Cross 1960); Geneva Convention III art. 3, August 12, 1949, reprinted in COMMENTARY III GENEVA CONVENTION: RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 27 (Jean de Preux et. al eds., International Committee of the Red Cross 1960); Geneva Convention IV art. 3, August 12, 1949, reprinted in COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 25 (Jean de Preux et. al eds., International Committee of the Red Cross 1958) (stating the first criteria is always that the organization is headed by a commander and that there is an established chain of command).

their duties without affixing any of the responsibility on them when their failings contribute to violations of the law of war.

#### VI. AMENDING ARTICLE 92 OF THE UCMJ

Immediately following the My Lai Massacre and in the years that followed, some commentators noted that the UCMJ, as currently drafted, did not provide for a command responsibility theory of liability. Some of these commentators made general pleas for reform; however, none offered specific and detailed plans for such reform. These general calls for reform went unheeded, and now after Abu Ghraib, the military again faces criticism for its seeming inability or unwillingness to fix criminal responsibility on commanders for the law of war violations of their troops. 422

Other more recent pleas for reform have been made by scholarly commentators. One commentator suggested that the best and most realistic approach would be to prosecute commanders under the law of war, pursuant to Article 18 of the UCMJ. By doing so, this commentator suggested that the international standard of command responsibility would then be fully applicable. There are, however, significant drawbacks to this suggestion. First, it is premised on the belief that the international standard of command responsibility is sufficiently clear to provide military courts with a workable standard. As this article has demonstrated, that is not the case. While many of the elements of the doctrine are well settled, there remains significant dispute over such critical concepts as the mens rea standard. No clear standard has yet emerged. As such, any attempts to prosecute a commander criminally under the current international law standard is unlikely to pass constitutional muster.

Second, it would represent a significant break with current U.S. policy, which is to prosecute our forces for violations of the UCMJ rather than war crimes. <sup>425</sup> Labeling our military commanders as possible war criminals would make such an approach very unpalatable. There is an added problem with trying commanders for violations of the law of war. The punitive articles of the UCMJ and the case law that underlies those offenses would not be applicable in these trials. Military courts have to look to international law to both define the doctrine of command responsibility and define the elements of the underlying offenses. This places an added and unnecessary burden on military courts and lawyers in order to prosecute and defend these cases.

<sup>420.</sup> See Eckhardt, supra note 42, at 14; William V. O'Brien, The Law of War, Command Responsibility and Vietnam, 60 GEO. L.J. 605, 629 (1972); Command Responsibility for War Crimes, 82 YALE L.J. 1274, 1289 (1973).

<sup>421.</sup> See Eckhardt, supra note 42, at 14; O'Brien, supra note 420, at 629.

<sup>422.</sup> See supra note 14 and accompanying text.

<sup>423.</sup> See Smidt, supra note 36, at 219.

<sup>424.</sup> Id.

<sup>425.</sup> See DEPARTMENT OF THE ARMY, supra note 38, at para. 507(b).

This burden alone is likely to make this option both unrealistic and unworkable in practice.

Another commentator has recently suggested that the Rules for Courts-Martial ("RCM") should be amended to better incorporate the notion of a commander's responsibility. Under this suggested reform, commanders at all levels would be required to examine and comment on the possible liability of a commander in any case where the facts suggest that command responsibility may be an issue. The most significant deficiency with this recommendation is that even if the commanders at all levels of command were to inquire into and comment on the possible liability of a commander, the inquiries and comments would be a meaningless exercise if there is no standard by which to appropriately affix criminal liability on that commander.

These suggestions for reform, at best, dance around the edges of the problem. What is needed is a complete and comprehensive amendment to the UCMJ to fully incorporate the doctrine of command responsibility with sufficiently clear elements and standards to both pass constitutional muster and to provide the military with an adequate and appropriate mechanism to hold commander's criminally responsible for the law of war violations of their subordinates. The reforms offered below will accomplish these objectives.

# A. Proposed Article 92A

Any proposed reforms should focus on amending Article 92, because that article already focuses on dereliction of duty. A new Article 92A should be created to address the specific aspects of command responsibility.

# 1. Applicability

This proposed new article should apply only to those officials serving as commanders. RCM 103(5) defines a *de jure* commander as "a commissioned officer in command or an officer in charge[.]", This provision is limited to commissioned officers and specifically those commissioned officers holding formal positions of command or who are otherwise officers in charge. This definition is broad enough to cover most situations where the questions of command responsibility may arise. However, it is too narrow to cover all of the possible situations, and the terms need to be expanded under this proposed article.

<sup>426.</sup> Smith, *supra* note 11, at 671-72, 701-02.

<sup>427.</sup> Id. at 702-03.

<sup>428.</sup> See generally MANUAL FOR COURTS-MARTIAL UNITED STATES para 16 (2005).

<sup>429.</sup> See Rules for Courts-Martials Rule 103(5), reprinted in Manual for Courts-Martial United States II-1(2005).

<sup>430.</sup> Id.

Under international law, the definition of commander includes those officers who have both tactical and executive responsibility over their subordinates. <sup>431</sup> Command responsibility is not limited to *de jure* commanders, but can also include those in *de facto* command. <sup>432</sup>

In order to be consistent with this precedent, Article 92A, if adopted, must clearly set forth a definition of command that includes those who exercise both *de jure* and *de facto* command over their subordinates. Additionally, the scope of command should not be limited just to commissioned officers or those who hold the official title as "commander." Language similar to that used in Article 28 of the Rome Statute would be a more expansive and appropriate definition of the term "commander." For example, Article 92A should state that a commander, for purposes of the article, includes those defined by R.C.M. 103(5), and any person who is effectively acting as a military commander and who has effective command and control, or effective authority and control over forces of any size.

This more expanded definition would allow for the inclusion of all military leaders who are charged with the unique and important responsibility of ensuring their forces comply with the law of war. By stating that the forces under the commander's control can be of any size, it also accounts for situations in combat in which even a very small group of soldiers must still be under the control and authority of a chain of command responsible for their conduct.

There are several factors one can consider in order to determine if someone is "effectively acting as a military commander." These factors of *de facto* command can include: whether the person is the senior ranking military official; whether the individual has the authority to issue orders to the military forces under his charge; whether the individual has the authority to assign forces to various responsibilities; whether the individual has the authority to discipline or initiate disciplinary proceedings against the forces under his charge; whether the person has the responsibility for supplying, billeting, feeding, and otherwise caring for the health and welfare of the forces under his charge; and whether there has been any official recognition of the individual's authority by superiors within the chain of command. While these factors are not an exclusive list, they can serve as a basis for determining if the person in question was "effectively acting as a military commander."

In addition to these factors, language in the proposed article that includes "effective authority and control over forces" accounts for commanders of occupied

<sup>431.</sup> See Diplomatic Conference, supra note 248, at 496-97; S.C. Res. 808, supra note 245, at 515; S.C. Res. 995, supra note 57, at 5; THE ROME STATUTE, supra note 57, at. 28, at 16-17; Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, para. 694 (Nov. 16, 1998), available at http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf; Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, para. 3, 4 (Sept. 2, 1998), reprinted in 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION 119 (S. De. Haardt & W. Van Der Wolf eds., 2000).

<sup>432.</sup> See Beth Van Schaack, Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia, 36 U.C. DAVIS L. REV. 1213, 1223 (2003).

territories who have additional obligations under the law of war. The proposed article should include the scope of responsibility of an occupying commander that extends to the conduct of all forces under his command, as well as the conduct of all civilians and other non-combatants in his geographic area.

The creation of this proposed Article 92A will resolve one of the glaring deficiencies under the UCMJ; it will clearly set out the duty of a commander to ensure that his forces comply with the law of war. Thus, commanders will have the special legal obligations of ensuring that their subordinates comply with the law of war. With these changes, prosecutors and courts will no longer be relegated to "boot strapping" evidence of a commander's duty under the law of war from outside sources.

#### 2. Mens Rea

The next and perhaps the thorniest issue that must be resolved is the codification of a mens rea standard that should attach in order to hold a commander criminally responsible for the conduct of his forces. However, before addressing the specific mens rea element that should apply, a further point of clarification is needed. The proposed article requires precise articulation as to which law of war violations the doctrine of command responsibility applies. Without such specificity, the domestic law on command responsibility could be painted with too broad a brush and potentially impose criminal liability on commanders for any criminal actions committed by their subordinates in peace or in war. Such application would clearly be inappropriate and an unwarranted expansion of the doctrine. To ensure that such a consequence does not result, some additional limits must be put into place.

#### a. Law of War Violations

In 1996 Congress passed the War Crimes Act which was intended to impose punishment on any person, civilian or military, who was directly liable for committing a war crime. The conventions and treaties incorporated into the 1996

<sup>433. 18</sup> U.S.C. § 2441 (2006). For purposes of that statute, a war crime is defined as any conduct:

<sup>(1)</sup> 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;

<sup>(2)</sup> 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;

<sup>(3)</sup> 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

<sup>(4)</sup> 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),

War Crimes Act provide a listing of the specific conduct that constitute war crimes. 434 Incorporating these same definitions into the proposed article offers several advantages. First, it ensures that the UCMJ is codified and applied consistently with other federal laws on the definition of war crimes. Secondly, it provides sufficient notice to commanders of the specific offenses that they have a duty to prevent, suppress, and punish. Finally, and most importantly, this approach adequately distinguishes the war crimes and analogous UCMJ offenses to which the doctrine of command responsibility is intended to apply. By doing so, it prevents the commander from facing potential criminal liability for other crimes that may be committed by his forces that do not amount to law of war violations.

## b. Actual Knowledge

After setting out the specific law of war violations that trigger its application, the proposed article must also set forth, in clear and unambiguous terms, the mens rea for command responsibility. First, the proposed article should state that if the commander has actual knowledge of the war crimes being committed, about to be committed, or that were committed by forces under his command, then the mens rea element is satisfied. Additionally, this article should clarify that actual knowledge can be proven by either direct or circumstantial evidence.

To account for the problem of a commander's willful blindness, the proposed article should adopt a provision similar to Section 2.02(7) of the Model Penal Code. That section states: "When knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." That provision can be modified within the proposed amendment to set forth the mens rea standard as follows: Knowledge that a war crime is established if a military commander is aware of a high probability that his forces are about to commit, are committing or have committed such crimes. By adopting this provision, the new article will prevent a commander from claiming ignorance by deliberately avoiding information that would put him on notice of possible war crimes. Imputing knowledge of a fact, when the commander is aware of a high probability of that fact's existence, would also impose a duty on a commander to inquire further when initial reports suggest that war crimes violations may be occurring or may be about to occur.

This definition of actual knowledge also allows for proof by circumstantial evidence and precludes a commander from purposefully ignoring information. It

when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id. at § 2441(c).

<sup>434.</sup> Id.

<sup>435.</sup> See generally MODEL PENAL CODE § 2.02(7) (1985).

<sup>436.</sup> Id.

imposes a duty on a commander and his staff to both seek-out accurate information, and to ensure that the commander is made aware of all relevant information as to the commission of possible war crimes. This places the obligation on the commander to ensure that his staff is functioning properly and that the staff places the appropriate emphasis on collecting and passing on information relating to possible law of war violations. Facts, such as the widespread scope of the law of war violations or the systematic nature of the violations, can be considered in determining if the commander had actual knowledge of the violations.

The aspect of the mens rea element that has caused the greatest consternation in the international law doctrine of command responsibility is whether a standard less than actual knowledge should be used to impose criminal liability on a commander, and, if so, what that standard should be. 437 As this article has demonstrated, various formulations have been adopted, such as "must have known," 438 "should have known,"439 "knew or ought to have known about,"440 "information which should have enabled [the commander] to conclude, 'A41 and 'had or should have had such knowledge." At is not unusual for tribunals to place different meanings on the same terms. 443 To some degree all of these formulations lack precision and can foster confusion. Thus, for the proposed Article 92A to be effective, this confusion and lack of precision needs to be avoided. It cannot be avoided by turning to these same approaches. Rather than adopting language that confuses the mens rea standard of command responsibility, the proposed article should adopt an approach similar to provisions adopted within the Model Penal Code. Specifically, the article should incorporate varying degrees of mens rea. The highest degree of mens rea is actual knowledge, as set out above. Two additional degrees of mens rea-recklessness and negligence—should also be included in the proposed article. Finally, a punishment scheme that accounts for these differing degrees of mens rea should be established.

#### c. Recklessness

In addition to a commander's actual knowledge, which triggers a duty to act, if a commander is reckless as to information that his forces may commit or are

<sup>437.</sup> See Shany & Michaeli, supra note 40, at 851-53.

<sup>438.</sup> See U.N. WAR CRIMES, von Leeb, supra note 6, at 77.

<sup>439.</sup> See Smidt, supra note 36, at 187, 198, 199, 200, 208, 211, 222.

<sup>440.</sup> See U.N. WAR CRIMES, von Leeb, supra note 6, at 70, 89.

<sup>441.</sup> Diplomatic Conference, supra note 441, at 496-97.

<sup>442.</sup> See The Official Transcript, supra note 219, at 48,444-48,447.

<sup>443.</sup> For an example of this at the ICTY, see Prosecutor v. Delai *et al.*, Case No. IT-96-21-T, judgment para. 393 (Nov. 16, 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf; *and* Prosecutor v. Blaskic para. 332 (March 3, 2000), *reprinted in* 2J GLOBAL WAR CRIMES TRIBUNAL COLLECTION 90 (S. De. Haardt & W. Van Der Wolf eds., 2001) (both courts applying different meanings to "had reason to know").

committing war crimes, he should be held criminally accountable. Recklessness, as defined in the Model Penal Code, is:

[A conscious disregard of a substantial] and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

For purposes of the proposed article, the definition of recklessness could be modified as follows: A conscious disregard of a substantial and unjustifiable risk that war crimes are about to be committed, are being committed or have been committed by forces under the military commander's effective command and control. The risk must be of such a nature and degree that, considering the nature and purpose of the military commander's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable commander would observe in the actor's situation.

Recklessness is distinguished from actual knowledge because its focus is not on the commander's actual awareness, but rather on his "conscious disregard." Under this proposed definition of recklessness, the commander must be aware of the risk that his forces are committing, will commit, or have committed war crimes. If there exists a high risk that his forces are violating the law of war, a commander's disregard of that risk and his failure to act would satisfy the mens rea requirement. This mens rea standard imposes a duty on commanders to be aware of this substantial risk and to take positive steps to prevent, suppress, and punish law of war violations. A commander who consciously disregards this substantial risk has failed the legal duty to control his forces.

There are several advantages to adopting this mens rea standard. First, it rejects current U.S. law, which in the context of negligent homicide and involuntary manslaughter, requires actual knowledge on the part of the commander. The recklessness standard more closely harmonizes domestic law with the standard adopted under international law. It also imposes a broad duty on commanders and recognizes their pivotal role in the control of forces and the ensuring of law of war compliance. Without the positive control of a commander, the risk that armed forces

<sup>444.</sup> MODEL PENAL CODE § 2.02(2)(c) (1985). This definition is similar to the definition of culpable negligence which applies to involuntary manslaughter under Article 119a which states: "It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." *See* MANUAL FOR COURTS-MARTIAL UNITED STATES para. 44c(2)(a)(i) (2005).

<sup>445.</sup> MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 73-74 (2002).

<sup>446.</sup> See Unif. Code of Military Justice  $\S$  892, art. 92, reprinted in Manual for Courts Martial United States A2-26 (2005).

will engage in wanton destruction, killing, and other war crimes would be significant. Such is the nature of warfare.

This proposed definition also evaluates a commander's disregard of the risk, based on the standard of a reasonable commander. Such a standard ensures an objective evaluation of the commander's failure. Clairvoyance on the part of the commander is not required. Rather, a commander who consciously disregards this risk is evaluated in the context of the situation at hand, and he is evaluated against what would be expected of a competent commander. This standard ensures both flexibility and accountability.

Finally, by clearly specifying this recklessness standard, the proposed article avoids the confusion that now exists under international law. The proposed article clearly adopts a standard that establishes that both actual knowledge of relevant facts and a conscious disregard of a substantial risk are two separate and distinct methods of imposing criminal liability.

## d. Gross Negligence

The third mens rea standard to be adopted under the proposed article is negligence. The definition of negligence under the Model Penal Code states:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>447</sup>

For purposes of the proposed article, the definition could be modified as follows: A military commander acts negligently with respect to a war crime when he should be aware of a substantial and unjustifiable risk that forces under his effective command and control will commit, are committing, or have committed such war crimes. The risk must be of such a nature and degree that the military commander's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable commander would observe in the actor's situation.

This definition of gross negligence, like recklessness, does not require actual knowledge on the part of the commander before criminal liability can be imposed. However, it differs from the recklessness standard in that here there is a failure on the part of the commander to be aware of a substantial and unjustifiable risk. The inclusion of this mens rea standard under the proposed article offers a significant

benefit, because it recognizes the pivotal role that a commander plays in the controlling of his forces. By evaluating a commander's failure to be aware of substantial und unjustifiable risks under a reasonable commander standard, the proposed article establishes a minimum level of performance that the law expects a commander to achieve. This formulation would impose an affirmative duty on a commander to be aware of the ever present risk that his forces may engage in war crimes. Establishing gross negligence as a separate and distinct mens rea standard further eliminates the confusions that currently exist within international law. Additionally, it provides adequate notice to commanders that negligent conduct can have serious consequences if that negligence involves the failure to properly control one's forces.

Several factors can be considered under a recklessness or a negligence mens rea standard to determine the military commander's culpability with regard to the risk of law of war violations. Such factors include: the level of training and experience of the forces under his command; the severity and duration of past combat operations that involved his forces; the nature of the mission; the availability of other forces who may be at a higher state of readiness and competence; the existence of specific orders from a higher authority; and the overall morale of the forces under his command. In addition, some activities by their nature involve an unusually high risk of law of war violations. The capture and treatment of enemy prisoners and other detainees is one such example. This and other high risk activities can also be factored into the recklessness and negligence analysis. Factors such as these are relevant to show the degree of risk that exists and whether a commander either consciously disregarded, or failed to be aware of the risk.

Creating these three separate and distinct mens rea components for command responsibility is a significant improvement over the current approaches. It makes clear what mens rea should apply to a commander who fails in his duty to ensure law of war compliance. It specifically imposes and reinforces the commander's recognized legal duty under the law of war to control the forces under his command. This proposal also recognizes the different levels of culpability that attach to a commander's failure to act. In particular, a commander who has actual knowledge of war crimes violations and fails to take adequate steps is more culpable than a commander whose failure to act stems from gross negligence. As will be discussed below, the punishments under the proposed article take into account these differing levels of culpability.

#### 3. Actus Reus

The doctrine of command responsibility creates a legal duty for a commander to act to prevent, suppress, or punish war crimes. The doctrine that has developed under international law also establishes a standard that a commander must meet to

satisfy this responsibility.<sup>449</sup> This standard is best reflected in Article 28 of the Rome Statute, which imposes criminal liability if a "military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."<sup>450</sup> This same standard should be adopted under the proposed article without further modification.

This standard offers several advantages. First, it imposes an affirmative duty on commanders to take all necessary and reasonable actions within their power. Under this proposed formulation, it is absolutely clear that the commander must do more than the bare minimum to prevent, suppress or punish war crimes. Instead, he must do everything necessary and reasonable, within his power, to prevent or suppress these acts. By evaluating the commander's conduct under a necessary and reasonable standard, the law does not expect the commander to do the impossible, nor does the standard create a strict liability requirement. Instead, it is a standard that gives full consideration to the realities that existed at the time the commander had a duty to act.

Secondly, the proposed language divides the actus reus into three distinct parts: prevention, suppression, and punishment. Each part can be evaluated separately by a tribunal. Questions relating to the prevention of future offenses could include: What did the commander do to train his forces on the law of war? What orders did the commander issue to prevent law of war violations? Were any special precautions taken or special reporting procedures implemented relevant to high risk activities, such as the treatment of enemy prisoners and detainees?

Additionally, under this formulation commanders would have a legal duty to suppress ongoing violations of the law of war. Of course, what a commander is able to do while all his forces are engaged in combat may be quite different than what a commander can do at other times. The necessary and reasonable test takes this into consideration. Relevant questions that can be used to evaluate whether the commander met his responsibility to suppress ongoing war crimes include: Did the commander immediately remove offending forces from the area? Did the commander personally involve himself and his staff in stopping the violations? Did the commander request additional resources and realign the allocation of resources to prevent violations from continuing? Did the commander expeditiously and thoroughly investigate information which raised the possibility that law of war violations may be occurring?

Furthermore, the commander's legal duty to punish past war crimes is clear and broad enough to include violations that may have occurred before a particular commander was in command of the forces. The proposed article allows for consideration of the following questions: What steps did the commander take to investigate and discover allegations of law of war violations? Were investigations of past violations thorough and expeditious? Did the commander either take appropriate

<sup>449.</sup> Id. at 496.

<sup>450.</sup> THE ROME STATUTE, supra note 57, at art. 28(a)(ii).

action within his level of authority, or forward the allegations to a higher military authority for disposition?<sup>451</sup>

#### 4. Causation

Causation is not an element that has been formally incorporated into the international treaties and statutes codifying the doctrine of command responsibility. Only a few cases, such as the Celebici case, have specifically addressed causation as a separate issue. As Nevertheless, causation plays an important part of the doctrine as it relates to a commander's responsibility to prevent future crimes. Accordingly, the proposed article should expressly state that before liability can be imposed for a failure to prevent future war crimes, there must be a proximate cause between the commander's failure to adequately prevent law of war violations and the war crimes committed by forces under his command. As the Celebici tribunal noted, there is "a recognition of a necessary causal nexus [which] may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them."

This causal nexus makes sense when applied to the prevention of future war crimes. If the commander did everything feasible to prevent the war crimes from occurring, given the extent of the commander's power and authority, then those efforts for the most part will be successful. In the rare instances where the crimes were committed in spite of the commander's best efforts, the commander still fulfilled his duty under the law.

On the other hand, it does not make logical sense to require a causal link between a commander's failure to punish past war crimes and the commission of those crimes. In some instances it is logically possible to establish a causal link between a commander's failure to suppress ongoing war crimes and the continued commission

<sup>451.</sup> In evaluating a commander's response to past law of war violations, it is important to give appropriate consideration to the fundamental military legal principle that each level of commander has the independent authority and responsibility to determine the proper disposition of an offense. RULES FOR COURTS-MARTIALS RULE 306(a), reprinted in MANUAL FOR COURTS-MARTIAL UNITED STATES II-25 (2005). Factors used to determine the appropriate disposition include: the character and military service of the accused, the nature and circumstances of the offense and the extent of the harm caused by the offense, the appropriateness of the punishment of the particular accused, possible improper motives of the accuser if any, reluctance of the victim to testify, cooperation of the accused in the apprehension and conviction of others; availability and admissibility of evidence; availability and likelihood of prosecution; and existence of jurisdiction over the accused. See id. Rule 306(b). Id. While there is no rule mandating what action a commander should or must take to dispose of a violation, commanders who disregard or fail to give appropriate weight to these established factors could be subject to criminal liability under the proposed article.

<sup>452.</sup> See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment para. 399 (Nov. 16, 1998), available at http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf.

<sup>453.</sup> Id.

of those crimes. For example, it may be demonstrated that had a commander acted, the extent of the war crimes would have been reduced. However, the distinction between past, present, and future crimes would in many cases be difficult to draw. Because of this difficulty and because the focus of the command responsibility doctrine is the commander's failure to meet his legal duties, causation with regard to suppressing current violations and punishing past violations should not be required as an element of proof.

# 5. Punishments for Violations of the Proposed Article

The most critical feature of the command responsibility doctrine is that a commander who fails in his legal duty is criminally liable for the war crimes committed by his forces. The proposed article should expressly incorporate this feature of the doctrine, while at the same time accounting for the fact that differing degrees of culpability on the part of the commander warrant different punishments.

A commander who knows that forces under his command are about to commit or are committing law of war violations, and fails either to act or to take sufficient measures to prevent or suppress those violations, acts much like an accomplice to the crime. While the commander may not share the criminal intent of his subordinates, his abandonment of one of his most critical responsibilities justifies the severest punishments. On the other hand, a commander who's failure to act is a result of gross negligence has violated a legal duty, but his culpability does not necessarily approach that of an accomplice.

Because the proposed article creates three degrees of mens rea, punishments should also reflect the degrees of culpability. The most serious punishments should be reserved for a commander who fails to act or fails to do everything necessary and reasonable, even though he knows that his forces are about to commit or are committing war crimes. In this situation, the proposed article should provide for a maximum punishment that is the same as the maximum punishment for the crimes committed by his subordinates.<sup>454</sup>

The proposed article should create lesser punishments for those commanders who fail to act because they consciously disregarded a substantial and unjustifiable risk. In such cases, the maximum punishment should be the same as for the underlying offense, but in no case should the punishment include death. This imposition of liability strikes an appropriate balance that both punishes commanders severely for their failure to control their forces, while at the same time recognizing that death would not be an appropriate punishment for a reckless failure to act.

<sup>454.</sup> For crimes which authorize the death penalty, additional aggravating factors should also be added to R.C.M. 1004 to guide the members in determining under what circumstances the death penalty should be authorized for a commander whose forces have committed the underlying offenses.

The proposed article should also establish a separate maximum punishment when the commander's failure to act is due to gross negligence. Here, the maximum punishment should be the same as the maximum punishment for the underlying offense, but in no case should the maximum punishment exceed confinement for twenty years. This limitation on punishment preserves one of the most important aspects of the command responsibility doctrine, while at the same time recognizing that there are limits to the punishments that should be imposed for a grossly negligent failure to act.

Finally, a separate and much lesser maximum punishment structure should be authorized for a commander who fails to investigate and initiate punishment for past violations. Imputing liability on a commander for the past crimes committed by his subordinates because the commander's failed to adequately investigate and punish those past actions would be unjustified and unfair. Holding commanders criminally liable for the conduct of their subordinates for a mere failure to investigate and punish those past crimes is also without precedent. Despite this, the doctrine of command responsibility under international law clearly recognizes a commander's responsibility to investigate and punish subordinates for past war crimes violations. Also, there is a nexus between a failure to punish past actions and the potential for future violations. However, no post-World War II military tribunal and none of the more recent tribunals have punished a commander solely for his failure to investigate and punish subordinates for past violations. Accordingly, a much lesser punishment scheme should be imposed on commanders whose only dereliction was a failure to adequately investigate and punish past offenses.

# **Proposed Article 92A**

In order to incorporate the recommended changes set out above, a new Article 92A entitled "Criminal Responsibility for Commanders" is created as follows:

- a. Any military commander as defined by R.C.M. 103(5), and any person who is effectively acting as a military commander and who has effective command and control or effective authority and control over military forces of any size.
  - b. Who
    - 1) Knowingly;
    - 2) Recklessly; or
    - 3) Negligently
- c. fails to take all necessary and reasonable measures within his power to prevent or suppress the commission of war crimes or to submit the matter to the competent authorities for investigation and prosecution; and in the case of a failure to prevent future war crimes, as defined in part F, the failure is a proximate cause of the commission of those war crimes,
  - d. shall be guilty of a dereliction of duty.
  - e. The following punishments are authorized under this section:

- 1) For knowing failures to take all necessary and reasonable measures to prevent or suppress war crimes, as defined in part F, the same maximum punishment that is authorized for the offenses committed by those forces may be imposed;
- 2) For reckless failures to take all necessary and reasonable measures to prevent or suppress war crimes, as defined in part F, the same maximum punishment that is authorized for the offenses committed by those forces, may be imposed, except that in no case is the death penalty authorized,
- 3) For negligent failures to take all necessary and reasonable measures to prevent or suppress war crimes, as defined in part F, the same maximum punishment that is authorized for the offenses committed by those forces, except that in no case will the period of confinement exceed 20 years for each separate offense.
- 4) For failures to properly investigate and punish war crimes as defined in part F, the following punishments are authorized:
  - a) for knowing failures, no confinement in excess of 2 years
  - b) for reckless failures, no confinement in excess of 1 year
  - c) for grossly negligent failures, no confinement in excess of 6 months.

#### f Definitions:

- 1) Negligence: A military commander acts negligently with respect to a war crime when he should be aware of a substantial and unjustifiable risk that forces under his effective command and control will commit, are committing, or have committed such war crimes. The risk must be of such a nature and degree that the military commander's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable commander would observe in the actor's situation.
- 2) **Knowledge**: Actual awareness that war crimes are about to be committed, are being committed, or have been committed. Knowledge can be proven by direct or circumstantial evidence. Knowledge of a war crime is established if a military commander is aware of a high probability that his forces are about to commit, are committing or have committed such crimes.
- 3) **Recklessness:** A conscious disregard of a substantial and unjustifiable risk that war crimes are about to be committed, are being committed, or have been committed by forces under the military commander's effective command and control. The risk must be of such a nature and degree that, considering the nature and purpose of the military commander's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable commander would observe in the actor's situation.
- 4) War Crime: A war crime is any offense as defined by 18 U.S.C. § 2441(c) (War Crimes Act).

#### VI. CONCLUSION

These provisions and definitions fully incorporate the doctrine of command responsibility into domestic law. The proposed Article 92A imposes a legal duty on commanders at all levels to control their forces. This article clearly establishes the mens rea of command responsibility and avoids the confusion and pitfalls that have plagued the international law of command responsibility. The article establishes an affirmative duty for the commander to take all necessary and reasonable actions. A commander's conduct is evaluated by an objective standard that is both fair and takes into account the situation as it exists at the time. Finally, the proposed punishments take account of the varying degrees of a commander's culpability.

The recent criticism of the military's handling of the abuses that occurred at Abu Ghraib is just the latest example of why there is a critical need to incorporate the doctrine of command responsibility into the UCMJ. That the United States was one of the earliest and strongest proponents of this doctrine in the international law context is all the more reason why we should apply the same standard to our own commanders that we apply to others.

Abu Ghraib will not be the last time that questions arise about the criminal liability of commanders for their failure to control their forces. Since Abu Ghraib, there have been additional revelations, investigations, and prosecutions of service members alleged to have mistreated detainees in their care. In just the past few months the military has also announced a number of other investigations and prosecutions of service members alleged to have killed civilians and other non-combatants in Iraq. Each of these incidents raise potential issues of command responsibility. It is long past time for the military to adopt a domestic standard under the UCMJ that will place the proper focus on commanders who contribute to these war crimes by their failure to control the forces under their command. Amending the UCMJ and adding the proposed Article 92A, which both incorporates the international law of command responsibility and significantly improves on that doctrine, is a sure way to ensure compliance with the law of war.

<sup>455.</sup> See generally, Relieved officers were not targets of Haditha investigation, USA TODAY, May 31, 2006, http://www.usatoday.com/news/nation/2006-05-31-marine-investigation x.htm.

<sup>456.</sup> For examples of more recent incidents that may have issues involving command responsibility, see id.