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CONFIDENTIAL

MEMORANDUM FOR THE LEGAL ADVISOR TO THE CHAMBERS OF THE ICTR

ISSUE: COMMAND RESPONSIBILITY FOR FAILURE TO PUNISH WAR CRIMES COMMITTED UNDER A PREDECESSOR COMMANDER

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I. Introduction and Summary of Conclusions*

A. Issue

This memorandum explores whether customary international law supports the assignment to a present commander of criminal responsibility for failure to punish his subordinates when he knows they have committed war crimes under a predecessor commander. The first part of the memorandum examines the historical development of the doctrine of command responsibility, focussing on the problem of command culpability and defining the elements its proof requires. The second part of the memorandum considers the historical fluctuations in standards applied in the punishment of command culpability, mainly over the course of the twentieth century. The third part of the memorandum surveys various relevant conventions and protocols, judgments, and scholarly commentary for references which may illuminate the issue of temporal application. Particular attention is paid to recently increasing suggestions that broader temporal application better serves the underlying purpose of the doctrine.

B. Summary of Conclusions

(1) Proving command culpability requires the establishment of the commander's effective authority, knowledge, and failure to act. When these elements must exist has seldom been clearly addressed.

The concept of command responsibility is found in writings about the conduct of warfare from the earliest to the most recent times.[1] The broad concept comprises both the

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- Issue: In view of the ICTY/ICTR Appeals Chamber's July 2003 "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility" in *Prosecutor v. Hadzihasanovic, Alagic, and Kubura, is* there support in customary international law (or alternatively in conventions, general principles of law, judicial decisions and writings of eminent commentators) for the proposition that a military commander is criminally responsible for failing to punish subordinates for crimes which he knows they committed under a predecessor commander?

[1] Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV.1, 2-20 (1973). [Reproduced in the accompanying notebook at Tab 31.]

commander's responsibility to ensure that his troops perform their tasks effectively and his responsibility to ensure observation of the laws of war. The latter responsibility has both direct and indirect facets: directly, the commander must not order his troops to perform acts which would violate the laws of war; but the indirect facet requires that he also must not tolerate or acquiesce in any violations his troops may commit, by failing to prevent or halt such violations where he can, or to punish them if he learns of the violations too late to prevent or halt them. This memorandum is concerned with the last-described responsibility—that is, with the principle that a commander who fails to prevent, halt, or punish law-of-war violations by his troops becomes personally liable for those violations—a principle sometimes referred to as command culpability. In twentieth-century tribunals it has become established that three elements must be proven to assign command culpability: a) the existence of an effective superior/subordinate relationship; b) knowledge by the superior of the subordinate's violation of the law of war; and c) failure by the superior to prevent, halt, or punish the violation. Definitions and temporal applications of these elements have not been clearly settled, but the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognizes

> that a superior may incur criminal responsibility for a crime committed by one of his subordinates if two criteria are met. First, the superior must have known or had reason to know that his subordinate was about to commit or had committed a crime. … Second, the superior must have failed: (1) to take the necessary and reasonable measures available at the time to prevent the subordinate from committing, the crime, (2) to stop the subordinate engaged in criminal activity, or (3) to punish the subordinate for the crime and thus deter other criminal activity.[2]

(2) Twentieth-century trials applied varying standards in the enforcement of the elements of command culpability. Standards are still in flux, with attention to case-by-case facts being an important determinant of outcomes.

[2] VIRGINIA MORRIS AND MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, 100-101. (INSIDER'S GUIDE) [Relevant excerpts reproduced in the accompanying notebook at Tab 9]

Beginning with some nineteenth-century cases, but especially since World War I, attempts have been made to articulate and codify standards for command culpability. Standards have varied from virtually strict liability, where de jure authority without more appears to have been dispositive, to a very strict actual knowledge standard, where even the commander's presence at the scene of violations did not suffice to establish responsibility.[3] Variations remain among recently negotiated codifications of the principle.[4] 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.[5]

(3) Statutory analysis, case histories, policy, and scholarly commentary favor a broad temporal application of the elements of command culpability. This is particularly important regarding failure to punish—since narrow temporal application can leave accountability gaps which result in impunity and encourage further violations.

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[3] Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 8.2 TULSA J. COMP. & INTL. L. 1, 91-92 (2001). [Reproduced in the accompanying notebook at Tab 28.]

[4] The Statutes of the ICTY and ICTR have the same language on this issue, but their provisions differ from that in the Rome Statute of the International Criminal Court. This difference will be discussed below.

[5] 1 INSIDER'S GUIDE , *supra* note 2 at 100-101. [Reproduced in the accompanying notebook at Tab 9.]

Most codifications of command culpability include language which encompasses not only present and future, but also past violations in the scope of a commander's responsibility for supervising his troops.[6] Case histories have not explicitly addressed time frame, but analysis of the relation between fact patterns and judgments reveals that broad applications have been put into effect. Such broad application is consistent with the underlying policy goal of command culpability, which is to protect civilian populations from atrocities committed by military personnel. Scholarly commentary has pointed out this consistency, and the importance of maintaining international standards on this issue in times when the criminal results of so many military conflicts are being brought to internationally-operated tribunals.

II. Background

This section will frame the issue in contemporary terms, and then survey the historical development of the elements and standards of command responsibility doctrine. It will lay the foundation for the later assertion that contemporary command responsibility doctrine should clarify a broad temporal application of the responsibility to punish as a logical projection from historical precedents.

A. Factual Background

The issue explored in this memo arises from a case before the International Criminal Tribunal for the Former Yugoslavia. In an amended indictment against Amir Kubura, the Prosecutor charges Kubura with being "criminally responsible in relation to … crimes that were committed by troops of the AbiH 3rd Corps 7th Muslim Mountain Brigade prior to his assignment

[6] Typical is the ICTY/ICTR wording, which holds commanders responsible if they were involved in "planning, preparation or execution" of a crime, or if they "knew or had reason to know that [a] subordinate was about to commit such acts or had done so…. " Statute of the ICTY, Article 7; Statute of the ICTR, Article 6. [Reproduced in the accompanying notebook at Tab 5 and 6]

[as substitute Commander] on 1 April 1993."[7] Since Kubura became Chief of Staff in the Brigade in question on 1 January 1993[8], the prosecution argued that "Amir Kubura knew or had reason to know about these crimes. After he assumed command, he was under the duty to punish the perpetrators."[9]

Counsel for the defendants filed a motion challenging the Tribunal's jurisdiction in the case on several grounds, including the nature of the conflict (internal or international) in which the alleged offenses occurred, and the temporal application of command responsibility doctrine. The Trial Chamber held that customary international law does apply command responsibility doctrine in both internal and international armed conflicts, and that "in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command."[10] In the appeal of that decision, the Appeals Chamber unanimously dismissed the appeal insofar as it related to the internal nature of the conflict. But the Appeals Chamber by a 3-2 majority allowed the appeal as it challenged the application of command responsibility doctrine to the duty to punish perpetrators of crimes committed before the superior/subordinate relationship existed.[11]

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[7] *Prosecutor v. Hadzihasanovic, Alagic, and Kubura, Caae IT-01-47-AR72 (Hadzihasanovic et al.*), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 15. (Decision on Appeal)(16 July 2003). [Reproduced in the accompanying notebook at Tab 16.]

[8] *Prosecutor v. Hadzihasanovic et al*, IT-01-47 (ICTY 2002-2003) Indictment, 8. [Reproduced in the accompanying notebook at Tab 16.]

[9] *Prosecutor v. Hadzihasanovic et al.*,IT-01-47 (ICTY 2002-2003)Amended Indictment, para. 58. Quoted in Decision on Appeal at 15. [Reproduced in the accompanying notebook at Tab 16.]

[10] *Prosecutor v. Hadzihasanovic et al.*,IT-01-47 (ICTY 2002-2003) Decision pursuant to Rule 72(E) as to Validity of Appeal (21 February 2003). Quoted in Decision on Appeal at 3. [Reproduced in the accompanying notebook at Tab 16.]

[11] *Prosecutor v. Hadzihasanovic et al.*,IT-01-47 (ICTY 2002-2003), Decision on Appeal at 15-25. [Reproduced in the accompanying notebook at Tab 16.]

This memorandum joins the dissenting Appeals Chamber judges in arguing that although previous judicial holdings do not establish clear precedent, the historical development of command responsibility doctrine along with the language of international instruments and the writings of eminent commentators supports the Trial Chamber's view that command responsibility doctrine should encompass a duty to punish known violations committed under a predecessor commander.

B. Historical Background

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, "When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general."[12] Sun Tzu's attention was focused on the importance of effective command to the success of the military mission—the first and most obvious prong of command responsibility. But in a demonstration of his theory, when officers failed to discipline their troops Sun Tzu declared them at fault and had them beheaded--after which the troops performed faultlessly under newly appointed officers.[13] Thus even this earliest example sets a precedent of officers' being punished for their failure to punish their subordinates.

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 which set out a strong policy of command responsibility including a clear duty to punish:

[12] S. TZU, THE ART OF WAR 125 (S. Griffith transl. 1963). Quoted in Parks, supra note 1, at 3. [Reproduced in the accompanying notebook at Tab 31.]

[13] *Id.* at 4.

> 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.[14]

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." Hagenbach was held to have had a duty to prevent such crimes; convicted of failing to do so, he was deprived of his knighthood and executed.[15]

In the seventeenth century, Grotius declared that "a community, or its rulers, may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it."[16] Grotius thus places the responsibility for preventing violations of law on "a community, or its rulers," and this general responsibility of rulers is also carried forward into contemporary international law. But the more specific duty to punish law-of-war violations after they have occurred continues to be assigned to military commanders. Another early

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[14] L.C. Green, *Command Responsibility in International Law*, 5 TRANSNAT'L. L. & CONTEMP. PROBS 319, 321. (citation omitted) . [Reproduced in the accompanying notebook at Tab 25.]

[15] Waldemar A. Solf, *A Response to Telford Taylor's* Nuremberg and Vietnam: an American Tragedy, 5 AKRON L. REV. 43, 65 (1972). [Reproduced in the accompanying notebook at Tab 35.];and Jordan Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99, 112 (1972). Quoted in Parks, supra note 1, at 4-5. [Reproduced in the accompanying notebook at Tab 31.]

[16] II GROTIUS, DE JURE BELLI AC PACIS 523 (C. E. I. P. ed, Kelsy transl., 1925) Quoted in Parks, supra note 1, at 4. [Reproduced in the accompanying notebook at Tab 31.]

codification of this principle of indirect command responsibility (duty not only to avoid giving illegal orders, but also 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.[17]

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; and the penalty for refusal or omission to perform this duty was to be punishment "as if he himself had committed the crimes … ." Acceptance of this responsibility is part of the commander's duty, and his failure to halt, prevent, or punish violations is treated both as a breach of duty and as acquiescence in the crimes.

C. Development of Elements of Command Culpability

By the late nineteenth century, WilliamWinthrop had undertaken an authoritative commentary on *Military Law and Precedents* in which 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

[17] Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775. Quoted in Parks, supra note 1, at 5. [Reproduced in the accompanying notebook at Tab 31.]

commanders in occupying or passing through towns or villages of the enemy's country."[18] Winthrop wrote in the aftermath of the American Civil War. 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.[19] Article 71 of the Lieber Code did, however, provide the death penalty for anyone who intentionally mistreated a wounded enemy, however, or for "whoever … orders or encourages soldiers to do so."[20] Also, the Union government did try enemy commanders for crimes of omission which occurred during the war. For example, Captain Henry Wirz was held responsible apparently not only for his own "direct acts of cruelty and murder" but also for failure to alleviate inhuman conditions at the Andersonville, Georgia prison camp where he was in charge.[21] Although Wirz protested that he had tried unsuccessfully to improve the food, shelter, and health care conditions at the prison (and there was some evidence that he had made efforts to do so), the court held him to a strict liability standard; he was determined to have presided over a camp whose conditions contravened the international law of war, and was executed.[22] The strict liability standard is, obviously, the harshest available, and it has been questioned whether the Wirz conviction was

[18] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 779 (2nd ed. 1920). [Reproduced in the accompanying notebook at Tab 12.]

[19] Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century—A Century of Evolution*, 10 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW 4, para. 10 (March 2003), found at http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101_text.html. [Reproduced in the accompanying notebook at Tab 26.]

[20] Instructins for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the Lieber Code), Article 71. [Reproduced in the accompanying notebook at Tab 1.]

[21] Lippman, supra note 3, at 2. [Reproduced in the accompanying notebook at Tab 28.]

[22] *The Trial of Captain Henry Wirz for Conspiracy and Murder, Washington D. C. , 1865, in* VII AMERICAN STATE TRIALS 657 (John D. Lawson ed. 1917). Quoted in Lippman, supra note 3 at 2-3. [Reproduced in the accompanying notebook at Tab 28.]

more "victor's justice" than international humanitarian justice.[23] For purposes of tracing the development of indirect command responsibility, however, the Wirz case is only partially relevant. Wirz was held responsible for acts of omission rather than commission; but he was not specifically assigned imputed responsibility for acts of subordinates whose behavior he should have controlled.

Slightly later in time the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, in "the first modern attempt to codify what could be described as the laws of war," established a "basic skeleton of international humanitarian law." Article 3 of this Convention provided 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."[24] Like the seventeenth-century assertion by Grotius,[25] this provision allocated command culpability to the belligerent state rather than to individual commanders, but because of its formalization in a multilateral Convention it was a step toward an international standard for allocation of responsibility to redress violations of the laws of war.

The next very large step toward establishing the parameters of international command responsibility enforcement was made by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties appointed by the Preliminary Peace Conference at the close of World War I.[26] This Commission proposed that "individuals responsible for …

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[23] Lippman, supra note 3, at 4. [Reproduced in the accompanying notebook at Tab 28.]

[24] Hendin, *supra* note 19 at para. 13.[Reproduced in the accompanying notebook at Tab 26.]

[25] GROTIUS, *supra* note 7.

[26] *Commission on the Responsibility of the Authors of the War an on Enforcement of Penalties (March 29, 1919),* 14 AM. J. INT'L. L.. 95 (1920) (*Commission on the Responsibility).* [Reproduced in the accompanying notebook at Tab 22.]

atrocities should be subject to criminal prosecution, regardless of rank or status."[27] It also specified that individuals would be held responsible both for affirmative acts and for failure to intervene; diplomatic immunity for the highest-ranking officials was disapproved, and the acceptability of a defense of superior orders was left for the relevant court to determine.[28] At this point, the necessary elements of command culpability became fairly clearly formulated; although the Commission's initial formulation posited that authorities should be liable for a failure to act, "regardless of their degree of knowledge or capacity to prevent the commission of crimes," the American representatives objected to this provision;[29] it was ultimately held that "a conviction under command responsibility required that the accused had possessed the position, power, capacity and knowledge to halt the crimes."[30] This can be seen as an early formulation of the contemporary three-prong doctrine, comprising the superior/subordinate relationship; the knowledge (at some level) of the violations; and the ability to halt, prevent, or punish the violations. As noted earlier, the temporal application of each element is not explicitly addressed.

The Commission's recommendation of criminal prosecution was intended to result in international trials of individuals whose criminal acts affected the interests of more than one of the Allied and Associated Powers.[31] A roster of 3,000 such individuals was gradually reduced until finally forty-five individuals were prosecuted. One of those was Emil Muller, a captain in the German army reserves who was briefly in charge of a prison camp in France which housed

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[27] *Id*. at 116.

[28] *Id*.

[29] Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, annex II, in *Commission on the Responsibility*, *supra* note 26, at 127, 143. [Reproduced in the accompanying notebook at Tab 22.]

[30] Lippman, supra note 3, at 9. [Reproduced in the accompanying notebook at Tab 28.]

English Prisoners of War.[32] Muller was acquitted of willful neglect of the abominable provisions and sanitary conditions at the prison camp he commanded, because it was found that he had made improvements, and the remaining problems were due to "circumstances which were beyond him and also his immediate superiors."[33] However, Muller was convicted of ill treatment of prisoners and subordinates, on evidence that he "witnessed a prisoner being harshly reprimanded by a Sergeant-Major, made an unrecorded remark, and the soldier then proceeded to fell the prisoner with his fist." Regarding this episode, the German Supreme Court concluded that Muller was responsible because he "at least tolerated and approved of this brutal treatment, even if it was not done on his orders." This situation was distinguished from other mistreatment of prisoners, which was determined to have been "carried out on the initiative of non-commissioned officers without Muller's knowledge," for which cases Muller was not held responsible.[34] The German Court's imputation of responsibility on the basis of Muller's tolerance and approval of brutality supplies ongoing support for the assignment of responsibility for failure to punish.

The Muller case thus illustrates that by the end of World War I the elements of command culpability had become settled: the accused must be in a position to prevent or punish the war law violation (i.e., a superior/subordinate relationship must exist); the accused must know about the violation; and the accused must have the capacity to take effective action (i.e., he must be

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[31] *Id*. at 7.

[32] *Id*.

[33] *Judgment in the Case of Emil Muller* (May 30, 1921), 16 AM. J. INT'L. L. 684, 687 (1922). [Reproduced in the accompanying notebook at Tab 14.]

[34] Id. at 689-691. Muller was tried by the Penal Senate of the German Supreme Court (Reichsgericht) because the Allied Powers decided that the original plan of conducting international trials would destabilize the Weimar regime and risk revolutionary insurrection. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY

able to prevent, halt, or punish the offense). In the following decades, however, discussion and variation continued on the standards by which each element would be judged.

D. Fluctuation of Command Culpability Standards in the Twentieth Century

(1) Post-World War II Trials

The most-discussed single case among the post-World War II command responsibility trials is that of General Tomoyuki Yamashita, who served as commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands from October 9, 1944, until his surrender on September 3, 1945.[35] Yamashita took command of Japanese forces in the Philippines only a few days before the beginning of the American invasion of the Philippines.[36] During his command, the American attack was under way and Japanese forces were largely in retreat. After his surrender in September 1945, he was charged (on October 2, 1945) with having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities…."[37] The charge included 123 atrocities, involving the execution, torture, starving, and other mistreatment of thousands of civilians and prisoners of war. A great deal of evidence was presented regarding the commission of the atrocities[38], but no unrefuted testimony directly

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OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 119-131(1982). Quoted in Lippman, *supra* note 3 at 7. [Reproduced in the accompanying notebook at Tab 28.]

[35] Parks, *supra* note 1 at 22. [Reproduced in the accompanying notebook at Tab 31.]

[36] Hendin, *supra* note 19, at para. 94. [Reproduced in the accompanying notebook at Tab 26.]

[37] *United States of America vs. Tomoyuki Yamashita*, a Military Commission appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces, Western Pacific, 1 October 1945. Cited in Parks, *supra* note 1, at 22. [Reproduced in the accompanying notebook at Tab 31.]

[38] Parks, *supra* note 1, at 25-33. [Reproduced in the accompanying notebook at Tab 31.]

linked Yamashita to the ordering or commission of the crimes.[39] Although Yamashita's defense argued that Yamashita himself "knew nothing of any of the atrocities" due to the "complete breakdown of communications incident to the swift and overpowering advance of the American forces," and that "his troops were disorganized and out of control, leaving the inference that he could not have prevented the atrocities even had he known of them,"[40] Yamashita was convicted and sentenced to death. The theater staff judge who reviewed his case found that

> [f]rom the widespread character of the atrocities … the orderliness of their execution and the proof that they were done pursuant to orders, the conclusion is inevitable that the accused know about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators.[41]

The Yamashita case has been widely taken to stand for a "strict liability" standard for the knowledge and capacity elements of the command culpability test. Whether or not it is an accurate interpretation of the decision, this view of *Yamashita* illustrates the standard which represents one end of the command culpability continuum: that which holds a commander responsible for violations by his subordinates by virtue of his position, regardless of his own instructions to his troops, his knowledge of their actions, or his practical ability to control their behavior. The case against Yamashita relied substantially on circumstantial evidence that atrocities were so widespread and systematic that he "must have known" of them, and probably ordered them.

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[39] RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982), 84-85. [Reproduced in the accompanying notebook at Tab 8.]

[40] Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, General Headquarters, United States Army Forces, Pacific, December 26, 1945. Quoted in Parks, *supra* note 1, at 32-33. [Reproduced in the accompanying notebook at Tab 31.]

[41] *Id*.

Few (if any) command responsibility cases have been decided on the strict liability standard.[42] Defense attorneys and commentators who believe that more weight should be put on due process rights of the accused commanders see arguably unjust convictions such as that of Yamashita as the danger that lurks in broad applications of command responsibility standards. This view is represented by the dissenting opinions in the U.S. Supreme Court's case *In re Yamashita,* 327 U.S. 1, in which the majority held that the military commission which tried and convicted Yamashita did have Constitutional jurisdiction over him. Justice Murphy in dissent argued that "the charge against the petitioner [failed to state] a recognized violation of the laws of war"[43] because it held Yamashita to an unreasonable standard of control under harsh battle conditions.[44] Murphy therefore felt that Yamashita's Fifth Amendment due process rights were "trampled under by … hatred."[45] In another dissenting opinion, Justice Rutledge protested that Yamashita was convicted of a "crime … defined after his conduct, alleged to be criminal, [had] taken place."[46] However, the majority introduced its holding with the observation that

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[47]

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[42] Extended discussions of whether or not this is an accurate reading of the *Yamashita* outcome appear in Parks, *supra* note 1 and LAEL, *supra* note 39, inter alia.

[43] *In re Yamashita*, 327 U. S. 1, 31. [Reproduced in the accompanying notebook at Tab 13.]

[44] *Id.* at 34.

[45] *Id.* at 27.

[46] *Id.* at 43.

[47] *Id. at 15.*

The Supreme Court majority thus affirms the military commission's finding that "where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops …."[48]

Emphasizing this view, General MacArthur in his comment in review of the Yamashita judgment saw its message as essential to the proper function of "the profession of arms" in society:

> Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. 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.[49]

Other post-World War II trials took different approaches to the elements of command culpability. In 1946, the International Military Tribunal for the Far East was established in Tokyo. This tribunal in defining command responsibility said that

> If this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates … of the atrocities … or of the existence of routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander, and must be punished.[50]

This standard, though arguably requiring somewhat more proof than the *Yamashita* "must have known" standard, supported the conviction of Sunroko Hata, commander of the expeditionary

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[48] *Id.* at 24.

[49] MacArthur review, in Brigadier General Green to CinCAFPAC, 4 February 1946, 000.5 Yamashita box 763, RG 331. Quoted in LAEL, *supra* note 39, at 118. [Reproduced in the accompanying notebook at Tab 8.]

[50] 19 United States v. Soemu Toyoda 5005-5006 [Official transcript of Record of trial], quoted in Parks *supra* note 1, at 70. [Reproduced in the accompanying notebook at Tab 31.]

forces in China. In that case the judges found that large-scale atrocities had been committed by Hata's troops and he had either been "indifferent" to them or had "made no provision for learning" whether laws of war were being enforced. Therefore, Hata's failure to take steps to prevent violations was the basis for his conviction.

In later Nuremberg trials, some variation in the knowledge standard has been observed. The *High Command Case,* held by the United States occupying authority under Control Council Law No. 10 in 1948, tried senior German officers who were charged with command responsibility for law-of-war violations committed by their subordinates.[51] Perhaps in deliberate contrast to the *Yamashita* decision, the justices in the *High Command Case* set a difficult standard for imputing command responsibility:

> …it is not considered under the situation outlined that criminal responsibility attaches to [the commander] merely on the theory of subordination and over-all command. He must be shown both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence.[52]

In 1948 another Control Council Law No.10 Tribunal court, in the *Hostage Case*, moderated the *High Command Case* standard slightly, requiring "proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced."[53] (Emphasis supplied.) To be held responsible, the *Hostage Case* court said an officer "must be one who orders, abets, or takes a consenting part in the crime."[54] However, a commanding officer

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[51] Andrew D. Mitchell,*Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV.381, 390. [Reproduced in the accompanying notebook at Tab 29.]

[52] XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950)(TRIALS OF WAR CRIMINALS) 555. [Reproduced in the accompanying notebook at Tab 19.]

[53] LAEL, *supra* note 39 at 124. [Reproduced in the accompanying notebook at Tab 8.]

[54] *Id.*

having received reports of acts in violation of the laws of war could be convicted if he "ignored reports of such violations and, if having the power to stop them, permitted them to continue." Thus, to have ignored reports of violations and left them unpunished was taken as evidence of "a consenting part in the crime," which imputed responsibility to the commander.

Richard Lael, in his analysis of command responsibility developments following *Yamashita*, points out that the *High Command* justices increased the burden on the prosecution to demonstrate "a commanding officer's knowledge of, and his criminal acquiescence in, a violation of a law of war."[55] Consistent with this, the *High Command* justices declined to find the accused guilty on some counts where proof was inadequate. Importantly, however, where an officer was found to have knowledge of violations and to have failed to punish them, the justices did interpret the failure to punish as "amounting to acquiescence." In the Judgment against Field Marshall von Kuechler, they held that "[t]here is no evidence tending to show any corrective action on his part. It appears … therefore that he not only tolerated but approved" of the violations. Von Kuechler was found guilty on this basis.[56] This articulation will be significant in the discussion below of a commander's failure to punish known acts committed under a predecessor.

(2) Vietnam—the Medina case

After the post-World War II tribunals, the next notorious command responsibility trials concerned the My Lai massacre during the Vietnam conflict. Notable for its revision of the standard of command responsibility was the trial of Captain Ernest Medina, the officer in command of the infantry company involved. In instructing the jury panel for that case, the judge specified that "legal requirements placed upon a commander require actual knowledge plus a

[55] *Id* at 127.

[56] XI TRIALS OF WAR CRIMINALS 568-580. [Reproduced in the accompanying notebook at Tab 19.]

wrongful failure to act. Thus mere presence at the scene will not suffice."[57] Critics of this very high knowledge standard for command responsibility, including Telford Taylor of the Nuremberg tribunals, suggested that "the Court's failure to follow … a variant of the negligence standard suggests that the instructions were intended to insure that Medina was exonerated."[58] Richard Lael, on the other hand, noted that Judge Howard's interpretation "represented a logical progression from the Yamashita to the Hostage to the High Command cases. … Howard simply scrapped [the "should have known" standard] altogether."[59] Lael discusses the increased protection this approach affords for military commanders under "atrocity-producing stress,"[60] and analyzes the relation of Judge Howard's instructions to earlier and later command responsibility standards.

(3) Late-twentieth century protocols and statutes

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International armed Conflicts (Protocol I) contains two Articles which attempt once again to codify the international standard of command responsibility. Professor Ilias Bantekas, in surveying contemporary command responsibility law, points out that post-World War II prosecutions for criminal omissions were mainly based on national laws which allowed the prosecution of "those superiors who tolerated the crimes of their subordinates,"since the Tribunal charters did not contain such provisions. However, Bantekas notes,

> [t]he same obligations were later contained in Article 87 of Geneva Protocol I (1977). Not only were these command duties uncontested during the

[57] Hendin, *supra* note 19 at para. 133. [Reproduced in the accompanying notebook at Tab 26.]

[58] Lippman, *supra* note 3, at 39. [Reproduced in the accompanying notebook at Tab 28.]

[59] LAEL, *supra* note 39, at 132. [Reproduced in the accompanying notebook at Tab 8.]

[60] *Id.*

> deliberations for the adoption of Geneva Protocol I, but both Articles 86 and 87 were held to be in conformity with pre-existing law.[61]

With regard to the knowledge requirement, Lael opines that Articles 86 and 87 of Protocol I have "completed the erosion of the Yamashita precedent" by moving definitively from the "should have known" standard there applied to a more restrictive knowledge standard.[62] Article 86 attributes responsibility to the High Contracting Parties and the Parties to the conflict "if they knew, or had information which should have enabled them to conclude in the circumstances at the time" that violations were committed, and failed to act.[63] Lippman, however, views Protocol I as a compromise, "sufficiently elastic to incorporate both a specific intent and a gross negligence standard."[64] He further observes that "[t]he 'should have enabled them to conclude' standard while less harsh than strict liability also insures that officials cannot adopt a disengaged and disinterested demeanor."[65]

When the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda were established, they included provisions which reflect the elasticity noted by Lippman as being characteristic of Protocol I. The command responsibility provisions in Article 7 of the ICTY statute and Article 6 of the ICTR statute reflect the principles of Protocol I. The drafters of Protocol I intended to codify the practice of the post-World War II tribunals imputing

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[61] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L. L. 573, 576. [Reproduced in the accompanying notebook at Tab 21.]

[62] LAEL, *supra* note 39 at 135. [Reproduced in the accompanying notebook at Tab 8.]

[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)(June 8, 1977), Articles 86 and 87. [Reproduced in the accompanying notebook at Tab 3.]

[64] Lippman, *supra* note 3, at 52. [Reproduced in the accompanying notebook at Tab 28.]

[65] *Id.* at 55.

responsibility where a commander "had not intervened to prevent a breach or put a stop to it."[66] Consistent with this, the Commission of Experts drafting the ICTY statute adopted the "knew, or had information which should have enabled them to conclude" standard of Protocol I.[67]

A still later formulation of command responsibility doctrine appears in the Rome Statute of the International Criminal Court (ICC), which was initialed in 1998 and came into force in July 2002. Command responsibility is addressed in Article 28 of the Rome Statute; again the knowledge standard has been modified. Although the Article 28 (a)(1) standard for military commanders and persons acting effectively as such maintains the "knew or had reason to know" standard, the nearby Article 28(b)(1), which applies to civilian superior/subordinate relationships, attaches liability to superiors only if "the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes." This creates a lower standard for civilian superiors than for military ones, which is a matter of concern for some commentators.[68] In contrast, the ICC standard for military leaders, as Professor Lippman points out, does not allow for a "disengaged and disinterested demeanor."[69]

The historical record reveals, then, repeated efforts to establish standards for command responsibility. If the earliest cases are included in the consideration, it can be seen that standards which have been applied vary considerably with regard to all three elements (position of control, knowledge of violations, and practical ability to act). Extensive attention and variation appear

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[66] CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1006 (1987). [Reproduced in the accompanying notebook at Tab 11.]

[67] 1 INSIDER'S GUIDE, *supra* note 2 at 99. [Reproduced in the accompanying notebook at Tab 9.]

[68] Beth Van Schaack, *Command Responsibility—A Step Backward*, 1 OTR ICC, Iss. 13 (Part 2), ON THE RECORD: YOUR LINK TO THE ROME CONFERENCE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, July 7, 1998, at 1-2. Found at http://www.advocacynet.org/news_view?news_119.html. [Reproduced in the accompanying notebook at Tab 36.]

[69] Lippman, *supra* note 3, at 55. [Reproduced in the accompanying notebook at Tab 28.]

particularly on the knowledge element. Little explicit attention has been given to the temporal application of command responsibility, in spite of the facts that it is a relevant consideration in all three elements and that variation in time-specific wording of statutes can significantly affect judicial determination of culpability. A re-examination of relevant precedents and current scholarly commentary will suggest that a broad temporal application of command responsibility, at least in military contexts, best serves the underlying purpose of the doctrine—the protection of civilian populations—and is a logical result of the doctrine's historical development.

III Evidence of Practice and Principle Regarding Temporal Application of Indirect Command Responsibility

In evaluating direct command responsibility (where the superior has actually given the order for a violation of the laws of war), temporal application requires no discussion—a command cannot be carried out before it is given. However, in the context of indirect command culpability, where the commander's responsibility is to intervene and prevent, halt, or punish violations of which he is aware, the temporal application becomes important in each of the crime's three elements. At what time must the superior-subordinate relationship exist relative to the violation? At what time must knowledge (or the reasonable expectation of knowledge) come to the superior? At what time must the superior possess the practical ability to halt or punish (the timing of prevention being obvious) the violation(s)? This memorandum will restrict its discussion to the responsibility to punish, since that presents the widest range of time variation.[70]

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[70] There might be some discussion about when a commander had the practical ability to halt violations, as for example in the cases where commanders have been held responsible for inhumane conditions at prison camps but supplies for improving such conditions were unavailable due to combat conditions. Examples are the American Civil War case of Henry Wirz and the World War I case of Emil Muller, discussed above at Section II C. While not an insignificant issue, this has been addressed in individual cases by the courts and is perhaps a subject for a different study.

This memorandum suggests that if a superior has both knowledge and the practical ability to punish violations committed by a subordinate within his command, the fact that the violations may have been committed under a predecessor superior should not excuse the present superior from his responsibility to punish. The rationale for this position is three-pronged: (a) it best serves the underlying purpose of command responsibility doctrine, which is the protection of the civilian population from abuses which wartime conditions tend to promote; (b) it does not deprive commanders of due process rights, since as military officers they accept the responsibility to prevent abuses, and failure to punish amounts to acquiescence in violations, whether past or present; and (c) knowledge that abuses have been punished acts as a general deterrent to future abuses, while failure to punish perpetuates the environment of lawlessness which fosters further violations. This analysis is supported by dicta and judgments from historical cases as well as by analysis of wordings in statutes and conventions, and particularly by scholarly commentary.

A. <u>Evidence from historical cases</u>

In an extensive study of command responsibility doctrine, Matthew Lippman points out that "[c]ommand culpability is designed to encourage military commanders and civilian superiors to fulfill their legal duty to control the conduct of combatants."[71] The necessity for such control may seem obvious, but was well articulated by President Theodore Roosevelt in confirming the 1902 conviction of Brigadier-General Jacob Smith for command culpability during the Samur campaign in the Philippines:

> …the very fact that warfare is of such a character as to afford infinite provocation for the commission of acts of cruelty by junior officers and enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over the acts of an improper character by their subordinates.[72]

[71] Lippman supra note 3, at 90. [Reproduced in the accompanying notebook at Tab 28.]

[72] Quoted in Mitchell, *supra* note 51, at 383. [Reproduced in the accompanying notebook at Tab 29.]

A.P.V. Rogers of the International Committee for the Red Cross points out that failure to punish has a tendency to create "a climate of disregard for the law of war."[73] Rogers points to the Nuremberg conviction of Major Rauer, "presumably on the basis that … he created a climate in which it was known by his subordinates that they would not be punished for killing prisoners of war."[74] In the Nuremberg Control Council Law No.10 *Einsatzgruppen Case*, Brigadier General Erich Naumann offered as part of his defense the assertion that "when he assumed command of his unit the orders in question were already in effect."[75] The Tribunal rejected this defense, however, holding that it was incumbent upon the defendant to have rejected the orders or at least demonstrated that he was not in agreement with them.[76]

In the *Hostage* and *High Command* cases, also under Control Council Law No. 10 at Nuremberg, "[a]bsence from headquarters was not a defense in those instances in which a military official instituted or acquiesced in a policy."[77] This holding supports a broad temporal application of command responsibility, requiring the commander to take corrective action even though he was not in effective command (being absent) at the time of violations, and treating his failure to do so as acquiescence in the violations. A more particular relevance of temporal application has also been noted in the *High Command Case*. In that case, counts two and three of the indictments against Field Marshalls von Leeb and von Kuechler charge them with responsibility

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[73] A.P.V. Rogers, *Command Responsibility Under the Law of War*, 19. Found at www.law.cam.ac.uk/rcil/COMDRESP.doc. [Reproduced in the accompanying notebook at Tab 34.]

[74] *Id.* at 9.

[75] IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 517. Cited in Hendin, *supra* note 19 at para.69. [Reproduced in the accompanying notebook at Tab 26.]

[76] *Id.*. at 309. Cited in Hendin, *supra* note 19 at para. 69. [Reproduced in the accompanying notebook at Tab 26.]

[77] Lippman, *supra* note 3, at 26. [Reproduced in the accompanying notebook at Tab 28.]

for the killings of hundreds of noncombatants in areas which were under the command of von Leeb during part of the relevant time and "thereafter of von Kuechler." The tribunal acquitted von Leeb on count two, finding that as a matter of fact he had never been made aware of the illegal actions under the order in question; von Kuechler, however, was convicted on counts two and three of the indictment, the tribunal holding that since "[m]any reports were made" about the execution of the orders in question, "[i]t was his business to know" of the activities of his subordinates which were duly reported.[78] This combination of facts supports the inference that "von Kuechler was held liable for failing to punish the crimes that had been committed under a predecessor superior and of which he was aware."[79] In general, the High Command Tribunal "was very clear in its principle that once the territorial commander had knowledge of criminal conduct on the part of a subordinate, even if that subordinate was outside of his chain of command, there was a positive duty to intervene."[80]

A broad temporal application of command responsibility is also indicated by the case of Samuel W. Koster, Commander of the 23rd Infantry (Americal) Division which launched the infamous My Lai operation in 1968. This was not a case of offenses committed under a predecessor commander, but Koster was charged with failing to respond to information about the massacre, and "may have initiated a conspiracy to conceal information" concerning the events.[81] Charges against Koster were dismissed, but when critics complained that this was "a disservice to

[78] XI TRIALS OF WAR CRIMINALS, *supra* note 52 at 567. [Reproduced in the accompanying notebook at Tab 19.]

[79] Van Schaack, supra note 69 at 4. [Reproduced in the accompanying notebook at Tab 36.]

[80] Hendin, supra note 19 at para. 74. [Reproduced in the accompanying notebook at Tab 26.]

[81] DEPARTMENT OF THE ARMY, REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: THE REPORT OF THE INVESTIGATION (1970). Cited in Lippman, *supra* note 3, at 40. [Reproduced in the accompanying notebook at Tab 28.]

the rule of international law, the law of war and the United States Constitution,"[82] the Secretary of the Army imposed administrative sanctions which were upheld by the United States Court of Claims with the observation that "there was no area in which a strict standard of command liability was as necessary as the investigation of misconduct."[83] This assertion highlights the importance of a commander's responsibility after the commission of offenses. To prevent or halt misconduct is of course preferable to discovering and punishing it after the fact. But also essential to the general effectiveness of the laws of war is maintaining the principle that those laws cannot be violated, nor can violations be condoned, with impunity.

B. Language of conventions, statutes, and other documents

(1) Protocol I

To examine the language of conventions and statutes which specifically relates to the temporal application of command responsibility, it is logical to begin with the 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, since the inclusion and wording of the command responsibility doctrine in that instrument codifies the widespread acceptance of its elements between 1949 and 1977.[84] In this Protocol, Article 86 treats generally breaches of international law arising from omissions. It contains two clauses. Clause 1 provides that

> The High Contracting Parties and the Parties to the conflict shall repress grave breaches and shall take measures necessary to suppress all other breaches, of the Convention or of the Protocol which result from a failure to act when under a duty to do so.[85]

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[82] MICHAEL BILTON AND KEVIN SIM, FOUR HOURS IN MY LAI (1992) 19. Quoted in Lippman, *supra* note 3 at 40. [Reproduced in the accompanying notebook at Tab 28.]

[83] Koster v. United States, 685 F. 2d 407, 414 (U.S. Ct. Cl 1982). [Reproduced in the accompanying notebook at Tab 15.]

[84] I INSIDER'S GUIDE , *supra* note 2 at 98-99. [Reproduced in the accompanying notebook at Tab 9.]

[85] Protocol I, Article 86. [Reproduced in the accompanying notebook at Tab 3.]

This article applies, then, to the top level of superiors in each Party—Prime Ministers and other political leaders, rather than military commanders. While important, this is not the focus of this memorandum; however, analysis of this article sheds light by contrast on the language of Article 87, which does apply specifically to military commanders. The second clause of Article 86 clarifies somewhat the degree of responsibility of the political leaders:

> 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 about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Political leaders, then are required to "repress" grave breaches, and "suppress" other breaches. The ICRC Commentary on the Additional Protocols points out that "[g]rave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches."[86] In contrast, for breaches of the Protocols other than grave breaches, "the Parties to the Protocol undertake to *suppress* them, which means that [the initial responsibility to repress] … 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."[87] The Commentary points out that this imposition of responsibility incurred by negligence is potentially problematic in criminal law. It is conceded that "[t]his element in criminal law is far from being clarified, but it is essential" to the system of penal sanctions of the Conventions, and

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[86] PILLOUD, *supra* note 66, at 1010 (1987). [Reproduced in the accompanying notebook at Tab 11.]

[87] *Id.* at 1011.

the Conference apparently had faith in the ability of tribunals to succeed in "satisfying the requirement of justice in … very difficult situations."[88]

Article 87 of Protocol I specifically deals with the duty of military commanders. The Commentary points out that "[the] first duty of a military commander whatever his rank, is to exercise command"[89], and that accordingly, "the role of commanders is decisive" in ensuring that "a fatal gap between the undertakings entered into by parties to the conflict and the conduct of individuals is avoided."[90]

Article 87 contains three clauses, each of which solidifies some aspect of a commander's responsibility. The first clause provides:

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

Thus, the first clause requires the commander to deal affirmatively with breaches which he perceives in the future (prevent), in the present (suppress), and in the past (report to competent authorities) behavior of his troops.

The second clause deals with recognition in advance of command responsibility:

> 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.

[88] *Id.*

[89] *Id.* at 1017.

[90] *Id.* at 1018.

This provision essentially addresses due process concerns of commanders, who are to be made "aware of their obligations" so that prosecution for failure to meet those obligations cannot be seen as unjust.

The third clause then specifies the commander's obligations in more detail, and in so doing clarifies the breadth of temporal application involved.

> 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 actions against violators thereof.* (Emphasis supplied.)

Thus, while "penal or disciplinary responsibility, as the case may be," is included in the duty to suppress for political leaders, it is set forth as an explicit and separate duty for the military commanders. In addition, the difference in verb-tense content between the specifications of Article 86, which applies to top-level administrators of the Parties, and Article 87, which applies to military commanders, is crucial to the analysis of temporal application. The top-level administrators, presumed to be in control throughout the conflict, are charged with responsibility for breaches which they knew (or should have been able to conclude) their subordinates were "committing or [were] about to commit" if they do not take "all feasible measures within their power to prevent or repress" such breaches. In contrast, the military commanders, whose field assignments may vary more fluidly over the course of a conflict, are to be made aware of "their obligations" to prevent and punish ("initiate disciplinary or penal actions") any breaches which "subordinates or other persons under [their] control are going to commit *or have committed*." (Emphasis supplied.) The Commentary points out that while Paragraph 1 of Article 87 addresses the prevention and suppression of breaches, Paragraph 3 also includes reference to "the case where a commander 'is aware that subordinates or other persons under his control are going to

commit *or have committed* a breach.' Thus these two paragraphs complement each other."[91](Emphasis supplied) The breadth of temporal application is, therefore, explicitly intended. Further, the Commentary points out that "[i]n adopting these texts, the drafters of the Protocol justifiably considered that military commanders … more than anyone else … can prevent breaches by creating the appropriate frame of mind," and that in case a breach does occur, "they 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."[92] Protocol I, therefore, establishes a firm basis for application of command responsibility to a commander's failure to initiate disciplinary or penal measures to redress law-of-war violations committed by his subordinates under a predecessor commander.

(2) Statutes of the ICTY and ICTR

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 in employing both past and future time frames to specify commanders' individual criminal responsibility for failure to 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. (Emphasis supplied.)

Given that both formulations were present in the Protocol I model, the fact that the Statutes include the "or had done so" language strongly suggests that the Statute drafters deliberately

[91] *Id.* at 1022.

[92] *Id.*

chose inclusion of the past-tense phrase so as to include the responsibility for acts committed before the commander in question was on the scene—rather than its exclusion, which might leave such situations to fall between the cracks. This suggestion is supported by the fact that the documentary history of the Statute's adoption includes three draft versions which did not include the past-tense element.[93] In addition, a March 1993 letter from the National Alliance of Women's Organizations urges that the Statute "provide for the prosecution … of those who ordered, encouraged, assisted, condoned or failed to take effective measures to prevent" atrocities,[94]and a note verbale from the Netherlands representative on 4 May 1993 suggests that

> the 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. …[95]

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."[96] The intention to include duty to punish within the Statute is also confirmed by the Venezuelan representative's statement that the adoption of the Statute is part of

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[93] 2 INSIDER'S GUIDE, *supra* note 2, at 320, 370, and 377. These are the first interim report of the Commission of Experts; a draft letter from France; and a draft letter from Italy, respectively. [Reproduced in the accompanying notebook at Tab 10.]

[94] *Id.* at 402.

[95] *Id.* at 475.

[96] *Id.* at 188.

a response by the Security Council to the international community's awareness that "[n]othing encourages crime more than impunity…."[97]

Further interpretive commentary on the ICTY Statute is offered by M. Cherif Bassiouni, who points out that the Statute does not contain a "general part," which would ordinarily provide 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."[98] The Tribunal must therefore "fill these legal gaps," relying on the "limited guidance" offered by customary international law. Once source of such guidance is the judgments of earlier international tribunals. Another is the reports of the Commission of Experts who drafted the Statute. Regarding the temporal application of command responsibility, the Commission of Experts' interim report includes the following comments:

> 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.[99]

3. ICTY judgment, *Prosecutor v. Krnojelac*

An important discussion of the temporal application of command responsibility by the ICTY emerges from the judgment in the case of Milorad Krnojelac, who was convicted of

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[97] *Id.* at 183.

[98] M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 340 (1996). [Reproduced in the accompanying notebook at Tab 7.]

persecution, inhumane acts, and cruel treatment as a superior as well as of cruel treatment for his individual responsibility. The court clarified the temporal application with regard to the first element of command responsibility, the existence of a superior/subordinate relationship. The Trial Chamber in the Krnojelac case pointed out that the authority of a superior might be either permanent or temporary or might even be on an ad hoc basis.[100] The judgment goes on to distinguish 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, those persons were under the effective control of the particular individual.[101]

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 should be taken as clearly implied; that is, 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. Hence it follows 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.

(4) Various war manuals

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 which include the past-tense provision as part of the commander's responsibility:

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[99] *Id.* at 343

[100] *Prosecutor v. Krnojelac*, IT-97-25 (ICTY 2003) Appeals Chamber Judgment 17 September 2003,para 398. [Reproduced in the accompanying notebook at Tab 17.]

> 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.*[102]
>
> 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 war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.[103]
>
> 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.[104]

All of these excerpts are significant as evidence of the customary assumption that a commander is responsible to punish offenses which his subordinates have committed in the past—not only to prevent or halt ongoing offenses. 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

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[101] *Id*. at para 399.

[102] Australian Defence Force Publication 37, *Law of Armed Conflict,* 1996, para. 1303. Cited in Rogers, *supra* note 74, at 15. [Reproduced in the accompanying notebook at Tab 34.]

[103] War Office, *Manual of Military Law Part III,* HMSO, 1958, 178. Cited in Rogers, *supra* note 74, at 15. [Reproduced in the accompanying notebook at Tab 34.]

[104] US Army JAG School, *Operational Law Handbook,* 1997, p. 18-11, based on Field Manual FM 27-10, p. 501. Cited in Rogers, *supra* note 74, at 15. [Reproduced in the accompanying notebook at Tab 34.]

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 is convincing evidence 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 responsibility of commanders in the field than of politicians at a distance) and the *Krnojelac* court's articulation of the permanent commander's extended responsibility (in contrast to the time-limited responsibility of the temporary or ad hoc commander), the military manuals build a convincing case for the broad temporal application of the duty to punish prong of command responsibility doctrine.

(5) Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court, which was adopted by the United Nations Diplomatic Conference in 1998 and entered into force in 2002, is remarkable for presenting a narrower temporal application of command responsibility doctrine than any of the other recent codifications. Article 28 of the Statute holds a military commander responsible for crimes committed

> "as a result of his or her failure to exercise control properly over …forces, where:
> (a) That military commander … either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (b) That military commander … failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[105]

It is true that "[t]his language is drawn directly from the Geneva Protocol [Protocol I] and recognizes that command culpability is based on the failure to fulfill and official duty and is not

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[105] Rome Statute of the International Criminal Court, Article 28.[Reproduced in the accompanying notebook at Tab 4.]

an imputation of liability for the acts of subordinates."[106] However, it imposes a less stringent standard on military commanders than does Protocol I, since it imports only the Article 86 language which Protocol I applies to the responsibility of the High Contracting Parties and Parties to the conflict; conspicuously missing is the broader temporal application of Article 87, which extended the duty of commanders to cover situations in which they are aware that people under their control are "going to commit or have committed" (emphasis supplied) a breach of the Geneva Conventions or of Protocol I. It is this alteration which caused at least one commentator to label the Rome Statute's treatment of command responsibility as "a step backward"[107] since, as discussed below, it seems to undermine or even eliminate the commander's duty to punish offenses of which he becomes aware after their commission.

C. Writings of Commentators

Commentators on command responsibility tend to take either a generally military perspective, a defendant's perspective, or a victims'/humanitarian perspective. Although the second of these must be respected as protecting the due process rights of military commanders, the combination of the first and third make a strong case for broad temporal application of command responsibility.

(1) Commentators from military backgrounds

General MacArthur's comment on the *Yamashita* case stands for an important position of the military community, which finds command responsibility and the protection of

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[106] 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). Quoted in Lippman, supra note 3 at 86. [Reproduced in the accompanying notebook at Tab 28.]

[107] Beth Van Schaack, *Command Responsibility—A Step Backwards, supra* note 69. [Reproduced in the accompanying notebook at Tab 36.]

noncombatants an essential element of the soldier's identity, and its failure a threat to international society.[108] Major William H. Parks, Marine Corps International Criminal Law Instructor and member of the U. S. Court of Military Appeals, concludes his survey of command responsibility doctrine by remarking that, according to Marine Corps recruiting literature, "Some men accept responsibility; others seek it."[109] Those who reach positions of military command have, the slogan implies, sought the responsibility –the "sacred trust," according to MacArthur— of protecting the weak and unarmed in times of war. In Parks' view, "Neither the principles of command nor the law of war can expect, nor accept, anything less"[110] than the full discharge of this responsibility to prevent, halt, and punish violations of the laws of war. Colonel William G. Eckhardt, in making "a plea for a workable standard" of command responsibility, which he says should require that a commander both caused and could have prevented the violation, nevertheless asserts that if a commander "had received reports of … incidents and did nothing about them, then he might be criminally responsible [because] [h]is inaction … would amount to …active encouragement to commit similar acts.[111]

(2) Defense-oriented Commentators

Eckhardt's analysis effectively combines concern for the commander's due process rights with acknowledgement that failure to punish draws culpability to a commander. Arguments more focussed on narrowing the application of command responsibility are presented by, for

[108] MacArthur quoted in LAEL, *supra* note 49.

[109] PARKS, *supra* note 1, at 104. [Reproduced in the accompanying notebook at Tab 31.]

[110] *Id.*

[111] Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea For a Workable Standard*, 97 MIL. L. REV 1, 5 (1982). [Reproduced in the accompanying notebook at Tab 24.]

example, the dissenting justices in the U.S. Supreme Court's *Yamashita* appeal case. Justice Rutledge in his dissent protested that

> It is not in our tradition for anyone to be charged with crime which is defined after his conduct … has taken place… [or] where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having the duty and the power to do so.[112]

And Major Bruce D. Landrum opines that "holding the prosecution to this higher standard of proof [which has evolved since *Yamashita*] is appropriate."[113] Those who argue for a "higher standard" generally have reference to the knowledge element, which (as discussed above) has varied from the possibly strict-liability approach of *Yamashita* to the proof of actual knowledge required in *Medina,* but has recently settled at the compromise of a "had reason to know" standard common to the Statutes of the ICTY, the ICTR, and the ICC. The temporal application of the duty to punish prong has been less often addressed and, as discussed below, seems less clearly settled.

(3) Comments from humanitarian law scholars

In the context of multiple international tribunals dealing with atrocities committed in various conflicts during the late twentieth century, many commentators have expressed concern that a narrow application of command responsibility doctrine will tend to perpetuate a "culture of impunity" which allows combatants to consider atrocities a viable option and an effective way to achieve their goals. With specific regard to the temporal application of the doctrine, Beth Van Schaack, writing for Advocacynet during the Rome Conference for the establishment of the International Criminal Court, warned that the ICC Statute as drafted would "significantly

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[112] Quoted in LAEL, supra note 39, at 111. [Reproduced in the accompanying notebook at Tab 8.]

[113] Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now,* found at 63.206.217.42/geneva_project/archive/DoD/docs/Landrum_Yamashita.doc. [Reproduced in the accompanying notebook at Tab 27.]

truncate the scope of the doctrine of command responsibility" because "under 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."[114] Van Schaack here calls attention to the Protocol I language which also appears in the International Criminal Tribunal Statutes and in military manuals of several nations, but did not make it into the Rome Statute. A further concern arising from this same omission is that 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 defense of superior orders, creates a lacuna in international criminal responsibility where it did not exist before.[115]

Judge David Hunt's dissenting opinion in the Kubura case also worries over a "gaping hole in the protection which international humanitarian law seeks to provide" if the scope of command responsibility doctrine is thus truncated:

> Where the prosecution is unable to identify, to find or to apprehend the relevant subordinates in order to prosecute them (a common event), there can be no prosecution if the superior has left his command before he knows or has reason to know of their commission, because he cannot be prosecuted even though the superior-subordinate relationship existed at the appropriate time; similarly, the superior who takes over his command, even though he may quickly know or have reason to know that the crimes have been committed and yet fail to punish, cannot be prosecuted for that failure according to [the Appeals Chamber's decision in Kubura's case].[116]

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[114] Van Schaack, *supra* note 69, at 3. [Reproduced in the accompanying notebook at Tab 36.]

[115] Id. at 3-4.

[116] *Prosecutor v.Hadzihasanovic et al*, IT-01-47 (ICTY 2002-2003), Separate and Partially Disseting Opinion of Judge David Hunt, Command Responsibility Appeal (16 July 2003), 13-14. [Reproduced in the accompanying notebook at Tab 16.]

A similar concern is expressed by Professor Jordan Paust, who provides a parallel, if somewhat more optimistic, comment on the 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. [citing Protocol I] Perhaps the next paragraph, addressing, for example, failures to 'repress their commission or to submit the matter to the competent authorities for investigation and prosecution" when coupled with customary international law as an interpretive background [citing the Vienna Convention on the Law of Treaties and the Rome Statute Art. 21 (1)(b) and (3)] will assure adequate coverage."[117]

Such "adequate coverage," against the interpretive background of customary international law should, then, include the broad temporal application of command responsibility doctrine whose potential constriction Van Schaack , Hunt, and Paust have noted with concern.

While comments as specifically focused as these three on the temporal application of command responsibility doctrine have not been frequently made, they are in keeping with a wide range of commentaries which emphasize the importance of a broad and persistent reinforcement of the doctrine. Professor Ilias Bantekas is still more optimistic than Professor Paust, for he concludes 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."[118] Expanding on the

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[117] 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. Ed. Sienho Yee and Want Tieya, 2001. [Reproduced in the accompanying notebook at Tab 32.]

[118] Bantekas, *supra* note 61 at 591. [Reproduced in the accompanying notebook at Tab 21.]

temporal application of the duty to punish prong, Bantekas vigorously asserts the position argued by the minority justices in the Kubura appeal[119] discussed at the opening of this memorandum:

> 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.[120]

Professor Lippman points out that "command culpability is designed to encourage military commanders and civilian superiors to fulfill their legal duty to control the conduct of combatants.[121] 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."[122] 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."[123] 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

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[119] *Prosecutor v. Hadzihasanovic et al.*, IT-01-47 (ICTY 2002-2003), *supra* notes 7-11. [Reproduced in the accompanying notebook at Tab 16.]

[120] Bantekas, *supra* note 61 at 592. [Reproduced in the accompanying notebook at Tab 21.]

[121] Lippman, supra note 2 at 90. [Reproduced in the accompanying notebook at Tab 28.]

[122] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*95 AM. J. INT'L. L. 7, 10 (2001). [Reproduced in the accompanying notebook at Tab 20.]

[123] *Id*. at 7.

humanitarian law than they would have otherwise, for fear of punishment."[124] 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."[125] 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."[126]

IV Conclusion

An important point to note in closing is that, as with any other type of legal scenario, every episode of command culpability may have distinguishing features which courts must consider. Major Parks sums up some of the complexities:

> In order to find a commander responsible, the acts charged must have been committed by troops under his command. Normally this refers to troops of his unit or of another unit over which he has both operational and administrative control; but absent either he may still be responsible if he otherwise had a duty and the means to control those troops and failed to do so. If he has executive authority over a specified occupied territory, he is responsible for all illegal acts occurring within that territory, or at least for controlling or preventing their occurrence.[127]

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[124] David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J.. 473, 475 (1999-200). [Reproduced in the accompanying notebook at Tab 37.]

[125] Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution.* 29 U. RICH. L. REV. 191, 231-232. [Reproduced in the accompanying notebook at Tab 23.]

[126] LAEL, supra note 39, at 142. [Reproduced in the accompanying notebook at Tab 8.]

[127] Parks, supra note 1, at 102. [Reproduced in the accompanying notebook at Tab 31.]

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."[128] It is logical that if a commander is liable for failure to punish violations which he discovers have taken place during a time when he was temporarily away from his command, he should also be liable for failure to punish violations which he discovers have taken place prior to his assuming command.

The presumption of acquiescence in violations known but not punished fits with the broad temporal application discussed above. An important element of the most thorough commentaries on command responsibility, however, is the acknowledgement that specific conditions of each case should be considered in assigning liability. Major Parks notes that "[i]n determining whether the commander … should have known … of the occurrence of the offenses charged, certain subjective criteria may be considered…" on a case-by-case basis. These criteria include the rank, experience, mobility, and isolation of the commander; the age, experience, training, and general composition of the forces under his command; the size of staff, communications abilities, and the complexity and comprehensiveness of duties attached to the commander's position; and the general combat situation.[129] Sequence of staff changes is a factual element related to these listed criteria. For example, in the case of Amir Kubura, charges were made of command responsibility for failure to punish violations which occurred in January and June of 1993. Kubura became substitute commander of the Corps in question on April 1, 1993, and the Appeals Chamber suggested that he could therefore not be charged with command

[128] *Id*. at 103.

responsibility for violations before that time; but the fact that he was Chief of Staff for the Corps from January 1, 1993 should argue strongly for his knowledge of the violations and the Corps' "history of unpunished criminality."[130] Thus, according to the foregoing analysis, Kubura and other commanders similarly situated should be required to punish their subordinates' violations committed under predecessor commanders—or be prosecuted themselves for failing to do so.

It is certainly true that the rights of individuals, both victims and defendants, should be guarded by the rule of law. 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*'"[131] If this is done, Paust's fear that "[t]he prohibition of crimes against humanity is in danger of being whittled away by newly restrictive definitions"[132] 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 … ."[133] Clearly there is such an ethical imperative, and it is recognized by many commentators, both military and legal. As a general principle, that imperative supports a broad temporal application of command responsibility doctrine.

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[129] *Id*. at 104.

[130] *Prosecutor v. Hadzihasanovic et al*, IT-01-47 (ICTY 2002-2003) *supra* notes 7-11, Decision on Interlocutory Appeal (16 July 2003)at 18. [Reproduced in the accompanying notebook at Tab 16.]

[131] 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. [Reproduced in the accompanying notebook at Tab 33.]

[132] *Id.*

[133] Lippman, supra note 3 at 93. [Reproduced in the accompanying notebook at Tab 28.]