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CLOSING A LOOPHOLE IN ACCOUNTABILITY FOR WAR CRIMES: SUCCESSOR COMMANDERS' DUTY TO PUNISH KNOWN PAST OFFENSES

In the last decade, international humanitarian law has made significant progress in its efforts to protect human rights by prosecuting individuals responsible for violations of those rights. The United Nations ad hoc criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), as well as the Special Court in Sierra Leone, are seeking to hold accountable individuals who instigated or tolerated atrocities in those countries' conflicts, from high-level government officials to influential authority figures at lower levels in military and civilian organizations. This Note addresses a problem that has recently arisen in that process. The wording of Article 28 in the Rome Statute of the International Criminal Court and a recent decision by the Appeals Chamber for the ICTY/R have created a loophole in accountability for military commanders in a very specific but not very unusual situation—when a successor commander fails to punish known crimes committed by his subordinates before he took control.¹ This loophole should be closed in order to help the international community bring the age of impunity to a close.

The duty of a military commander to punish his subordinates who violate the laws of war is well established. The particular issue of whether this duty extends to a successor commander was explicitly raised for the first time before the Appeals Chamber of the International Criminal Tribunals in an interlocutory appeal on behalf of Amir Kubura, a commander in the army of Bosnia and Herzegovina. Kubura was charged with command responsibility for killings, cruel treatment of prisoners, and wanton destruction and plunder of property committed by members of his corps between January 1993 and January 1994. He acted as substitute commander of the 3rd Corps, 7th Muslim Mountain Brigade beginning on April 1, 1993, and was

¹ For the sake of economy, I will refer to this fact pattern as "successor commanders' duty to punish."

appointed commander on July 21; several of the charges originally brought against him "concern events that started and ended before Kubura became the commander of the troops allegedly involved in those events."² The indictment asserts that "Kubura knew or had reason to know about these crimes," and that "[a]fter he assumed command, he was under the duty to punish the perpetrators."³ This duty was particularly urgent since "the troops commanded by [Kubura] from April 1993 had a history of unpunished criminality."⁴ The trial chamber held that in principle, a commander could be held responsible for failure to punish violations committed by his subordinates under a predecessor commander.⁵ The Appeals Chamber, in a 3-2 decision, reversed that holding, declaring that "an accused cannot be charged under Article 7(3) of the [ICTY] Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate."⁶

This Note will argue that the Appeals Chamber's decision in this case should not be followed in the future and that steps should be taken to clarify interpretation of the Rome Statute so as to prevent such an outcome before the International Criminal Court. It will review the history of command responsibility doctrine (the customary international law at issue here) to show that the doctrine's underlying premises support enforcement of a successor commander's duty to punish. It will then argue that historical, statutory, and publicist support for such enforcement is even stronger than the opinions of the Appeals Chamber's dissenting judges indicate. Finally, it will propose possible steps to be taken to close the accountability loophole.

The closing of this gap in international humanitarian law is crucial because this gap will otherwise allow certain atrocities to go unpunished, and thus dilute the effectiveness of worldwide efforts to increase accountability for human rights violations. The long-range goal of accountability, of course, is to reduce the likelihood of future violations by putting potential offenders on notice that offenses will

² Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Prosecutor v. Hadzihasanovic), IT 01-47-AR72 (ICTY), ¶ 39 (July 16, 2003), <http://www.un.org/icty/hadzihas/appeal/decision-e/030716.htm> [hereinafter *Interlocutory Appeal*].

³ *Interlocutory Appeal*, *supra* note 2, ¶ 38 (quoting Amended Indictment (Prosecutor v. Hadzihasanovic), IT-01-47-PT (ICTY), ¶ 58 (Jan. 11, 2002), <http://www.un.org/icty/indictment/english/had-ai020111e.htm>).

⁴ *Interlocutory Appeal*, *supra* note 2, ¶ 43 (quoting Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment (Prosecutor v. Hadzihasanovic), IT 01-47 (ICTY), ¶ 21 (May 24, 2002)).

⁵ See *Interlocutory Appeal*, *supra* note 2, ¶ 5 (citing Decision Pursuant to Rule 72(E) as to Validity of Appeal, (Prosecutor v. Hanzhasanovic), IT-01-47 (ICTY), ¶ 202 (Feb. 21, 2003)).

⁶ *Interlocutory Appeal*, *supra* note 2, ¶ 51.

be punished. This deterrent value benefits all people in all countries because a viable system of international humanitarian law will help prevent future threats to international peace and security. Thus, a weak element in such a body of law should be addressed and strengthened as soon and as much as possible.

I. HISTORICAL EVOLUTION OF COMMAND RESPONSIBILITY DOCTRINE

Command responsibility doctrine is the well-settled principle that a military commander may be held criminally responsible for violations of the laws of war committed by his subordinates if he either orders such violations or fails to prevent, halt, or punish their perpetration. If a commander actually orders violations, his participation in the violation is direct and relatively easy to establish; therefore, "[t]he doctrine of command responsibility is normally viewed in the literature as . . . primarily concerned with responsibility for failure to act" to prevent, halt, or punish violations.⁷ This doctrine puts responsibility on military commanders to maintain "the most difficult kind of 'law and order,' law and order in the fury and devastation of war."⁸

Command responsibility doctrine has developed over centuries in military practice and theory, and its application has also been documented over thousands of years, so its broad outlines are well entrenched in customary international law. However, only in the past century have attempts been made to codify the elements of command responsibility, first in treaties and later in statutes establishing various tribunals. The codifications generally agree on four elements required for proof of command criminal responsibility:

- 1) a violation of the laws of war must have occurred;
- 2) a superior/subordinate relationship must exist between the commander and the perpetrator(s);
- 3) the superior must have knowledge of the violation; and

⁷ W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 110 (1995-1996). Fenrick is Senior Legal Advisor in the ICTY Office of the Prosecutor. In this paper, I will follow Fenrick's practice of using "command responsibility" to refer to the failure-to-act offense. Where a distinction between this and the offense of ordering violations is needed, I will refer to ordering violations as "direct" and failure to prevent, halt, or punish violations as "indirect" command responsibility.

⁸ William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605, 606 (1971-1972).

- 4) the superior must have failed to prevent or halt the violation, or to punish the perpetrator(s).⁹

In contemporary terms, "the scope of [the] command responsibility [doctrine, which determines the degree to which a leader can insulate himself from criminal culpability when his subordinates commit criminal acts,] remains one of the most important issues in prosecuting human rights atrocities."¹⁰ The broad scope of this doctrine, including its application to successor commanders, is supported by historical records of its enforcement.

A. *Earliest Records of Command Responsibility Including Duty to Punish*

"The first duty of a military commander . . . is to exercise command," and this duty, including "penal action against violators" is "the very essence of . . . enforcement of treaty rules in the field."¹¹ This principle is well grounded in military history. The pervasiveness of the duty to punish (whose omission was called "a new crime" by defendants as late as the post-World War II *Yamashita* case)¹² supports the assumption that its temporal application should be interpreted broadly.

1. *Responsibility for Military Objectives: Sun Tzu*

As far back as military organizations have operated, or at least as far back as their operations have been analyzed in writing, a commander's influence over his troops has been recognized. In the oldest known military treatise, dating to 500 B.C.E., Sun Tzu wrote, "[w]hen troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general."¹³ Sun Tzu's attention was focused on the importance of effective command to military success—the first and most obvious prong of direct command responsibility. But in a demonstration of his theory, when officers failed to

⁹ Daryl A. Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, in 6 INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 239, 250 (Gideon Boas & William A. Schabas eds., 2003).

¹⁰ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 128 (1997).

¹¹ CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1017-18 (Yves Sandoz et al. eds., 1987).

¹² RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 97 (1982).

¹³ Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 3 (1973) (quoting SUN TZU, THE ART OF WAR 125 (Samuel B. Griffith trans., 1963)).

discipline their troops, Sun Tzu declared the officers at fault and had them beheaded—after which the troops performed faultlessly under newly appointed officers.¹⁴ Though Sun Tzu's focus was on the troops' failure to achieve their military objective rather than on subordinates' violating laws of war, this example does set a precedent of punishing officers who fail to punish their subordinates.

2. *Command Criminal Responsibility: Fifteenth-Century Europe*

Superiors' criminal responsibility for crimes committed by subordinates has also been recognized from very early times. In 1439, Charles VII of France issued an Ordinance at Orleans that set out a strong policy of command responsibility including a clear duty to punish:

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 himself and shall be punished in the same way as the offender would have been.¹⁵

Evidence that this approach to command responsibility was not only announced but also followed in the fifteenth century comes from the case of Peter von Hagenbach, who in 1474 was tried by an international tribunal of twenty-eight judges from allied states of the Holy Roman Empire on charges of failing to prevent his subordinates from committing murder, rape, perjury, and other crimes against "the laws of God and man."¹⁶ The tribunal held that Hagenbach had a duty to prevent such crimes; convicted of failing to do so, he was deprived of his knighthood and executed.¹⁷

¹⁴ *Id.* at 4.

¹⁵ L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 321 (1995) (citation omitted).

¹⁶ Waldemar A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43, 65 n.89 (1972).

¹⁷ *Id.* at 65. See also Captain Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112 (1972).

3. Clarification of Rationale: 18th and 19th Century Documents

Another early codification of this principle of indirect command responsibility (duty to punish unordered violations) appears in the 1775 Massachusetts Articles of War, where the eleventh article 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 any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of the Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.¹⁸

Thus, by the end of the eighteenth century, a firm foundation was established for the responsibility of a military commander not only to refrain from issuing illegal orders, but to "see Justice done" with regard to any illegal acts by his subordinates of which he became aware; the penalty for refusal or omission to perform this duty was punishment "as if he himself had committed the crimes."¹⁹ Acceptance of this responsibility is part of the commander's duty, and his failure to prevent, halt, or punish violations is treated both as a breach of duty and as acquiescence in the crimes. William Winthrop, in his authoritative nineteenth-century commentary on *Military Law and Precedents*, further clarified the rationale for enforcing this duty when he emphasized that, both under the American Articles of War and the general obligations of the laws of war, "[t]he observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy's country."²⁰ Winthrop wrote in the aftermath of the American Civil War.²¹ These early emphases on the protection

¹⁸ Parks, *supra* note 13, at 5 (citing Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775) (emphasis omitted).

¹⁹ *Id.*

²⁰ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 779 (2d ed. 1920).

²¹ The Civil War's Lieber Code, which dealt extensively with the conduct of military forces in the field, did not specifically treat the subject of failure to prevent or punish illegal conduct by subordinates. Article 71 of the Lieber Code did, however, provide the death penalty

of the civilian population lay the foundation for broad temporal application of the duty to punish, since consistent punishment is clearly such an important part of deterring violations by subordinates—and impunity, as is often observed, encourages further violations.

a. Twentieth-Century Documents Codifying Command Responsibility

The most important early codifications of international humanitarian law were initiated by the International Committee of the Red Cross (ICRC) and include the First Geneva Convention of 1864, the Hague Conventions of 1907, the Geneva Conventions of 1949, and the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.²² While many other treaties and statutes have been drafted, the ICRC Conventions and Protocols remain a fundamental source of authority in this area.

i. Pre-WWII Codifications, First Applied Post-WWII

When the Nuremberg International Military Tribunal was convened at the close of World War II, it drew its basic principles on the law of war from the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land,²³ which the Tribunal declared had “undoubtedly represented an advance over existing international law at the time of their adoption . . . but by 1939 . . . were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.”²⁴ Treatment of command responsibility doctrine in the 1907 Hague Convention was limited to

for anyone who intentionally mistreated a wounded enemy, or for “[w]hoever . . . orders or encourages soldiers to do so.” Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Article 71 (1863) (the Lieber Code) (*reprinted in THE LAWS OF ARMED CONFLICTS* 13 (Dietrich Schindler & Jiri Toman eds., 1988)).

²² See PILLOUD, *supra* note 11. The editors’ note points out that:

[T]he expression **international humanitarian law applicable in armed conflict** means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression ‘international humanitarian law applicable in armed conflict’ is often abbreviated to **international humanitarian law** or **humanitarian law**.

Id. at xxvii.

²³ THE LAWS OF ARMED CONFLICTS, *supra* note 21, at 63-93.

²⁴ *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences: October 1, 1946*, 41 AM. J. INT’L L. 172, 248-49 (1947).

its provision in Article 3 that "if there was a violation of the articles or regulations that the belligerent State so violating them would be responsible for the acts committed by its military and would be liable to pay compensation for the same."²⁵ While this provision holds a violating State responsible, it does not address individual criminal responsibility for the violations. That concept was written into international humanitarian law in the wake of World War I, when the Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The report of this Commission concluded that "[a]ll persons . . . however high their position may have been . . . who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."²⁶ However, while the victorious Allies drew up a list of hundreds of accused violators (including the Kaiser) with plans to try them in an international military tribunal, political considerations resulted in the decimation of the list and its processing by German courts rather than the convening of an international tribunal.²⁷ Frustrated by this outcome, the Allied Powers sought in the Nuremberg International Military Tribunal, as well as the other post-World War II tribunals, to combine the 1907 Hague Convention principles with the 1919 Commission's attention to individual criminal responsibility for a broad exercise of international humanitarian law.²⁸

ii. Expansion of Command Responsibility Doctrine in Post-WWII Trials

The issue of indirect command criminal responsibility (criminal liability for failure to prevent, halt, or redress violations) arose specifically in several post-World War II cases, and the standards for conviction on these charges have been extensively argued. The following discussion will show that support for successor commanders' liability is inherent in these early cases.

²⁵ Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century—A Century of Evolution*, 10 MURDOCH U. ELEC. J. OF L., ¶ 13 (Mar. 2003), at <http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>.

²⁶ *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*, 14 AM. J. INT'L L. 95, 117 (1920) (emphasis removed).

²⁷ See LAEL, *supra* note 12, at 42 (detailing the change in plans).

²⁸ The first trials were held by an American Military Commission convened in Manila by General MacArthur. Later, International Military Tribunals were held in Nuremberg and Tokyo, and further tribunals were established by the individual occupying powers—among them, the American tribunals at Nuremberg under Control Council Law No. 10 which will be discussed *infra* in text accompanying notes 138-151.

a) *Yamashita: The First Important WW II Command Responsibility Case*

The first and probably the most notorious World War II command responsibility prosecution was that of General Tomoyuki Yamashita, who was in charge of Japanese troops in the Philippines while American forces were re-establishing control there. Yamashita was charged with failure to control his troops and thus held criminally responsible for the abuse, rape, and murder of thousands of Filipino civilians and American prisoners of war during the last stage of the Japanese occupation. He was tried, convicted, and sentenced to death by an American military commission convened by General Douglas MacArthur. Most of the subsequent discussion of the Yamashita case has dealt with the knowledge and control standards applied there,²⁹ and with the question of whether the tribunal held Yamashita to a "strict liability" standard, issues that are beyond the scope of this Note. But an important element of the defense argument in *Yamashita* was the principle of *nullum crimen sine lege*.³⁰ In an unsuccessful clemency appeal, the defense asserted that:

This is the first time in modern history that a commanding officer has been held criminally liable for acts committed by his troops. . . . The accused could not have known, nor could a sage have predicted, that at some time in the future a Military Commission would decree [these] acts . . . to be a crime³¹

Again in its unsuccessful procedural appeal to the United States Supreme Court, Yamashita's defense counsel asserted that the Army had failed to charge Yamashita with a "traditional violation of the law of war," and thus that the Military Commission trial was inherently unconstitutional.³² The prosecution successfully rebutted these arguments by reference to "three crucial international agreements: Articles 1 and 43 of the annex to the Fourth Hague Convention, Article 19 of the Tenth Hague Convention, and Article 26 of the Geneva Red Cross

²⁹ These are the second and third prongs of the command responsibility definition. See *supra* text accompanying note 9.

³⁰ Also called the principle of legality, an international law analog to the U. S. Constitution's prohibition of ex post facto laws.

³¹ LAEL, *supra* note 12, at 97 (quoting *Yamashita* defense clemency petition).

³² *Id.* at 101 (quoting Colonel Clarke who characterized command responsibility as a "novel concept").

Convention of 1929. All imposed grave responsibilities on military commanders, responsibilities that Yamashita had ignored."³³

Although Yamashita's conviction did not hinge on temporal application of the command responsibility doctrine, the defeat of his defense plea of *nullum crimen sine lege* by reference to earlier codifications of customary international law set a precedent that is informative in the present discussion. The fact that these codifications existed, and that they were viewed as articulations of customary international law and enforceable as such, formed the basis for Yamashita's command responsibility. The defense argument that the established laws had not previously been applied in exactly the way they were in Yamashita's case did not override the Commission's decision that the combination of customary international law with the facts of Yamashita's case warranted his conviction. Similarly, the absence of a precedential case with an exact articulation of command criminal liability for a successor commander's failure to punish should not prevent the consideration of relevant facts in cases before present and future international criminal tribunals.

b) Further Development of Command Responsibility Doctrine in Other Post- WWII Tribunals

The trials of war criminals in the aftermath of World War II were conducted by tribunals established under national military regulations in the Far East and in Europe, as well as by International Military Tribunals at Nuremberg and Tokyo established for the special trial of "the major instigators of the war."³⁴ In most of the cases before these tribunals, indirect command responsibility was not a main issue, since the accused were charged either with having planned and directed the atrocities or with having issued or transmitted illegal orders—that is, with direct command responsibility rather than with indirect command responsibility ("indirect" indicating failure to act in prevention or punishment of violations). The most extensive discussion of indirect command responsibility occurred in two cases before American military tribunals under Control Council Law No. 10—trials of German field commanders in cases known as the *High Command Case*

³³ *Id.* at 102. The Fourth Hague Convention provisions cited require belligerent forces "[t]o be commanded by a person responsible for his subordinates" and an occupying commander to "take all measures in his power to restore, and ensure, as far as possible, public order and safety." *Id.* at 143-44. The Tenth Hague Convention article 19 and the Red Cross Convention article 26 require commanders-in-chief to "provide for the details of execution of the foregoing articles, as well as for unforeseen cases . . . conformabl[e] to the general principles" of the conventions as a whole. *Id.*

³⁴ *Id.* at 72.

and the *Hostages Case*.³⁵ The courts in those cases established a fairly heavy burden on the prosecutors to prove command criminal responsibility: in cases where the commander's "failure to properly supervise his subordinates constitutes criminal negligence . . . it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."³⁶ But under this standard they did convict several commanders on command criminal responsibility charges. In this context, it has been significantly argued that in the *High Command Case*, "Field Marshal von Kuechler was held responsible for the illegal execution of Red Army soldiers which occurred before (and after) he took up command, on the basis that word of all of these executions was reported to his headquarters after he assumed command, yet he took no punitive action."³⁷ This reading of the von Kuechler case, discussed below, provides the most compelling precedent for the proposition that "[a] superior's duty to punish subordinates . . . extends to violations that were committed before the superior assumed authority."³⁸

b. Increase of Command Responsibility Scholarship After My Lai Massacre

After the conclusion of the post-World War II tribunals, public concern with the enforcement of command responsibility waned. However, the doctrine once again became a focus of legal as well as military interest after the 1969 revelation that U. S. Army personnel had perpetrated a massacre of Vietnamese civilians at the village of My Lai on March 16, 1968.³⁹ Two famous trials resulted from this incident. Lieutenant William L. Calley, Jr., was charged both with ordering the violations and with participating in them; Calley's conviction thus involved direct commission of crimes and direct command responsibility. Calley's immediate superior, Captain Ernest Medina, was charged with indirect command responsibility and ac-

³⁵ "The High Command Trial," *United States v. Wilhelm von Leeb et al.*, tried thirteen high ranking German officers for (1) Crimes against Peace; (2) War Crimes; (3) Crimes against Humanity; and (4) Conspiracy.... "The Hostages Case," *U.S. v. Wilhelm List et al.*, tried twelve high-ranking officers as principals and accessories to the murder and deportation of civilians, carried out under their orders. These cases are reported in X and XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) [hereinafter NUREMBERG TRIALS]. See also Parks, *supra* note 13, at 38-64 (discussing these cases extensively).

³⁶ XI NUREMBERG TRIALS, *supra* note 35, at 543-44.

³⁷ Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 767 (2000-2001).

³⁸ *Id.*

³⁹ See, e.g., O'Brien, *supra* note 8; Parks, *supra* note 13; Paust, *supra* note 17.

quitted in a military trial that generated much discussion of the knowledge standard to which commanders should be held.⁴⁰ Although the *Medina* result prompted concern over whether the United States Uniform Code of Military Justice was in keeping with international standards⁴¹ no significant change in the customary international law of command responsibility emerged from these trials.⁴²

However, during the same time period, the International Committee of the Red Cross (ICRC) was at work on the Additional Protocols to the Geneva Conventions of 12 August 1949, with special interest in improving "the protection of the civilian population against the dangers of hostilities."⁴³ From this project, Articles 86 and 87 of Protocol I provided clarification of customary international law on "Failure to act" and on "Duty of commanders" respectively. These Articles are an important source of authority as well as of the language in the current ad hoc International Criminal Tribunal Statutes, and their goals as well as their language and history support the broad temporal application of command responsibility.⁴⁴

i. World Events in the 1990's Prompting Action in this Field

In May of 1993 the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY).⁴⁵ This action was taken in response to "a high level of public outrage" over atrocities being reported in the former Yugoslavia, along with "doubt that the available national judicial systems (which would usually be responsible for enforcing international humanitarian law) [could] be either impartial or effective in punishing those responsible for violations."⁴⁶ The following year saw the establishment of the International Criminal Tribunal for Rwanda (ICTR)⁴⁷ after se-

⁴⁰ See, e.g., LAEL, *supra* note 12; O'Brien, *supra* note 8; Parks, *supra* note 13; Paust, *supra* note 17.

⁴¹ See, e.g., Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1 (1982); O'Brien, *supra* note 8.

⁴² Fenrick, *supra* note 7, at 118.

⁴³ PILLOUD, *supra* note 11, at xxxiv.

⁴⁴ Articles 86 and 87 of Protocol I are discussed in detail *infra*, in text accompanying notes 80-113.

⁴⁵ Officially, this is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/808 (1993).

⁴⁶ James C. O'Brien, *Current Developments: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 639 (1993).

⁴⁷ Officially, this is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other

rious violations occurred there and African representatives requested action by the Security Council.

The Statutes of these tribunals, prepared by organs of the United Nations, reflect the current state of customary international law. In addition to the language of the statutes themselves, clarification of the intent of the statutes is available from the Secretary General's Reports on the statutes⁴⁸ and the explanations of votes by the members of the Security Council, as well as from numerous commentaries and several years of case law that have emerged from the tribunals. The combinations of these Statutes and their legislative histories, along with the history and rationale of command responsibility doctrine and comments by publicists specializing in both military and humanitarian law, offer support for a broad temporal application of command responsibility doctrine—including the enforcement of successor commanders' duty to punish.

In the following sections of this note I will first examine the doctrine's basis in military law. I will then consider the criminal-law objections that chiefly underlie the Appeals Chamber's *Hadzihasanovic* decision, arguing that they are overcome by the developmental history of the doctrine as well as by the legislative history of the ICTY Statute and other relevant codifications. Finally, I will refer to commentaries from humanitarian law specialists noting the importance of successor commanders' duty to punish, and propose steps that might be taken to close the accountability gap which is left by the recent decision against its enforcement.

II. THE ISSUE OF SUCCESSOR COMMANDERS' DUTY TO PUNISH: MILITARY, CRIMINAL, AND HUMANITARIAN LAW PERSPECTIVES

Background information crucial to the issue of successor commanders' duty to punish lies in the fields of military law and general criminal law, as well as in the developing body of international humanitarian law.

such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc S/RES/955 (1994).

⁴⁸ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, U.N. Doc. S/25704 (1993) (on file with the Case Western Reserve University Law Review); Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, U.N. SCOR, U.N. Doc. S/1995/134 (1995).

A. *Military Tradition Providing Foundations for Successor Commander Duty to Punish*

In a discussion of Vietnam-era command responsibility issues, Professor William V. O'Brien noted that "the international law of war is . . . a challenging and complex body of law requiring constant re-evaluation"⁴⁹ and that "the law of combat is eminently the law of command decisions and command responsibility" in which "judgments as to responsibility for belligerent behavior deemed unreasonable . . . [u]sually . . . are made within the military command hierarchy."⁵⁰ It is noteworthy that up to the end of the nineteenth century, the doctrine of command responsibility was defined by students and practitioners of the profession of arms, rather than by those in the professions of law or diplomacy. As noted above, that situation began to change in the late nineteenth and early twentieth centuries. Colonel William G. Eckhardt has suggested that some problems in enforcement of the doctrine can be attributed to this change:

Prior to World War II, legal standards for commanders were practical articulation of the accepted practice of military professionals. This customary international law expressed soldier's standards which were born on the battlefield and not standards imposed upon them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and enforced. Following the war crimes trials at the conclusion of World War II, political implications intruded into what had previously been a largely apolitical area.⁵¹

Eckhardt, who when writing this article was Chief of the Defense Appellate Division, U.S. Army Legal Services Agency, asserts that because "[t]he very words 'war crimes' became politically repulsive," countries "refused to label misconduct on the battlefield war crimes if it could be handled domestically under some common law crime."⁵² At the same time, he continues, "[a]political soldiers, sensing a political pitfall, began to shun what was once the accepted practice of professionals. . . . The soldier sees his iron law of war . . . made much less practical."⁵³

⁴⁹ O'Brien, *supra* note 8, at 608.

⁵⁰ *Id.* at 659.

⁵¹ Eckhardt, *supra* note 41, at 3.

⁵² *Id.*

⁵³ *Id.*

Writing from a defense point of view, Eckhardt sought a “workable standard” that would make a soldier’s duties as clear as (he implies) they used to be before political and humanitarian-law considerations intruded. Ultimately, as will be shown below, Eckhardt’s arguments and those of other military commentators weigh on the side of enforcing successor commanders’ duty to punish. The arguments against enforcement are those that suggest nonmilitary observers cannot accurately evaluate the exigencies of combat situations.

1. Military Arguments Against Enforcement, Stressing Combat Difficulties

From the defense of General Yamashita comes most vividly the protest that a commander has immediate concerns with ongoing activities that preclude his investigating or otherwise dealing with his subordinates’ past activities. Although Yamashita’s case did not involve offenses committed under a predecessor commander, the difficulty of supervising his troops under trying combat conditions was a major argument that might apply at least as forcefully in a successor commander’s defense. In his dissent to the Supreme Court’s denial of Yamashita’s habeas corpus petition, Justice Murphy argued that “[t]o use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.”⁵⁴ Whether inefficiency and disorganization were caused by the imminent victory of opposing forces or by other factors, they could arguably impact a commander’s ability to pursue sanctions against members of his troops who had committed violations before he personally took command of them. This is the major objection to successor commanders’ responsibility to punish; the objection is significantly qualified, however, by Major William H. Parks in his argument that “subjective factors” should enter importantly into evaluation of any command responsibility charge.⁵⁵

2. Supporting Enforcement: Assignment Strategies and Military Professionalism

Besides the standard of what a commander could reasonably achieve in retrospective discipline of his troops, another element to consider from the military point of view is the potential effect on command assignment strategies if military supervisors took this pol-

⁵⁴ LAEL, *supra* note 12, at 112.

⁵⁵ Parks, *supra* note 13, at 90-95; see discussion *infra* in text accompanying note 66.

icy into account when determining their arrangements of commanding officers. A cynical analysis might foresee supervisors exploiting an available loophole in law enforcement. They might, for example, deliberately promote commanders up the ranks of their own corps, so that the new commanders' own implication in previously-committed violations would limit their inclination to investigate and punish.⁵⁶ Or alternatively, supervisors who wanted to arrange impunity for their troops might move commanders from one post to another frequently enough to avoid responsibility: if the commander in charge when crimes occurred did not know of them, and was transferred before the crimes were revealed, neither he nor his successor would satisfy both knowledge and control requirements, so neither would be responsible to punish the perpetrators. Either of these scenarios, both of which cynically assume a command structure that wishes to allow law-of-war violations by its rank and file, might suggest ulterior motives for military personnel to argue against enforcement of successor commanders' duty to punish. But for military professionals who advocate adherence to the customary laws of war, both of the above hypothetical situations yield arguments in favor of enforcing this duty.

3. *Other Military Concerns Arguing for Enforcement Within Reason*

Of course, military analysts who write or speak on the subject of responsibility for violations of the laws of war emphasize the importance of defining and clarifying those laws so that they can be observed and violations can be fairly dealt with. Colonel Eckhardt asserts that "the very heart of military professionalism is command responsibility" because it allows the commander, by "[c]ontrolling others through training, discipline, and supervision," to achieve required military objectives while "doing the least damage possible to the body politic."⁵⁷ Writing with concern that the 1977 Protocols Additional to the Geneva Convention of 1949 had failed to clarify international standards for command responsibility sufficiently to put commanders on fair notice, Eckhardt offered a nonmilitary hypothetical to illustrate one significant question and an underlying principle pertinent to the present discussion:

⁵⁶ This result might be a factor in the case of Amir Kubura, who was Chief of Staff in the 3rd Corps of the 7th Muslim Mountain Brigade in the Army of Bosnia and Herzegovina from January of 1993 to April of 1993, at which time he became substitute commander and later commander. Indictment (Prosecutor v. Handzihasanovic), IT-01-47 (ICTY), ¶ 8 (July 5, 2001), www.un.org/icty/indictment/english/had-ii010713e.htm.

⁵⁷ Eckhardt, *supra* note 41, at 8.

Assume for a minute that a patrolman on the streets of New York City, while being jostled by a crowd, unexpectedly pulls his service revolver and shoots a number of innocent bystanders. What is the criminal responsibility of the police commissioner? . . . [I]s he criminally responsible for that particular act? Certainly if this police commissioner had received reports of one or two similar incidents and did nothing about them, then he might be criminally responsible. He would have breached his duty to control his patrolman. His inaction after being made aware of a series of incidents would amount to a concerted policy and active encouragement to commit similar illegal acts.⁵⁸

Though speaking for the defense, Eckhardt illustrates that a superior who has received reports of past violations and has failed to take corrective action has expressed "a concerted policy and active encouragement to commit similar illegal acts,"⁵⁹ thus arguably incurring command criminal responsibility. Eckhardt does not specify whether his hypothetical police commissioner's criminal responsibility would materialize upon his receiving the past-violation reports and failing to act, or only upon the patrolman's repeating the violation—and this is indeed the point that this discussion seeks to clarify. But Eckhardt's use of the phrases "concerted policy" and "active encouragement" supports the principle that the commissioner's breach of duty is his failure to act, rather than the eventual predictable result of that failure.

Confirming this suggestion is the analysis by Major William H. Parks, U. S. Marine Corps instructor in criminal and international law at The Judge Advocate General's School. On the topic of "acquiescence," Parks notes that "[t]he commander is deemed to share responsibility where he has knowledge of an offense and fails to take reasonable corrective action."⁶⁰ Notably, Parks' analysis does not specify that the offense must have occurred during the commander's own period of supervision. In support of this point, Parks quotes the U.S. Army Field Manual 27-10 for the proposition that commanders are responsible for punishing violations by their subordinates; however, he notes that:

[I]n seeking an answer to any question of a commander's *acquiescence* a reverse tack is required. Current British military law states this point by considering a commander to have ac-

⁵⁸ *Id.* at 5.

⁵⁹ *Id.*

⁶⁰ Parks, *supra* note 13, at 80.

quiesced in an offense "if he fails to use the means at his disposal to insure compliance with the law of war;" in comment it continues: "The failure to do so raises the presumption—which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable—of authorization [sic], encouragement, connivance, acquiescence, or subsequent ratification of the criminal acts."⁶¹

Thus, hypothetical situations as well as theoretical and textual analyses from representative military professionals present logical support for the enforcement of a successor commander's duty to punish known violations committed under his predecessor.

It must be conceded that no judicial opinion yet located explicitly articulates this responsibility. The ICTY Trial Chamber in *Hadzihasanovic* stated that the responsibility exists "in principle," though this decision was later overruled by the Appeals Chamber.⁶² Some commentators have asserted that precedent for successor commanders' duty to punish is established in the *High Command Case* judgment of Field Marshal von Kuechler at the Control Council Law No. 10 Tribunal in Nuremberg.⁶³ The cited judgment states:

Subsequent to the time that the defendant assumed command of the Army Group North, the record discloses that numerous reports showing such illegal executions were made to his headquarters, *covering a wide period of time*. These reports must be presumed in substance to have been brought to his attention. In fact, his own testimony indicates he was aware of these reports. There is no evidence tending to show any corrective action on his part. It appears from the evidence therefore that he not only tolerated but approved the execution of these orders.

He must, therefore, be held criminally responsible for the acts committed by his subordinates in their illegal execution of Red Army soldiers and escaped prisoners of war.⁶⁴

⁶¹ *Id.* at 81 (quoting British War Office, III Manual of Military Law (Law of War on Land, 1958), ¶ 631, note 1).

⁶² Interlocutory Appeal, *supra* note 2, at ¶¶ 5, 57.

⁶³ Boelaert-Suominen, *supra* note 37, at 767; Beth Van Schaack, *Command Responsibility—A Step Backwards*, 1 OTR ICC, Iss. 13 (Part 2) (July 7, 1998), at http://www.advocacy.net/org/news_view/news_119.html.

⁶⁴ XI NUREMBERG TRIALS, *supra* note 35, at 568 (emphasis added).

Again, the judgment does not explicitly articulate von Kuechler's liability for events that occurred before his assumption of command. Here, however, von Kuechler was tried alongside, among others, Field Marshal von Leeb, from whom von Kuechler took over command of the Army Group North in January 1942. Both men were charged with implementing the Commissar Order, issued by Hitler in March 1941, which directed the killing of certain Russian soldiers. Field Marshal von Leeb was found to have protested against the Commissar Order and to have been without knowledge of the illegal executions in question, and he was therefore acquitted on that charge. Since von Kuechler was found guilty of having "not only tolerated but approved" the executions,⁶⁵ which began before he assumed command, the inference that von Kuechler was held responsible for events both before and after he assumed command seems justified.

Military professionals discussing the issue of command responsibility generally put some emphasis on the difficulty of articulating standards for enforcement because of the great variation in conditions surrounding each case. Major Parks has presented an extensive discussion of twelve "subjective factors" that should be recognized and considered on a case-by-case basis in efforts to evaluate a commander's knowledge and responsibility to act, as well as interpreting his acquiescence in violations by his subordinates. The factors Parks mentions are: 1) the rank of the accused; 2) experience of the commander; 3) the duties of the commander by virtue of the command he held; 4) mobility of the commander; 5) isolation of the commander; 6) the "sliding probability ratio" of unit/incident/command ["the greater the size of the offense and/or the unit involved, the higher in the chain of command knowledge may be subjectively imputed"]; 7) size of the staff of the commander; 8) comprehensiveness of the duties of the staff of the commander; 9) communications abilities; 10) training, age and experience of the men under his command; 11) composition of forces within the command [joint or combined command more difficult than unified]; 12) combat situation [control more difficult in fast-moving combat].⁶⁶ Parks agrees with Professor Arthur Rovine that in *Yamashita* General MacArthur committed a "great injustice to international law by failing to appoint a law member" to the tribunal "in light of the number of high-ranking officers tried by tribunals whose membership included members of the bar."⁶⁷ Parks thus emphasizes the importance of both legal and military factors in

⁶⁵ *Id.*

⁶⁶ Parks, *supra* note 13, at 90-95.

⁶⁷ *Id.* at 88-89 (referring to THE AIR WAR IN INDOCHINA 140-41 (Raphael Littauer & Norman Uphoff eds., rev. ed. 1972)).

assessing command responsibility. Eckhardt's concern that "[m]odern law of war is driven by an idealistic internationally minded community" working with an "inarticulate" standard⁶⁸ is the main military objection to stronger command responsibility enforcement, and that objection should be satisfied by adequate attention to the subjective factors outlined by Parks.

4. *Summary of Military Perspective*

In summary, analysis from the military point of view of the issue of successor commanders' duty to punish generally favors enforcing such a duty. There is concern that commanders be given fair notice of their potential criminal liability for failure to punish; but comments on the history, expectations, and published standards of professional military conduct suggest that successor commanders' duty to punish violations is a part of military tradition that is necessary for effective operations. What is new is not the duty, but the form of enforcement of that duty—through international criminal tribunals set up by the humanitarian law establishment, rather than through military commissions convened and operated within the military establishment itself. In the still-developing interrelation of military, domestic, and international law, seamlessness of coverage has not yet been achieved.⁶⁹ Therefore, concerns over general principles of criminal law and of humanitarian law must also be examined in exploring this issue.

B. Criminal Law Maxims Raising Concerns About Successor Commanders' Duty to Punish

1. Fair Notice Concerns (Nullum Crimen/Nulla Poena Sine Lege and Ex Post Facto)

Beginning with the establishment of the first International Tribunals for the trials of war criminals following World War II, defendants have argued the lack of precedent as a bar to the tribunals' criminal jurisdiction. M. Cherif Bassiouni⁷⁰ has said that the Nurem-

⁶⁸ Eckhardt, *supra* note 41, at 3.

⁶⁹ Parks notes, for example, a "jurisdictional defect" which prevents law-of-war violators from being tried by non-military courts where they have left the military before their offenses are uncovered—a defect which operated in post-Civil War cases, was called to Congressional attention in 1902, operated again with regard to My Lai, and "has to this day gone unheeded." Parks, *supra* note 13, at 10 n.27.

⁷⁰ Professor of Law and President of the International Human Rights Law Institute, DePaul College of Law; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Chairman, Drafting Committee of the U.N. Diplomatic Conference on the Establishment of an International Criminal Court.

berg and Tokyo tribunals "relied on a string of shaky historical legal precedents, but they marked a turning point in history."⁷¹ This statement nicely expresses the ironic tension between the tribunals' expressing pride in holding war criminals individually responsible "for the first time in history," and at the same time requiring evidence of precedent to legitimize their criminal convictions. As Bassiouni further noted,

[n]o longer were victors to mete out arbitrary punishment on the defeated and their leaders on purely political grounds. Thereafter, individuals would be brought before a tribunal, ostensibly impartial, where procedures and forms attendant to criminal adjudication would be followed, and only those found guilty under that law would be punished according to the wrongfulness of their deeds. Responsibility was individual and not collective, and no one could claim immunity as a head of state. The previously recognized defense of "obedience to superior orders" was rejected. Each of these developments was an historic breakthrough.⁷²

Not surprisingly, then, "during the prosecutions stemming from World War II, the arguments of *ex post facto* and *nulla poena sine lege* were consistently raised and were valid from a criminal law point of view."⁷³

These broad arguments can be and have been countered to a certain extent. It is true that specific penalties for the offenses charged had not been established in advance, so it might seem the *nulla poene* argument must be conceded; but the *ex post facto* argument was met by the assertion that (as noted previously in the discussion of the *Yamashita* tribunal) the offenses charged were long established in customary international law as roughly codified in the Hague Conventions of 1907 and the Red Cross Convention of 1929.⁷⁴ Responses to these arguments vary widely. Professor Jordan Paust in an article discussing "Applicability of

⁷¹ M. Cherif Bassiouni, *Historical Development of Prosecuting Crimes Against Peace*, in III INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 25, 26 (M. Cherif Bassiouni ed., 1987) [hereinafter Bassiouni, *Historical Development*].

⁷² *Id.*

⁷³ M. Cherif Bassiouni, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in III INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 3, 7 (M. Cherif Bassiouni ed., 1987) (citation omitted) [hereinafter Bassiouni, *Prosecution of International Crimes*].

⁷⁴ See LAEL, *supra* note 12, at 102 (stating the colonel faulted by "ignoring three crucial international agreements . . . All imposed grave responsibilities on military commanders"); see also *supra* text accompanying note 33.

International Criminal Laws to Events in the Former Yugoslavia," suggested that

a new international tribunal could merely mirror any relevant domestic law penalties as well as penalties evident in the customary practice of nations. Those who attempt to invoke *nulla poena sine lege*, or *sine crimen* [sic], arguments that were rightly denounced at Nuremberg could thereby be estopped from doing so.⁷⁵

This is in fact the approach taken in the establishment of the ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda, which purport to apply only customary international law, and to impose penalties that typically would be applicable in the courts of the countries in question.⁷⁶ Elsewhere, Paust downplays the *ex post facto* concern by opining that "[i]n a sense, all criminal conduct is second-guessed by the community or its representatives after the fact. The law relating to superior orders and command responsibility, though sometimes more obviously so, is no different."⁷⁷

On the other hand, the dissenting Supreme Court Justices in the unsuccessful *Yamashita* habeas corpus petition protested that "[i]t is not in our tradition for anyone to be charged with crime which is defined after his conduct . . . has taken place," and that "[n]othing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force."⁷⁸ And in specific regard to the issue of a successor commander's duty to punish, the *Hadzihanovic* Appeals Chamber observed that "it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed" and that "[i]n this particular case, no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate."⁷⁹ Thus the

⁷⁵ Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499, 520 (1993-1994) [hereinafter Paust, *International Criminal Laws*].

⁷⁶ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U. N. S.C. Doc. S/25704, paras. 111-15.

⁷⁷ Jordan J. Paust, *Superior Orders and Command Responsibility*, in III INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 73, 88 (M. Cherif Bassiouni ed., 1987) [hereinafter Paust, *Superior Orders*].

⁷⁸ LAEL, *supra* note 12, at 111-12 (quoting Rutledge & Murphy, JJ. respectively).

⁷⁹ Interlocutory Appeal, *supra* note 2, ¶¶ 44-45.

Appeals majority recognizes the precedential value of customary international law—but requires clear evidence of the existence of such custom, in contrast to the “shaky historical precedents” of the World War II Tribunals or the concession to the “second-guessed” interpretation suggested by Paust.

2. *Validity of Fair Notice Concerns Arguable*

Where, then, might we find evidence to support the assertion of the Prosecutor and the dissenting judges in the *Hadzihasanovic* Appeals Chamber that customary international law does provide for a successor commander’s duty to punish violations committed by his subordinates under a predecessor commander? The most conventional sources are other codifications of the laws of war (since the majority do not wish to merely rely on the tribunal’s construction of the statute), including the more recent Rome Statute of the International Criminal Court and the published commentary on that Statute, as well as the limited amount of case law on command responsibility.

a. *Language of Conventions, Statutes, and other Documents*

i. Protocol I

The document most crucial to clarifying the issue of successor commanders’ duty to punish is the June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and the related Protection of Victims of International Armed Conflicts (Protocol I).⁸⁰ This is true for several reasons. The presentation of command responsibility doctrine in Articles 86 and 87 of Protocol I provides the first codification of the doctrine’s elements, and reflects the widespread acceptance of those elements between 1949 and 1977.⁸¹ As a result, subsequent codifications have relied heavily on the wording of Protocol I; echoes of Protocol I’s Articles 86 and 87 occur in the Statutes of the ICTY (1993) and ICTR (1994), in the Report of the International Law Commission (ILC) and its Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code) (1996), and in the Rome Statute of the International Criminal Court (1998). But an important and arguably erroneous change in interpretation of Protocol I has emerged starting with the 1996 ILC Draft Code; this change reappeared in the

⁸⁰ PILLOU, *supra* note 11.

⁸¹ 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 98-99 (1995).

Rome Statute and, by way of those sources, as an important part of the basis for the *Hadzihasanovic* Appeals Chamber decision.

The problem is that Article 86 ("Failure to act") states that a "superior" is responsible for failure to act against violations that he knows his subordinate "was committing or was about to commit," while Article 87 ("Duty of commanders") says that a commander has the duty to act against violations that his subordinates "are going to commit or have committed." The erroneous interpretation has asserted that the duty of commanders is defined in Article 86 only, and therefore does not include acting against past violations—since only the progressive and future verb phrases ("was committing or was about to commit") can be applied to military commanders. That interpretation has the effect of limiting a commander's duty to punish only to violations that he knows are in progress or about to be committed, excluding violations that he knows *have been* committed. This is an illogical interpretation and is contradicted by the plain language of the Protocol and by the official ICRC Commentary on the Protocol.

a) Article 86

Protocol I, Article 86, entitled "Failure to act," treats breaches of international law arising from omissions. It contains two clauses. Clause 1 provides that "[t]he 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 that result from a failure to act when under a duty to do so."⁸²

The "High Contracting Parties," are the States themselves or their organs.⁸³ Thus, Article 86 focuses on responsibilities of Prime Ministers and other administrative leaders to "repress grave breaches and . . . suppress all other breaches" resulting from failure to act. The distinction between the obligation to "repress grave breaches" and to "suppress all other breaches" is discussed in the ICRC Commentary on the Additional Protocols, where it is explained that "[g]rave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches."⁸⁴ The Commentary then notes that legislation applying to any individual accused of breaches would of course be that of

⁸² PILLOUD, *supra* note 11, at 1005.

⁸³ *Id.* at 1007, ¶ 3529 (stating "[t]he fact that a breach of the rules of applicable international law may consist of an omission, i.e., a failure to act, just as well as an act by a State organ, is uncontested nowadays . . .").

⁸⁴ *Id.* at 1010.

"his own national legislation," so "any 'repression' that might be undertaken ultimately by penal or disciplinary sanctions are [sic] the responsibility of the authority on which those committing such breaches depend or the Power to which they belong."⁸⁵ However, other Parties to the Protocol are given the right to *suppress* such breaches (other than by enacting municipal legislation, which could not apply to other States' nationals) "under the principle of universal jurisdiction."⁸⁶ Thus, in Article 86, clause one, all Parties to the Protocol and the conflict are required and empowered to enforce the terms of the Protocol.

The second clause of Article 86 goes on to clarify that these State organs are responsible not only for acts or orders of high officials themselves, but also for acts of their agents:

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.⁸⁷

The Commentary provides nine paragraphs of discussion of this clause, with extensive references to cases from the tribunals which followed the Second World War. It notes that "[t]his rule concerns both the immediate commander and his superiors. However, the specific duties of commanders are further dealt with in the detailed provisions that will be examined under Article 87 (*Duties of commanders*)."⁸⁸

⁸⁵ *Id.* at 1010-11.

⁸⁶ *Id.* at 1011. In ordinary English usage:

Suppress [and] repress are general terms which mean to hold back, by the use of more or less force **Suppress** . . . usually implies the exercise of great . . . power or even of violence [I]t often suggests the prompt use of effective methods; as, to *suppress* an insurrection **Repress**, on the other hand, implies little more than a checking, or restraining, sometimes by an external force, sometimes by the power of the will or mind as, to *repress* one's curiosity [emphasis in original].

WEBSTER'S DICTIONARY OF SYNONYMS 812 (1st ed. 1951). The Protocol's use of both terms seems rather to attempt a distinction between control imposed by municipal legislation and that exercised by universal jurisdiction. The result is that all concerned Parties are empowered to punish violators of the Protocol.

⁸⁷ PILLOUD, *supra* note 11, at 1005.

⁸⁸ *Id.* at 1015.

Here is the point at which the erroneous interpretation of the Protocol has occurred. The International Law Commission, in its Report on the work of its forty-eighth session (comprising the ILC's Draft Code of Crimes Against the Peace and Security of Mankind and the Special Rapporteur's commentaries on the Draft), stated that "[t]he principle of individual criminal responsibility under which a military commander is held responsible for his failure to prevent or repress the unlawful conduct of his subordinates is elaborated in article 86 of Protocol I."⁸⁹ This statement taken alone is simply mistaken, as is obvious from the Protocol I Commentary's pointing out that "specific duties of commanders" are examined in Article 87. Nevertheless, Article 6 of the ILC Draft Code echoes the language of Article 86(2) and thus does not include the past-tense verb phrase that is so important in this discussion. This seems to be an unfortunate error in drafting, judging from other portions of the ILC Special Rapporteur's commentary.⁹⁰ Reading Protocol I according to the ICRC Commentary shows that the chief purpose of Article 86 is to make clear that not only the "immediate commander" but also *his* superiors—

⁸⁹ *Report of the Commission to the General Assembly on the work of its forty-eighth session*, [1996] 2 Y.B. Int'l L. Comm'n, Part 2, at 25, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

⁹⁰ Elsewhere in the same paragraph, the Special Rapporteur's commentary notes that "[t]he duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of Additional Protocol I," and that "a military commander has a duty, where appropriate, to initiate disciplinary or penal action against alleged offenders who are his subordinates." The following paragraph asserts that the "text of this article [Draft Code Article 6] is based on the three instruments mentioned in the preceding paragraph"—which are Additional Protocol I and the Statutes of the ICTY (article 7) and the ICTR (article 6), all of which have the past-tense verb phrase. Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. A/51/10, at 36-37. Available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N96/236/37/IMG/N9623637.pdf>, accessed 02/12/04. This disconnect between the Special Rapporteur's commentary and the draft articles themselves may be explained by the fact that "Special Rapporteurs have tended . . . to operate in isolation from the Commission," and that "draft articles are sometimes presented for final consideration by the Commission without commentaries, and the commentaries are only adopted, with little time for consideration, in the last stages of a session." Report of the International Law Commission on the Work of its Forty-Eighth Session, Chapter VII A, "Programme, procedures and working methods of the Commission and its documentation," reprinted in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION 50, Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law 387-89 (1998). Elsewhere, the proceedings of the Colloquium just cited reveal that the authority of the Draft Code is questionable at best, since it is listed in a group of "Cases in which the Commission has prepared a draft, but in which there has not been any follow-up action, [emphasis in original]" and the last news of its status is that "the General Assembly decided to invite governments to submit, before the end of the General Assembly's fifty-third session, comments and observations on the action which might be taken in relation to the draft." *Id.* at 175-6. The Proceedings further note that "a cursory examination of the Commission's record reveals that there have been instances in which drafts which the Commission has prepared have not conformed with the requirements of the General Assembly and so have had to be abandoned without further action." *Id.* at 178.

including high government officials—can be held liable for failure to act. The Commentary goes on to emphasize this purpose: “[t]he present provision [Article 86, Paragraph 2] merely poses the principle of the indictment of superiors who have tolerated breaches of the law of armed conflict.”⁹¹

The Commentary on Article 86(2) does include the elements of command criminal responsibility:

Under the terms of this provision three conditions must be fulfilled if a superior is to be responsible for an omission relating to an offence committed or about to be committed by a subordinate:

- a) the superior concerned must be the superior of that subordinate (“his superiors”);
- b) he knew, or had information that should have enabled him to conclude that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it.⁹²

Within this explanation, the temporal application is already unclear (the chapeau gives past and future, “committed or about to be committed,” while element (b) gives only present and future, “being committed or was going to be committed”) and the preceding Commentary is careful to note that “[t]his provision . . . should be read in conjunction with paragraph 1 and Article 87 (*Duty of commanders*), which lays down the duties of commanders.”⁹³ How, then, can one justify relying solely on Article 86(2) to define temporal application of command responsibility for military commanders?

The erroneous assertion that “criminal offence based on command responsibility is defined in Article 86(2) only”⁹⁴ is a major factor in the perpetuation of the loophole for successor commanders’ duty to

⁹¹ PILLOUD, *supra* note 11, at 1015. Moreover, Pilloud does not limit the Article 86 liability of high officials to toleration of progressive and future violations: “information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed Every case must be assessed in the light of the situation of the superior concerned at the time in question” *Id.* at 1014, ¶ 3545. This approach is similar to that of Major Parks, discussed *supra* in text accompanying note 55.

⁹² *Id.* at 1012-13, ¶ 3543.

⁹³ *Id.* at 1011, ¶ 3541.

⁹⁴ Interlocutory Appeal, *supra* note 2, ¶ 48 (citing *Celebici* Appeal Judgment (Prosecutor v. Delalic), IT-96-21 (ICTY), ¶ 237).

punish. Careful attention to Article 87 and the ICRC Commentary on it emphasizes the wrongness of that assertion.

b) Article 87

Article 87 of Protocol I ("Duty of commanders") begins, like Article 86, with the phrase "The High Contracting Parties," and it may be this wording that has led some commentators to conclude that Protocol I "requires *states* to ensure that their military commanders prevent grave breaches by persons under their control, but does not suggest that a failure by the commanders to do so incurs more than state responsibility."⁹⁵ On the contrary, Article 87 represents the Protocol's attempt to "make the control of the application of the Conventions and the Protocol part of the duties of military commanders."⁹⁶ The Commentary elucidates this purpose at some length:

According to the sponsors of the proposal which was behind the rule under consideration here: "in its reference to 'commanders', the amendment was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command."⁹⁷

The importance of this distinction—why it matters whether Article 86 or Article 87 is more pertinent to the duties of military commanders in the field—lies in the tenses of the verb phrases in Article 87, paragraph 3, which are referred to above and will be discussed below.⁹⁸ For the sake of a clear comparison, all of Article 87 is reproduced here:

⁹⁵ RATNER & ABRAMS, *supra* note 10, at 128. This comment by Ratner and Abrams cites to Article 83 ("Dissemination"), which covers the obligation of High Contracting parties and their civilian and military authorities to "encourage the study" of and "be fully acquainted with" the text of the Conventions and the Protocol; this suggests a lack of careful attention to either Article 86 or Article 87. A similar assumption is expressed by the *Hadzihasanovic* Appeals Chamber majority's statement that "it is Article 86, paragraph 2 . . . that expressly addresses the individual responsibility of superiors for acts of their subordinates, while Article 87 speaks of the obligations of States parties." Interlocutory Appeal, *supra* note 2, ¶ 53.

⁹⁶ PILLOUD, *supra* note 11, at 1019, ¶ 3552.

⁹⁷ *Id.* at 1019, ¶ 3553 (citing to *IX Official Records of the 1974-1977 Conference*, at 120, ¶ 70, Doc. CDDH/ISR.50). The attached footnote further explains, "[t]his statement was not contested. Some delegations would even have wished this clarification to have been included in the text of the Protocol in order to avoid any ambiguity, as the word 'commander' is not always understood in the same way in the armies of different countries." *Id.* at 1019 n.7 (citation omitted).

⁹⁸ See *supra* text accompanying note 81, and *infra* notes 107-12.

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 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 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.

The opening section of the Article 87 Commentary, after remarking on the inherent duty of a military commander to discipline his troops according to the system he is part of, states that this Article “enjoins the High Contracting Parties and the Parties to the conflict to ensure that military commanders carry out this task.”⁹⁹ In case one were tempted to infer from this language that failure of commanders to do so would not incur “more than a state responsibility,” it is important to recall the Article 86 Commentary that responsibility of the commander’s own Power to discipline him “does not detract from the right of States under customary law . . . to punish serious violations of the laws of war under the principle of universal jurisdiction.”¹⁰⁰ That is to say, if Parties to the conflict do not enforce these duties of their commanders, then other States should do so under the principle of universal jurisdiction, such as by the formation of International Criminal Tribunals. After all, as the Nuremberg Tribunal observed

⁹⁹ PILLOUD, *supra* note 11, at 1018, ¶ 3549.

¹⁰⁰ *Id.* at 1011, ¶ 3539.

and the ICTY Appeals Chamber has quoted with approval, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁰¹

Still further emphasis is laid on the application of Article 87 to individual commanders, as the opening section of the Commentary notes that this Article concerns "the very essence of the problem of enforcement of treaty rules in the field," that "the role of commanders is decisive," and that "the necessary measures . . . must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided."¹⁰²

In the commentary on the individual clauses of Article 87, the application is still clearer. The overarching principle is that "this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over . . . at the moment his commanding officer has fallen."¹⁰³ The Commentary goes on to give hypothetical examples of the duty, since the terms "should be understood very specifically, if full practical meaning is to be given to the provision."¹⁰⁴ It explains the extension to "other persons under their control," noting that a commander must control temporary replacement troops as long as they are with him, and that a commander in occupied territory "must consider that the local population entrusted to him is subject to his authority . . . for example, in the case where some of the inhabitants were to undertake some sort of pogrom against minority groups."¹⁰⁵ Even a commander who "without being invested with responsibility in the sector concerned, discovers that breaches have been committed . . . is obliged to do everything in his power to deal with this."¹⁰⁶

Paragraph 2 of Article 87 concerns the commanders' responsibility to disseminate among their troops information about the troops' obligations under the Conventions and the Protocol. It addresses "fair notice" concerns of military personnel, and is therefore important to the issue of command criminal responsibility, but it is not a controversial element of the present discussion.

¹⁰¹ Appeals Judgement (Prosecutor v. Delalic), IT-96-21-A (ICTY), ¶ 162 (2001) (citing Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Duško Tadić)), IT-94-1-AR72 (Oct. 2, 1995)).

¹⁰² PILLOUD, *supra* note 11, at 1018, ¶ 3550.

¹⁰³ *Id.* at 1019, ¶ 3553.

¹⁰⁴ *Id.* at 1019, ¶ 3554.

¹⁰⁵ *Id.* at 1020, ¶ 3555.

¹⁰⁶ *Id.*

Paragraph 3 of Article 87 is the paragraph that explicitly contains the past-tense verb phrase in describing breaches that a commander must address. The fact that this phrase (placing responsibility on "any commander who is aware that subordinates . . . *have committed* a breach") does not appear in Article 86(2) (or, consequently, in the ILC Draft Code or the Rome Statute) is relied on by the *Hadzihasanovic* Appeals Chamber in holding that successor commanders' duty to punish is unenforceable. However, the Commentary both undercuts such a distinction and gives illustrations that lend support to the enforcement of that duty. The early section of the Commentary notes that "the measures . . . which military commanders must take . . . (i.e., to prevent, suppress, and where necessary, report such breaches) . . . are indicated again in paragraph 3 *with a slightly different wording, though without any substantial modification as regards the basic meaning.*"¹⁰⁷ Thus, the difference in verb tenses should not be read as indicating a substantial limitation on the duty.

In addition, the discussion of Article 87(3) includes specific remarks that implicate successor commanders' duty. It is noted that "more than anyone else they [commanders] can prevent breaches by creating the appropriate frame of mind . . . and by maintaining discipline."¹⁰⁸ The acquiescence in breaches, that is expressed by a successor commander's knowing failure to punish them and its resulting bad effect on the subordinates' "frame of mind," is a major historical and rational basis of the duty. And further, commanders "are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach."¹⁰⁹ This investigative role also attaches strongly to the position of a successor commander. In sum, the Commentary notes that "[t]he object of these texts is to ensure that military commanders at every level exercise the power vested in them."¹¹⁰ Among the closing remarks in the Commentary is that "some delegations remarked [sic] that Article 87 contains provisions which are already found in the military codes of all countries," so that the articulation there "is merely a question of ensuring that they are explicitly applicable with respect to . . . the Protocol."¹¹¹ In all, the Commentary on Articles 86 and 87 places great weight on the importance of military commanders' duty to enforce the provisions of Protocol I. The fact that it does not expressly identify successor commanders' duty to punish as a

¹⁰⁷ *Id.* at 1020, ¶ 3556 (emphasis added).

¹⁰⁸ *Id.* at 1022, ¶ 3560.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1022, ¶ 3562.

¹¹¹ *Id.* at 1023, ¶ 3562.

separate case implies, as Judge Hunt suggests with regard to military manuals' handling of the question, "that the duty to punish in that situation is so obvious that no-one [sic] has ever seen the need to refer to it expressly."¹¹²

The final observation to be made at this point is that the analysis of Protocol I Articles 86 and 87 and the accompanying Commentaries not only directly supports the enforcement of successor commanders' duty to punish, but also calls into serious question the Appeals Chamber's reliance on the ILC Draft Code and the *Celebici* decision,¹¹³ which refer only to Article 86 for authority on command criminal responsibility.

ii. Commentaries on Statutes of the ICTY and ICTR

Although the Appeals Chamber majority decline to be limited by a mere "construction of the Statute" under which they operate, it is necessary for the clarity of this discussion to set forth the Statute's command responsibility provisions. The Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, promulgated in 1993 and 1994, follow the model of Protocol I, including the elements from both Articles 86 and Article 87 and thus employing both past and future time frames to specify commanders' individual criminal responsibility for failure to prevent, halt, or punish breaches. ICTY Statute Article 7 and ICTR Statute Article 6, respectively, provide that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute 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.

In view of the above discussion, and the fact that the ICTs are specifically empowered to prosecute those responsible for serious violations rather than State organs, it seems very likely that the Statute drafters deliberately chose inclusion of the past-tense phrase so as to follow Protocol I in allotting to a commander the duty to punish violations that may have occurred before his arrival on the scene—since

¹¹² Separate and Partially Dissenting Opinion of Judge Hunt (Prosecutor v. Hadzihasanovic), IT-01-47 (ICTY), ¶ 12 (July 16, 2003), <http://www.un.org/icty/hadzihas/appeal/decision-e/030716so.htm> (regarding Interlocutory Appeal, *supra* note 2) [hereinafter Hunt].

¹¹³ See *supra* note 94.

exclusion of the past-tense language opens “a fatal gap”¹¹⁴ allowing such violations to fall between the cracks. This suggestion is supported by the fact that the documentary history of the Statute’s adoption includes three superseded draft versions that did not include the past-tense element as well as a note verbale from the Netherlands representative on 4 May 1993 suggesting that:

[T]he following offences in particular should be within the competence of the ad hoc tribunal:

-The fact of having ordered, authorized or permitted the commission of war crimes and/or crimes against humanity, and

-The fact of being in a position “to influence the general standard of behaviour” and having *culpably neglected to take action against crimes of that kind*.¹¹⁵

Thus, when the Statute was adopted at the 3217th meeting of the Security Council on 25 May 1993, Mrs. Albright of the United States could clarify that “[w]ith respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of . . . the failure of a superior . . . to take reasonable steps to prevent *or punish* [Article 2 through 5] crimes by persons under his or her authority.”¹¹⁶ The intention to include the duty to punish within the Statute, and the implication that violations should not be allowed to go unpunished because of changes of command assignments, is also confirmed by the Venezuelan representative’s statement that the adoption of the Statute responds to the international community’s awareness that “[n]othing encourages crime more than impunity.”¹¹⁷

Further interpretive commentary on the ICTY Statute is offered by Professor M. Cherif Bassiouni, who points out that the Statute does not contain a “general part” ordinarily providing definitions of the “constitutive elements of the crimes.” Although some such provisions appear in Article 7 of the Statute (comprising the explanation of command responsibility), “none of these questions are defined with the minimum specificity required in most criminal justice systems.”¹¹⁸ The Tribunal must therefore “fill these legal gaps,” relying on the

¹¹⁴ PILLOUD, *supra* note 11, at 1018, ¶ 3550; fuller reference *supra* note 98.

¹¹⁵ 2 MORRIS & SCHARF, *supra* note 81, at 475 (emphasis added).

¹¹⁶ *Id.* at 188 (emphasis added).

¹¹⁷ *Id.* at 183.

¹¹⁸ M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 340 (1996) [hereinafter BASSIOUNI, LAW OF ICTY].

"limited guidance" offered by customary international law. Bassiouni elsewhere remarks that "[t]he rules enacted by the judges and the jurisprudence of [the ICTY and ICTR] . . . filled the 'legislative' gap, even though raising doubts about the fairness of this judge-made approach Thus, while the exercise was necessary, the method by which it was achieved is open to question."¹¹⁹ The doubts about the fairness of "the judge-made approach" will be discussed below, as will the admittedly limited guidance to be gleaned from judgments of earlier international tribunals.¹²⁰

Another source of ICTY background information is the reports of the Commission of Experts whose preliminary work influenced the subsequent drafting of the Statute by the U.N. Office of the Legal Advisor. Regarding a commander's duty to prevent, halt, or punish violations, the Commission of Experts' interim report includes the following statements:

In particular, a military commander who is assigned command and control over armed combatant groups who have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future. Thus, a commander has a duty to do everything reasonable and practicable to prevent violations of the law. Failure to carry out such a duty carries with it responsibility.

Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.¹²¹

In the last sentence of this excerpt the order of clauses, in addition to the choice of verb tenses, reveals an assumption of the successor commanders' duty to punish. The commander "has the duty to punish . . . those under his command whom he knows . . . committed a violation." If the duty were limited to cases where violations were committed after the commander's taking charge, the clearer wording would be "those whom he knows committed a violation under his command."¹²² The present wording of this report shows that the focal

¹¹⁹ GEERT-JAN G. J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW, at xxxi (2001).

¹²⁰ See *infra* text accompanying notes 184-92 and 138-52, respectively.

¹²¹ BASSIOUNI, LAW OF ICTY, *supra* note 118, at 343.

¹²² Thanks to Professor Dale Nance for pointing out this important rhetorical point. Note a similar pattern in the ILC Special Rapporteur's commentary, *supra* note 90.

elements are the commander's authority over the subordinate and his knowledge of the offense—not the time when the offense occurred.

Also noteworthy in the above excerpt is the commander's duty to reform before reemploying "groups who have engaged in war crimes in the past." In the *Hadzihasanovic* case, whose Interlocutory Appeal yielded the negative ruling on successor commanders' duty to punish, "the troops commanded by [Kubura] from April 1993 had a history of unpunished criminality."¹²³ This would therefore be a situation where the principle of case-by-case evaluation of individual facts¹²⁴ should be carefully carried out. That approach was clearly suggested by the Trial Chamber's holding that "in principle" Kubura could be charged, though of course the facts of the case would need to support the charge. Unfortunately, such an approach is precluded by the Appeals Chamber's ruling.

Lastly, the Report of the Secretary-General accompanying the draft Statute for the ICTY, which presents the Statute's official legislative history, addressed the issue of command responsibility as follows:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. *This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.*¹²⁵

W. J. Fenrick, in commenting on this provision, notes that "[a]lthough Article 7(3) is infelicitously worded, it provides a basis for liability independent of Article 7(1)."¹²⁶ The infelicitous wording of the Statute makes the temporal application of commanders' duty to punish less clear than it might be, but the Secretary General's Report

¹²³ Interlocutory Appeal, *supra* note 2, ¶ 43 (citing Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment (Prosecutor v. Hadzihasanovic), IT 01-47 (ICTY), ¶ 21 (May 24, 2002)).

¹²⁴ Discussed in detail by Parks, *supra* note 13, at 90-95; presented in this text *supra* note 66.

¹²⁵ Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., ¶56, U.N. Doc. S/25704 (1993) (emphasis added).

¹²⁶ Fenrick, *supra* note 7, at 111.

clarifies the engagement of the duty at the point when the commander knows his subordinates are about to commit *or had committed* crimes, without limiting under whose command the crimes might have been committed.

iii. Various War Manuals

Another source of guidance for interpreting the specific elements of command responsibility is an overview of manuals of military organizations. Attention to military manuals is appropriate both because military tradition created command responsibility doctrine and because military organizations must train soldiers to carry out that responsibility.

In a survey of war manuals of various countries, Major General A.P.V. Rogers cites segments from Australian, United Kingdom, and United States war manuals that include the past-tense provision as part of the commander's responsibility:

Australia (1996)

The commander will be held responsible if the commander:

- a. knows subordinates are going to commit war crimes and does not prevent them,
- b. knows subordinates *have committed war crimes and does not punish them*,
- c. should know subordinates are going to commit war crimes and does not prevent them, or
- d. should know subordinates *have committed war crimes and does not punish them*.¹²⁷

U.K. (1958)

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

¹²⁷ A. P. V. Rogers, *Command Responsibility Under the Law of War*, 15, at www.law.cam.ac.uk/rcil/COMDRESP.doc (last visited Sept. 2003) (citing Australian Defence Force Publication 37, *Law of Armed Conflict*, 1996, para. 1303) (emphasis added).

war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.¹²⁸

U.S.A. (1997)

Commanders are responsible for war crimes committed by their subordinates when any one of three circumstances applies:

- a. The commander ordered the commission of the act;
- b. The commander knew of the act, either before or during its commission, and did nothing to prevent or stop it; or when
- c. The commander should have known, "through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit *or [had] committed a war crime* and he fail[ed] to take the necessary and reasonable steps to insure compliance with the law of war *or to punish* violators thereof."¹²⁹

All of these excerpts are significant as evidence of the customary assumption that a commander is responsible to punish offenses that his subordinates have committed in the past—not only to prevent or halt ongoing offenses. Since the absence of the past tense language in some documents was taken by the Appeals Chamber to "militate against" the inference of successor commander responsibility, conversely its presence in these manuals supports the inference.

The U.S. Army Field Manual is most specific in breaking out the various temporal applications: clause b, regarding prevention or halting of the violation, acknowledges the necessary limitation of this course of action to the commander who knows of the violation "before or during" its commission, while clause c introduces the past tense to emphasize the necessity of punishing past actions when they become known to the commander. This is a simple distinction, but its presence in military field manuals suggests that command responsibility for offences under a predecessor commander is assumed in customary military law. Taken together with the Protocol I distinction (which gives broader temporal application to the disciplinary respon-

¹²⁸ *Id.* at 15 (citing War Office, *Manual of Military Law Part III*, HMSO, 178 (1958)) (emphasis added).

¹²⁹ *Id.* at 17 (citing United States Army JAG School, *Operational Law Handbook*, at 18-11 (1997) based on Field Manual FM 27-10, at 501) (alterations in original) (emphasis added).

sibility of commanders in the field than of politicians at a distance) it further strengthens the case for the broad temporal application of the duty to punish prong of command responsibility doctrine.

iv. The Rome Statute

Many organizations worked long and hard toward the completion of the Rome Treaty of 17 July 1998, establishing the International Criminal Court. The international humanitarian law community celebrated the Treaty's coming into force upon the completion of the requisite number of endorsements in 2002. However, the Rome Statute has some weaknesses and limitations, and unfortunately its treatment of command criminal responsibility is one of them. In his Preface to the Commentary on the Rome Statute of the International Criminal Court, M. Cherif Bassiouni recounts some of the difficulties that faced the drafters of the Statute:

By the time the Preparatory Committee's "consolidated" text reached the responsible officials in late May [1998], officials had little time to study the text, brief their superiors, and obtain appropriate instructions on political and complex legal issues. . . . This process was difficult for many of the delegates who were in Rome for the Diplomatic Conference, many of whom were new to the subject By the second week of the Diplomatic Conference, as many as 15 groups met at different times and places throughout the FAO building without the benefit of interpretation. . . . As a result of these circumstances, the groups working on different portions of the Draft Statute completed their work at different times and without any logical or legal sequence. . . . The Drafting Committee, therefore, received disparate articles or parts of articles without subject matter sequence and at different times; it was like receiving pieces of an enormous jigsaw puzzle. . . . The Drafting Committee completed its work on approximately 120 articles on Wednesday, 15 July, and submitted it to the Committee of the Whole which, remarkably, approved them in under two hours. . . . Consequently, only those who had worked on specific provisions of the Statute could draft a legislative history to interpret those provisions [of the Statute].¹³⁰

¹³⁰ M. Cherif Bassiouni, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at xix-xx (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

This long description of the difficulties faced by the Rome Statute drafters is pertinent because of the emphasis it places on the need for expert commentary as a clarifying device. Although the 1999 *Commentary* is not an official document endorsed by the ICRC, it is called “both timely and useful” by Drafting Committee Chairman Bassiouni.¹³¹ Its usefulness here is that it offers a variant interpretation on the very point for which the *Hadzihasanovic* Appeals Chamber referred to the ICC Statute: the time-frame reference of its command responsibility provision.

The Rome Statute itself in Article 28 follows the arguably erroneous¹³² 1996 International Law Commission Draft Code, including only present and future violations in commanders’ duty to punish, and omitting the retrospective duty established in Protocol I, Article 87.¹³³ However, the commentary, which according to Bassiouni provides useful guidance in the interpretation of the Statute, offers the following gloss on Article 28 (a) element 5, “failure to exercise control properly”:

As reflected in article 87 of First Add. Prot., a commander has a duty to take all practicable measures to ensure his forces comply with international humanitarian law. In particular, the commander must:

- ensure his forces are adequately trained in international humanitarian law,
- ensure that due regard is paid to international humanitarian law in operational decision making,
- ensure an effective reporting system is established so that he or she is informed of incidents when violations of international humanitarian law might have occurred,
- monitor the reporting system to ensure it is effective, and

¹³¹ *Id.* at xx.

¹³² See *supra* notes 89-91 and accompanying text.

¹³³ Protocol I Article 86 and the ILC Draft code require the commander’s knowing a subordinate “was committing or was going to commit” a crime; the Rome Statute uses the same tenses, though in the plural—subordinates “were committing or about to commit” crimes—whereas Article 87 uses the importantly different retrospective language, requiring the commander to know that subordinates “are going to commit or have committed” crimes.

•take corrective action when he or she becomes aware that violations are about to occur *or have occurred*.¹³⁴

Again, one must concede that this language does not explicitly identify a successor-commander situation as one that it means to cover. But under this interpretation, it is at least clear that the *Hadzihasanovic* Appeals Chamber majority were mistaken in concluding that “Under the Rome Statute . . . command responsibility can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so.”¹³⁵

Indeed, the *Hadzihasanovic* problem was anticipated by an NGO observer of the Rome Conference. Beth Van Schaack, writing for Advocacynet in July 1998, warned that the ICC Statute as drafted would “significantly truncate the scope of the doctrine of command responsibility” because “[u]nder the current formulation . . . no liability attaches where the superior did not know that subordinates were about to commit or were committing crimes, but did know later that international crimes ‘had been committed’ and failed to take steps to have them investigated and punished.”¹³⁶ Van Schaack here calls attention to the above-discussed Protocol I language that appears in the International Criminal Tribunal Statutes and numerous military manuals but did not make it into the Rome Statute. Expressing a further concern arising from this same omission, Van Schaack focuses directly on the temporal application problem that arose in *Hadzihasanovic*; she notes that as part of its “step backward,” the Rome Statute as written:

would not reach the superior who takes control of subordinates after international crimes had been committed and fails to punish the perpetrators. . . . This formulation of the doctrine of command responsibility sends the following message: once international crimes are committed by subordinates, the superior can be conveniently “gotten rid of” and no one at the level of command and control will be held liable for the crimes of the subordinates. This loophole combined with the current formulation of Article [33], which allows for the de-

¹³⁴ William J. Fenrick, *Article 28: Responsibility of Commanders and Other Superiors*, in COMMENTARY ON THE ROME STATUTE, *supra* note 130, at 518-19 (emphasis added).

¹³⁵ Interlocutory Appeal, *supra* note 2, ¶ 46.

¹³⁶ Van Schaack, *supra* note 63.

fense of superior orders, creates a lacuna in international criminal responsibility where it did not exist before.¹³⁷

In summary, the statutory evidence used by the *Hadzihasanovic* Appeals Chamber to support its holding against successor commanders' duty to punish is fundamentally flawed. It consists of a significantly incomplete reference to Protocol I (citing only Article 86 but not the crucially complementary Article 87) and two other documents (the ILC Draft Code and the ICC Rome Statute) that appear to spring from the same incomplete reference to the same source. Significantly, both of these documents are modified by commentaries (the Rapporteur's concurrent commentary on the Draft Code; the subsequent expert commentary on the Rome Statute) that restore the retrospective application of Article 87.

b. Case Law

The Appeals Chamber also examined case law in its search for guidance, and the materials discovered there offer similarly weak support for the majority position.

i. Kuntze

The Appeals Chamber considered the *Kuntze* case¹³⁸ from the Nuremberg Control Council No. 10 Tribunal:

[T]his case . . . constitutes an indication that would run contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command over the perpetrator, and that it could certainly not be brought to support the opposite view.¹³⁹

The *Kuntze* case as referenced by the Appeals Chamber includes Kuntze's being charged with responsibility for "alleged mistreatment of Jews and others occurring within the area under Kuntze's command."¹⁴⁰ The Appeals Chamber quotes Tribunal language that asserts that Kuntze's responsibility for unlawful acts is "amply established" because "[i]t is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recur-

¹³⁷ *Id.*

¹³⁸ XI NUREMBERG TRIALS, *supra* note 35, at 1230 (In the matter of the United States v. Wilhelm List, et al.).

¹³⁹ Interlocutory Appeal, *supra* note 2, at ¶ 50.

¹⁴⁰ *Id.*

rence.”¹⁴¹ The Appeals Chamber’s commentary in a footnote points out that:

While it is clear that this judgment recognizes a responsibility for failing to prevent the recurrence of killings after an accused has assumed command, it contains no reference whatsoever to a responsibility for crimes committed prior to the accused’s assumption of command.¹⁴²

It is true that no such reference appears, but that is hardly surprising since all of the unlawful acts with which Kuntze was charged took place after he assumed command. The more significant language in the quoted excerpt is the Tribunal’s holding that “it is quite clear that he acquiesced” in the performance of the unlawful acts—since this directly echoes the Control Council No. 10 *High Command Case*¹⁴³ standard that in order for a commander to be held criminally negligent for failure to properly supervise his subordinates, “it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”¹⁴⁴ Thus the logical inference is that the Control Council No. 10 Tribunal held Kuntze responsible for his *acquiescence* in the unlawful killings, which was revealed by his failure to intervene—but which could also be revealed by a failure to punish known violations that had occurred under a predecessor commander.

ii. von Kuechler/von Leeb

A potentially more useful case from the Control Council No. 10 Tribunal is that of Field Marshal von Kuechler from the *High Command Case*. Von Kuechler was commander of the 18th Army from 1940 to January 1942 when he “took over the command of Army Group North, as successor to Field Marshal von Leeb.”¹⁴⁵ In the *High Command Case*, both von Leeb and von Kuechler were tried on various command responsibility charges. Whereas von Leeb was acquitted on most of the charges against him,¹⁴⁶ von Kuechler was held re-

¹⁴¹ *Id.* at 50 n.65 (citing XI NUREMBERG TRIALS, *supra* note 35, at 1279-80).

¹⁴² *Id.*

¹⁴³ The *High Command Case* is the other famous Control Council No. 10 command responsibility case, along with the von List “Hostage Case” of which *Kuntze* is a part. See *supra* notes 35-38 and accompanying text.

¹⁴⁴ XI NUREMBERG TRIALS, *supra* note 35, at 543-44.

¹⁴⁵ *Id.* at 566.

¹⁴⁶ For example, he was found not guilty of carrying out the Commissar Order which required the murder of Russian political officers because “[h]e did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it.” XI

sponsible for "[i]llegal execution of Red Army soldiers and murder and ill-treatment of prisoners of war" in his command of Army Group North, for violations which occurred over "a wide period of time":

Subsequent to the time that the defendant assumed command of the Army Group North, the record discloses that numerous reports showing such illegal executions were made to his headquarters, covering a wide period of time. These reports must be presumed in substance to have been brought to his attention. In fact, his own testimony indicates he was aware of these reports. There is no evidence tending to show any corrective action on his part. It appears from the evidence therefore that he not only tolerated but approved the execution of these orders.

He must, therefore, be held criminally responsible for the acts committed by his subordinates in their illegal execution of Red Army soldiers and escaped prisoners of war.¹⁴⁷

This pair of cases (von Leeb and von Kuechler) illustrates the importance of the case-by-case evaluation of command-responsibility charges advocated by Major Parks.¹⁴⁸ Crimes against prisoners of war apparently took place within the jurisdiction of Army Group North during the command of von Leeb as well as that of von Kuechler. However, in von Leeb's last months of command, "[a]s General von Leeb was heavily engaged during this period with the initial phases of the siege of Leningrad, a matter he was desperately attempting to conclude before winter, he had neither the authority nor the means of ascertaining what treatment prisoners of war were receiving."¹⁴⁹ Also, "[s]ubordinate units within General von Leeb's command responsible for the handling of prisoners of war were similarly responsible directly to the German High Command."¹⁵⁰ As a result, the Tribunal found that von Leeb "had the right to assume that the officers in command of those [subordinate] units [charged with responsibility] would properly perform the functions that had been

NUREMBERG TRIALS, *supra* note 35, at 557 (quoted in Parks, *supra* note 13, at 45). For "Crimes Against Prisoners of War" he was acquitted because "evidence failed to show von Leeb possessed either knowledge or a duty to know of crimes committed against prisoners of war" because "responsibility for prisoners at that time was in the hands of the quartermaster general." Parks, *supra* note 13, at 45.

¹⁴⁷ XI NUREMBERG TRIALS, *supra* note 35, at 568.

¹⁴⁸ See *supra* text accompanying note 66.

¹⁴⁹ Parks, *supra* note 13, at 46.

¹⁵⁰ *Id.* at 45-46.

entrusted to them.”¹⁵¹ In contrast, when von Kuechler took over command of the Army Group North and demonstrably received numerous reports of ill-treatment of prisoners, his failure to take corrective action was interpreted by the Tribunal as acquiescence that invoked liability for criminal negligence.

Without specific dates to pinpoint the “wide period of time” in which the Army Group North offenses took place, it is not possible to categorically assert that von Kuechler was held responsible for violations that occurred under von Leeb.¹⁵² However, the facts of the two cases invite that interpretation, and explanations in the tribunal’s judgments do not rule it out. More importantly, it is clear that without the *possibility* of holding the successor commander responsible in this case, those violations that occurred while von Leeb was too fully engaged in combat to monitor prisoner-of-war treatment (and therefore did not possess the requisite knowledge to establish liability) would have been beyond the reach of the tribunal—even though they had been acquiesced in and thus encouraged by the successor commander. This illustrates the loophole created by the current wording of the Rome Statute’s Article 28 (absent the interpretive commentary by Fenrick), and which is also allowed for in the Appeals Chamber’s Decision on the Interlocutory Appeal in *Hadzihasanovic*. The loophole should be closed.

iii. *ICTY Judgment, Prosecutor v. Kunarac*

Another useful discussion of the temporal application of command responsibility, this time in case law from the ICTY, emerges from the judgment in the case of Dragoljub Kunarac, who was convicted of torture and rape under both Article 7(1) of the Statute (individual criminal responsibility) and Article 7(3) of the Statute (command responsibility). This decision gives detailed treatment to temporal application of the first element of command responsibility, the existence of a superior/subordinate relationship. It points out that the authority of a superior might be either permanent or temporary or might even be on an ad hoc basis.¹⁵³ The judgment goes on to distin-

¹⁵¹ *Id.* at 46 (citing XI NUREMBERG TRIALS, *supra* note 35, at 558). Parks adds: “The author would qualify this statement with what may be the obvious, as follows: A commander has the right, *within reason*, to assume, etc. What is reasonable under the circumstances would depend on a number of criteria, all of which relate to putting a commander on notice.” *Id.* at 46 n.144. Parks there refers the reader to his list of subjective factors. *See supra* note 66.

¹⁵² Nevertheless, Boelaert-Suominen, *supra* note 37, and Van Schaack, *supra* note 60, do draw that conclusion.

¹⁵³ Trial Chamber Judgment (Prosecutor v. Kunarac), IT-96-23-T & IT-96-23/1-T (ICTY), ¶ 399 (Feb. 22, 2001), <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>.

guish command responsibility of temporary or ad hoc commanders from permanent ones:

To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of the particular individual.¹⁵⁴

Since the court points out that ad hoc or temporary commanders do *not* have responsibility for their temporary subordinates outside the time frame of their actual effective control, the converse is strongly implied: that is, it is reasonable to infer that a commander who takes up a “permanent” command assignment *does* have responsibility for his long-term subordinates outside the time frame of his actual effective control. Otherwise, why would the court specify that “it must be shown that, at the time when the acts charged in the Indictment were committed, [the perpetrators] were under the effective control of the particular individual” particularly in the case of “men who operate under [the superior] on an ad hoc or temporary basis”?¹⁵⁵ This is analogous to situations where commanders have attempted to escape command responsibility on the grounds that they were away from their posts when certain events took place—this argument has not been accepted from a permanent commander.¹⁵⁶

While the presumption of a commander’s knowledge of and therefore of his responsibility for his subordinates’ illegal actions may be rebutted by “a showing of absence from the command at the time of the offense,” still that rebuttal is “temporary in nature, extending only for the period of the absence,” and “[a]ny inaction upon resumption of command raises a presumption of acquiescence, knowledge again being presumed.”¹⁵⁷ If a commander is liable for failure to punish violations that he discovers have taken place during a time when he was temporarily away from his command, it follows logically that he should also be liable for failure to punish violations that he discovers have taken place prior to his assuming command.

Referring again to Parks’ list of “subjective factors,”¹⁵⁸ it is understandable that a commander who has only brief ad hoc control over a

¹⁵⁴ *Id.* at ¶ 399.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Parks, *supra* note 13, at 74 (pointing out that Major General Shigeru Sawada was convicted for executions of prisoners that took place in his absence, since upon his return he acquiesced in the deeds).

¹⁵⁷ *Id.* at 103.

¹⁵⁸ Parks, *supra* note 13, at 90-95; see *supra* text accompanying note 66.

subordinate, but no ongoing superior/subordinate relationship, should not be held responsible for violations by that subordinate in some far removed setting. But a new permanent superior who learns that one or more of his regular subordinates has engaged in violations of the laws of war should be held responsible for punishing or reporting such violations or else held liable for acquiescing in them.

Hence, the discussion of temporal application in *Krnjelac* supports the proposition that a commander who takes up a command where he knows or soon learns that his new subordinates have already committed violations of the laws of war has an affirmative duty to take appropriate penal or disciplinary action—and that his failure to do so amounts to acquiescence in the violations, resulting in his own criminal liability.

iv. Kordic & Cerkez

Among the ICTY cases which have discussed command responsibility (or superior responsibility, using the term that more clearly includes civilian as well as military superiors), another case including comments useful to this discussion is *Prosecutor v. Kordic & Cerkez*, in which the charges “relate, inter alia, to the persecution, killing, inhuman treatment and unlawful imprisonment of Bosnian Muslims,” both on the defendants’ individual responsibility and in their capacity as superiors. In this judgment, the Trial Chamber determined that:

The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.¹⁵⁹

Importantly, the Trial Chamber in this judgment refers to the ICRC Commentary on Protocol I, Article 87, thus confirming that document’s endorsement of successor commanders’ (or superiors’) duty to punish.

The force of this point has been partly conceded even by the defense in *Hadzihasanovic*, as noted in Judge Shahabuddeen’s partial dissenting opinion. In a Response to the Prosecution’s Brief, the defense noted that:

¹⁵⁹ Trial Chamber Judgement (*Prosecutor v. Kordic*), IT-95-14/2-T (ICTY), ¶ 446 (Feb. 26, 2001), <http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf> (citing COMMENTARY, *supra* note 11, at 1022, ¶ 3562).

[T]he *obiter* from the *Kordic* Judgement is partly right. A commander cannot turn a blind eye, if he finds out that a violation was committed by a subordinate before he assumed command. If he fails to punish this subordinate, the commander may be individually responsible for an offence, but not pursuant to the doctrine of command responsibility as he had no responsibility towards the perpetrator when the offence was committed.¹⁶⁰

As Judge Shahabuddeen notes, "it is difficult to isolate the specific branch of [international criminal] law which imposes criminal responsibility [in such a case] if it is not command responsibility."¹⁶¹

v. *Dissents in Hadzihasanovic*

The separate and dissenting opinions of Judge Hunt and Judge Shahabuddeen in the *Hadzihasanovic* case are well argued and well illustrated. Judge Hunt maintains that successor commanders' duty to punish "reasonably falls within" the customary international law principle of command criminal responsibility and that denial of its enforcement undermines the Vienna Convention on Treaties principle that documents should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in the light of [the document's] object and purpose."¹⁶² Judge Shahabuddeen concludes that denial of successor commanders' duty to punish is "at odds with the idea of responsible command on which the principle of command responsibility rests."¹⁶³ As Professor Theodor Meron (now Judge Meron, coincidentally a member of the *Hadzihasanovic* Appeals Chamber majority) has written about an earlier ICTY case, "the narrowness of the majority (three to two) and the cogency of [the] dissent may suggest that the jury is still out on this question."¹⁶⁴ One may hope that the *Hadzihasanovic* Interlocutory Appeal Decision will be one of those decisions that appear occasion-

¹⁶⁰ Partial Dissenting Opinion of Judge Shahabuddeen (Prosecutor v. Hadzihasanovic), IT-01-47 (ICTY), ¶ 36 (July 16, 2003), <http://www.un.org/icty/hadzihas/appeal/decision-e/030716do.htm#33> (regarding Interlocutory Appeal, *supra* note 2) [hereinafter Shahabuddeen].

¹⁶¹ *Id.* at ¶ 37.

¹⁶² Hunt, *supra* note 112, at ¶¶ 8, 22.

¹⁶³ Shahabuddeen, *supra* note 160, at ¶ 14.

¹⁶⁴ THEODOR MERON, WAR CRIMES LAW COMES OF AGE 89 (1998) (referring to *Prosecutor v. Erdemovic* in which an Appeals Chamber judgement ruled "that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or . . . killing of innocent human beings." Appeals Chamber Judgement (Prosecutor v. Erdemovic), IT-96-22-A (ICTY), ¶ 19 (Oct. 7, 1997), <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.pdf>).

ally in legal history where the dissent ultimately becomes the accepted view.

3. *Other Criminal Law Concerns: Imputed Responsibility*

In addition to the fair notice issue, which essentially rests on the interpretation of customary international law discussed above, two other concerns from the general criminal law perspective should be addressed—the question of imputed responsibility and the principle that doubtful interpretations should be decided in favor of the accused.

As indicated by the foregoing discussion, the task of the International Tribunals in applying command responsibility doctrine is complex:

The action required depends on when the superior knew or should have known about the crime. A person who has the authority and the opportunity to prevent a crime and fails to do so is to some extent responsible for the fact that the crime occurred. Similarly, a person who learns that a subordinate has committed a crime and fails to take measures to punish the perpetrator is not only condoning the crime committed but also sending a signal that such crimes can be committed with impunity, thereby encouraging rather than deterring the commission of additional crimes in the future. In such circumstances, the superior's failure to act may be viewed as contributing to the commission of the crime or as implicating the superior in the crime by conferring impunity on the perpetrator. It will be for the International Tribunal to determine the degree of culpability of a superior for a crime committed by a subordinate in light of the facts and circumstances of the case and bearing in mind the exceptional nature of this basis for individual criminal responsibility.¹⁶⁵

By "exceptional nature of this basis for individual criminal responsibility,"¹⁶⁶ the comment above seems to suggest what may seem facially implied, that command responsibility amounts to "imputed liability" of the commander for the deeds of his subordinates. However, this theory has been rejected by tribunals since the post-World War II era. Although some commentators have suggested that the *Yamashita* trial actually imposed vicarious liability (a discussion this

¹⁶⁵ 1 MORRIS & SCHARF, *supra* note 81, at 100-01.

¹⁶⁶ *Id.*

Note will not pursue), every comment since that time has “refused to accept the vicarious responsibility or strict liability theory.”¹⁶⁷ Instead, command responsibility is seen as a crime of omission, in which the commander fails to control his subordinates when under a duty to do so. It does not, as Judge Shahabuddeen notes, make the commander “guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*.”¹⁶⁸ Rather, it holds the commander “guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so.”¹⁶⁹ Or, as the Preparatory Committee for the ICC Statute put it, regarding Article 28 (Draft article 25): “[t]his language is directly drawn from the Geneva Protocol [Protocol I] and recognizes that command culpability is based on the failure to fulfill an official duty and is not an imputation of liability for the acts of subordinates.”¹⁷⁰

In further clarification, the unofficial commentary on Article 28 of the ICC Rome Statute explains that “[t]o a degree, the doctrine of command responsibility might be regarded as a special form of accomplice liability applicable to military commanders held criminally liable for a failure to act.”¹⁷¹ A clearer definition of this “special form” of liability may be one strategy for closing the current loophole.¹⁷²

4. Criminal-Law Uncertainty to be Resolved in Favor of the Accused

Another criminal law issue that should be addressed is the principle that where questions of law cannot be clearly resolved on other grounds, they should be decided in favor of the accused. Judge Shahabuddeen also deals with this question:

[T]he interlocutory appeal pleads that “[u]ncertainty in the law must be interpreted in favour of the accused.” As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal pro-

¹⁶⁷ Parks, *supra* note 13, at 72, 103.

¹⁶⁸ Shahabuddeen, *supra* note 160, ¶ 32.

¹⁶⁹ *Id.*

¹⁷⁰ Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 8.2 TULSA J. COMP. & INT’L L. 1, 86 (2001) (citing *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 25, n. 12 A/Conf. 183/Add.1 (1998), reprinted in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 142 (M. Cherif Bassiouni ed., 1998)).

¹⁷¹ Fenrick, *supra* note 134, at 517.

¹⁷² See discussion *infra* note 197 (regarding suggestions by Bing Bing Jia).

ceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method. The selection of the method in this case is governed by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. It is only if the application of the method of interpretation prescribed by the Convention results in a doubt which cannot be resolved by recourse to the provisions of the Convention itself—an unlikely proposition—that the maxim applies so as to prefer the meaning which is more favourable to the accused. In my view, that is not the position here: there is no residual doubt.¹⁷³

Since the issue of successor commanders' duty to punish is likely to arise repeatedly in future cases before international criminal tribunals, the best course would be to resolve the statutory confusion that has resulted from the partial scrambling of Protocol I. A clear and explicit definition of successor commanders' duty to punish would confirm Judge Shahabuddeen's position of "no residual doubt."

*C. Commentaries by Publicists in International Humanitarian Law
Supporting the Closing of this Loophole*

The writings of prominent publicists are another traditional source of customary international law. In the context of multiple international tribunals dealing with atrocities committed in various conflicts during the late twentieth century, many publicists have commented on command responsibility. Several have expressed concern that narrow application of command responsibility doctrine will perpetuate a "culture of impunity" that allows combatants to consider atrocities a viable option and an effective way to achieve their goals.

One such concern is expressed by Professor Jordan Paust, in a comment on the ICC Rome Statute:

One problem is that Article 28(1)(a) addresses circumstances where subordinates "were committing or about to commit" crimes, but does not expressly include the circumstance also addressable under customary international law where a superior knew or should have known that crimes had already been committed and the superior fails to take needed corrective action within his or her power. Perhaps the next paragraph, addressing, for example, failures to "repress their commission

¹⁷³ Shahabuddeen, *supra* note 160, ¶ 12.

or to submit the matter to the competent authorities for investigation and prosecution,” when coupled with customary international law as an interpretive background, will assure adequate coverage.¹⁷⁴

Such “adequate coverage,” against the interpretive background of customary international law should, then, include the enforcement of successor commanders’ duty to punish.

While comments specifically focused on the temporal application of command responsibility doctrine are not plentiful, those that have been made are reinforced by a wide range of commentaries advocating broad and persistent reinforcement of command responsibility. Professor Ilias Bantekas of the Westminster University School of Law has discussed the doctrine in general, asserting that “Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR Statute, Article 86(2) of Geneva Protocol I and Article 28(1)(a) of the ICC Statute firmly establish the existence of a duty to prevent and a duty to punish the crimes of subordinate persons.”¹⁷⁵ Bantekas goes on to advocate the enforcement of successor commanders’ duty to punish, explaining its rationale in some detail:

A superior’s “duty to punish” arises after the commission of an offense. It is predicated upon offenses by others which have already occurred, not future offenses. Punishment is, therefore, intended to deter the commission of future offenses. . . . The duty to punish does not require a pre-existing relationship to those who perpetrated the offenses, as this would have been part of the incumbent superior’s preventive duty at the time the offenses occurred. Thus even persons who assume command after such offenses have taken place are under a duty to investigate and punish the offenders. . . . Tolerating criminal conduct, as evidenced by the failure to punish, is tantamount to acquiescence.¹⁷⁶

Professor Matthew Lippman points out that “[c]ommand culpability is designed to encourage military commanders and civilian superi-

¹⁷⁴ Jordan J. Paust, *Content and Contours of Genocide, Crimes Against Humanity, and War Crimes*, in *INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI* 289, 305 (Sienho Yee & Wang Tieya eds., 2001) (citing Protocol I, the Vienna Convention on the Law of Treaties and the Rome Statute Art. 21 (1)(b) and (3)).

¹⁷⁵ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L L. 573, 591 (1999).

¹⁷⁶ *Id.* at 592.

ors to fulfill their legal duty to control the conduct of combatants.”¹⁷⁷ This is important for many reasons. Payam Akhavan concludes that “[b]eyond retribution and the moral impulse to vindicate humanitarian norms, individual accountability for massive crimes is an essential part of a preventive strategy and, thus, a realistic foundation for a lasting peace.”¹⁷⁸ One reason why this is true is that “[a] post conflict culture of justice . . . makes moral credibility a valuable political asset for victim groups, rendering vengeance less tempting and more costly.”¹⁷⁹ In the current climate of increased attempts to enforce command responsibility, “[t]here is at least modest anecdotal evidence to suggest that some individual actors in the former Yugoslavia have adhered more closely to the requirements of international humanitarian law than they would have otherwise, for fear of prosecution.”¹⁸⁰ This is in contrast to a 1993 report that “in response to a rebellion by Serbian troops, . . . Karadzic promised officers that if they returned they would not be punished for their roles in war crimes.”¹⁸¹ On the hopeful assumption that such progress is in fact being made, the international legal community should continue to accumulate precedents of accountability, not truncating but rather giving full force to customary international law in order to “serve notice on all personnel in command that . . . should they choose not to enforce energetically the law of war, they do so at their own peril.”¹⁸²

III. POSSIBLE REMEDIES FOR THE LOOPHOLE

Given, however, that two important recent documents (the ICC Rome Statute and the *Hadzihasanovic* Appeal Decision) have registered opposition to the enforcement of successor commander duty to punish, what available remedies are most likely to reverse the troubling drift toward allowing impunity in this admittedly narrow territory of international humanitarian law?

¹⁷⁷ Lippman, *supra* note 170, at 90.

¹⁷⁸ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 10 (2001).

¹⁷⁹ *Id.* at 7.

¹⁸⁰ David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 475 (1999-2000).

¹⁸¹ Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 231-32 (1994-1995).

¹⁸² LAEL, *supra* note 12, at 142.

A. Hadzihasanovic Appeals Decision: *Could be Overruled by a Subsequent Decision*¹⁸³

The *Hadzihasanovic* Appeals Chamber decision could conceivably be overruled in a subsequent decision, since the cases that may reach the Appeals Chamber from the former Yugoslavia and from Rwanda could very well include further instances of successor commanders' failure to punish their subordinates' violations of the laws of war. Would such an overruling give rise to a prospective/retroactive application problem, or charges of judicial activism?

The question of prospective overruling versus retroactive application of judicial decisions has been discussed since early in the history of the common law. The historical argument for retroactivity, dating back to Blackstone, is that judges do not "pronounce a new law, but [rather] maintain and expound the old one."¹⁸⁴ According to that theory, "if it be found that [a] former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as had been erroneously determined."¹⁸⁵

Thus the practice of retroactive overruling was meant to minimize the impression of judicial law-making, since judges were said not to be *making* law at all, but only explaining it. However, in criminal law it has been pointed out that "problems might . . . be presented . . . by retroactive application of an overruling decision which reinterprets a criminal statute and, in effect, announces the 'creation of a judicial crime.'"¹⁸⁶ Application of the overruling decision to acts done during the intervening period might thus violate the defendant's right to fair notice.¹⁸⁷ Other objections raised to retroactive overruling have been that it could unfairly surprise persons who had justifiably relied upon previous decisions, that the latter problem might inhibit judges from overruling outmoded precedents, and that the retroactivity policy itself might actually misrepresent the "lawcreating function" claimed by Legal Realists.¹⁸⁸ Thus some judges, among them Justice Cardozo, have advocated prospective overruling on the following grounds:

¹⁸³ The *Hadzihasanovic* case is going forward with an indictment amended to reflect the Appeals Chamber decision.

¹⁸⁴ Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L. J. 907, 907 (1961-1962) (quoting 1 BLACKSTONE, COMMENTARIES 69 (1769)) [hereinafter *Prospective Overruling*].

¹⁸⁵ *Id.* at 908 (quoting 1 BLACKSTONE, COMMENTARIES 68-71 (1769)).

¹⁸⁶ *Id.* at 910 (citing *James v. United States*, 366 U.S. 213, 224 (1961)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 910-11.

The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the [judicial] repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril.¹⁸⁹

Differing approaches to the question of prospective or retrospective application of overrulings have been taken, depending on the events involved and the judicial philosophies advocated. In the case of *Great Northern Railway v. Sunburst Oil & Refining Co.*, Justice Cardozo writing for the Supreme Court declared that for purposes of United States law, "the federal constitution has no voice upon the subject" of prospective overruling.¹⁹⁰

In the case of the ad hoc Criminal Tribunals, neither prospective nor retrospective overruling of this interpretation could clearly be argued to be unfair to the litigants, since the tribunals are established with the assumption that they will be applying customary international law as it existed at the time of the Statutes' creation—perhaps with a conceded element of judicial lawmaking, according to Bassiouni's assessment noted above. In principle, however, the Judges are clearly intending to follow Blackstone's theory of explaining rather than creating the law. The element of unfair surprise is unlikely to be significant because "in a great many cases . . . the parties will have acted without any knowledge at all of what the governing law was."¹⁹¹ As one venerable commentator has suggested, "[p]ractically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all ex post facto."¹⁹² Ideally, all of the litigants in command responsibility cases would be so well grounded in military tradition that their awareness of their duty would not be a serious question. In practice, an overruling of this decision would not result in a retrying of Kubura; the indictment against him has been amended to reflect the outcome of the appeal,¹⁹³ and the trial will go forward on that basis. But it should be possible for other commanders

¹⁸⁹ *Id.* at 912 (quoting Cardozo, *Address Before N.Y. State Bar Association*, 55 REP. N.Y. STATE BAR ASS'N. 263, 296 (1932)).

¹⁹⁰ *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932); *see also Prospective Overruling*, *supra* note 184, at 922.

¹⁹¹ *Prospective Overruling*, *supra* note 184, at 945.

¹⁹² *Id.* at 946 (quoting JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 100 (2d ed. 1921)).

¹⁹³ Third Amended Indictment (Prosecutor v. Hadzihasanovic), IT-01-47-PT (ICTY) (Sept. 26, 2003), <http://www.un.org/icty/indictment/english/had-3ai030926e.htm>.

accused of failure to punish predecessor-commander violations to be held responsible for that failure, since a reinterpretation would (as Blackstone suggested) be a declaration not that customary international law has been changed, but only that it was misrepresented in the *Hadzihasanovic* Interlocutory Appeal Decision.

B. ICC Rome Statute Clarification

The International Criminal Court is meant to be in place for the trial of any international criminal case in which the domestic court concerned is unwilling or unable to hold a fair trial. The intention is that in case of future problems analogous to (though one hopes less extensive than) those in the former Yugoslavia or Rwanda, the legal establishment for criminal prosecutions would already be in place and the difficult process of establishing ad hoc tribunals would be obviated. Cases can be brought before it by any of the States parties to the Court or by the Prosecutor with the approval of a three-judge preliminary panel.

As indicated by the comments of Bassiouni in his Preface to the Commentary on the Rome Statute¹⁹⁴ there were many difficulties in the formulation of the Statute at the Rome Conference, and many political negotiations and compromises added to the considerable logistical challenges to produce a Statute that, while admirable in many ways, still is open to improvement. Jelena Pejic, a Lawyers' Committee for Human Rights participant at the Rome Conference, has noted that "NGO support [for the Statute at the Rome Conference] was based on . . . a determination to work to improve the ICC Statute in the years ahead."¹⁹⁵ It is therefore hoped that the language of the command responsibility segment of the ICC Statute can be brought into line with the Protocol I language that, according to the ICC Statute's Commentary, the Statute is meant to reflect. Some NGO representatives have expressed concern over the weaker knowledge standard for civilian superiors, which was probably a major source of negotiation and compromise;¹⁹⁶ but the temporal application element, which does appear to have been pre-established in Protocol I and which the Commentary suggests that the Statute ought to follow, should be adjusted to prevent future tribunals from repeating the interpretation of the *Hadzihasanovic* Appeals Chamber.

¹⁹⁴ See *supra* note 130 and accompanying text.

¹⁹⁵ Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 INT'L LAW. 65, 69 (2000).

¹⁹⁶ See, e.g., Van Schaack, *supra* note 63.

A form that such revision might take is suggested by an analysis of the problem by Bing Bing Jia, Legal Officer of the ICTY Chambers:

It is obviously difficult to punish a commander as an accomplice if he came to the troops after a war crime had been perpetrated by them, in which crime he had no role whatsoever, thus being unable to prevent its commission in any way. On the other hand, . . . it does make sense that the successor commander may incur liability if he failed to repress the crime by punishing the offenders, thus preventing a recurrence. His failure in this situation may produce the result of concealment of the crime, thus assisting the culprits in avoiding penal sanction. His subordinate could take his failure as implied approval of the deed. For this case, it may be possible to say that the assisting person ('accessory after the fact' in common law) should normally be subject to a lesser penalty than the principal(s), as is the case in certain systems of domestic law.¹⁹⁷

Although amending the Statute itself would be difficult because of built-in safeguards to its stability, subsidiary documents such as the Elements of the Crimes could more easily incorporate a definition of successor commanders' failure to punish as an offense of accessory after the fact.

C. General Influence of U.N. Bodies on International Law

Although it is somewhat unlikely, in the interest of continuing the worldwide effort to eliminate impunity for war crimes a Security Council or General Assembly Resolution on the subject of successor commanders' duty to punish could be introduced. Such a resolution would not be binding on tribunals, but would be evidence of customary international law that could be influential in future decisions in this still formative area of law. A Resolution of this type following the first Persian Gulf War established important principles of environmental protection as part of international criminal law.¹⁹⁸ A strat-

¹⁹⁷ Bing Bing Jia, *The Doctrine of Command Responsibility: Current Problems* 2 Yearbook Int'l. Humanitarian Law 131, 161-162 (2000) (citing P. Saland, 'International Criminal Law Principles,' THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 204 (Roy Lee, ed.) (1999)).

¹⁹⁸ Stephanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT'L L. 165, 166 (1992) (citing U.N. GAOR 6th Comm., 46th Sess., U.N. Doc. GA/L/2707 (1991)).

egy to end impunity for human rights violations might attract enough interest to spur a similar Resolution in its support.

D. Military Establishment Adjustments

In line with Major Eckhardt's Vietnam-era suggestion, military organizations could increase the level of training, and raise the level of observance of the traditional military value of protection of the weak and unarmed, possibly in some ways a higher standard than can be imposed from outside. This solution would seem to be practicable in the case of military professionals, for whom as General MacArthur declared, respect for the laws of war is an essential part of their code:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice.¹⁹⁹

An appeal to the honorable tradition of fighting men might be less clearly applicable to the non-professional combatants who now carry on so many extended conflicts than it was to the members of MacArthur's sacred cult. But even so, spreading the word that atrocities will ultimately be punished may help to prevent some of them from being committed.

IV. CONCLUSION

An examination of the history, documentation, and current status of command responsibility doctrine shows that steps are needed to ensure and clarify the enforcement of successor commanders' duty to punish their subordinates' violations of international humanitarian law. It is certainly true that the rights of individuals, both victims and defendants, should be guarded by the rule of law. However, Professor Jordan Paust has pointed out that customary international law, if applied "without extra limitations not found in customary international law," can be administered by international tribunals in such a way as "to avoid problems connected with 'the principle *nullem crimen sine lege*.'"²⁰⁰ If this is done, Paust's fear that "[t]he prohibition

¹⁹⁹ LAEL, *supra* note 12, at 118 (quoting MacArthur's review of the *Yamashita* judgment).

²⁰⁰ Jordan Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547, 554 (1994-1995).

of crimes against humanity is in danger of being whittled away by newly invented and restrictive definitions”²⁰¹ may be averted. Professor Lippman has asserted that “[m]issing from the jurisprudence of command responsibility is the moral dimension. The legal niceties divert attention from the question of whether there is an ethical imperative or privilege to intervene to prevent war crimes”²⁰² Clearly there is such an ethical imperative, and it is recognized by many commentators, both military and legal. That principle supports enforcement of successor commanders’ duty to punish; the international humanitarian law community should therefore take steps to close the current loophole through which individuals who should be held responsible can now escape that enforcement.

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²⁰¹ *Id.* at 547.

²⁰² Lippman, *supra* note 170, at 93.

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