III. INTERNATIONAL CRIMINAL COURT

The Evolution and Scope of Command Responsibility

Matthew Lippman[*]

Keywords: command responsibility, International Criminal Court, war crimes

Abstract: The statute of the newly established international criminal court provides for command responsibility; the vicarious liability of civilian and military officials for the internationally proscribed conduct of their subordinates. The interpretation of this provision requires an understanding of the doctrine's complex and convoluted evolution. The Geneva Protocol of 1977 created a measure of uniformity. The Geneva Protocol, along with the *Delalić* decision of the trial chamber of the Criminal Tribunal for the Former Yugoslavia, likely will inform the interpretation of command responsibility under the statute of the International Criminal Court.

1. INTRODUCTION

The Rome Statute of the International Criminal Court, in Article 28, holds military and civilian authorities responsible for preventing and punishing the criminal conduct of their subordinates.[1] This is the culmination of almost fifty years of debate, discussion and judicial decisions concerning the principle of command responsibility.[2]

The imposition of criminal liability upon a civilian or military leader for the acts of subordinates is based on the premise that the law of war presupposes that combatants are under the control of a superior. The extension of criminal culpability to commanders creates an incentive for them to insure that their troops abide by the humanitarian law of war. This vicarious liability is necessitated by the lethal consequences resulting from the contravention of the legal contours of armed conflict.[3]

* Ph.D. Northwestern: J.D. American; LL.M. Northwestern; Professor and Acting Head Department of Criminal Justice.

1. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), 37 ILM 999, at 1017, Art. 28 (1998) [hereinafter Rome Statute].
2. *See generally* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319 (1995).
3. *See* W. G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 Milit. L. Rev. 1, at 4-11 (1982).

13 Leiden Journal of International Law 139-170 (2000)
© 2000 Kluwer Law International

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

The scope of this seemingly straightforward principle remains uncertain. Legal judgments, for the most part, have been the product of judicial panels presiding over post-war prosecutions. These courts generally have neither enjoyed the psychological distance nor the opportunity for sustained deliberation which are required to draw detailed definitions and distinctions.[4]

This essay provides an overview of the development of command responsibility in the twentieth century. The next paragraph outlines the debate over the concept during World War I. The refinement of command responsibility by international tribunals in the aftermath of World War II then is surveyed. The next sections outline the application of the doctrine during the Vietnam War and Israeli-Palestinian conflict. The incorporation of command responsibility into the 1977 Geneva Protocol and its application to prosecutions before the Yugoslav war crimes court then are sketched. The essay culminates with a discussion of the Rome statute.

2. WORLD WAR I

The Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to report on the responsibility for World War I and the breaches of the laws and customs of war committed by the German Empire and her allies. The commission concluded that the war resulted from the premeditated plan of the Central Powers, Turkey and Bulgaria.[5] It nevertheless determined that the launching of a war of aggression was not an act which contravened positive international law.[6] Enemy leaders, however, were not completely exonerated from international responsibility. The commission proclaimed that the German Empire and her allies had engaged in "outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and the laws of humanity."[7]

The commission made the unprecedented proposal that the individuals responsible for these acts should be subject to criminal culpability, regardless of their rank or status.[8] These individuals were to be held accountable for affirmative acts as well as for a failure to intervene. In regards to omissions, the commission determined that the Kaiser and other civilian and military authorities could have mitigated the barbarities which were committed during the conflict: a

4. *See* Comment, *Command Responsibility for War Crimes,* 82 The Yale L.J. 274, 1278-1287 (1973).
5. *Commission on the Responsibility on the Authors of the War and on Enforcement of Penalties,* (29 March 1919), 14 AJIL 95, at 107 (1920).
6. *Id.*, at 118.
7. *Id.*, at 113.
8. *Id.*, at 116.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

"word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air."[9]

The American representatives, Robert Lansing and James Brown Scott, in their statement of reservations, made it a point to emphasize that they had objected to the commission's initial formulation of command responsibility which posited that civilian and military authorities should be held liable for a failure to act, regardless of their degree of knowledge or capacity to prevent the commission of criminal conduct. The Americans argued that it must be established that an individual possessed the knowledge of a criminal act as well as the power and authority to prevent or to repress the delict. Lansing and Scott stressed that the imposition of liability on individuals who abstained from acting did not exonerate those who directly engaged in the criminal conduct.[10]

The Allied Powers developed a roster of 3,000 offenders which gradually was reduced to 854. This included over eighty high-ranking civilian and military leaders. In the end, the Allies acquiesced to the claim of the Weimar government that these trials would destabilize the fledgling democratic regime. The Germans were permitted to prosecute forty-five individuals before the penal senate of the *Reichsgericht*.[11] These trials, for the most part, focused on lower-level combatants.[12]

The issue of command responsibility was implicitly raised in the prosecution of Emil Muller. Muller was a captain in the army reserves who, between April and May 1918, commanded a penal camp in France which housed English prisoners. The camp was described as being situated in a muddy, unsanitary marsh which was unfit for human habitation. There also was insufficient food, water and sanitation. The accused sent several memos demanding supplies and made ardent efforts to improve conditions. A substantial number of the one thousand prisoners nevertheless died from disease. Muller was aware that prisoners were punished by being bound to a post in violation of regulations. In two instances, these prisoners were left to stare directly into the sun. The German court found that this had been carried out on the initiative of non-commissioned officers without the knowledge or approval of the accused. Muller nevertheless was convicted of mistreatment and was sentenced to six months imprisonment.[13]

In summary, discussion of the doctrine of command responsibility first arose during the debate over war crimes following World War I. The Versailles commission advocated holding military officials liable for failing to intervene to halt war crimes. As a requisite for conviction of an omission, an accused, such as

9. *Id.*, at 117.
10. *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, id.*, at 143-144.
11. J. F. Willis, Prologue to Nuremberg the Politics and Diplomacy of Punishing War Criminals of the First World War 119-131 (1982).
12. *See* Judgement in the Case of Karl Heynen (26 May 1921), 16 AJIL 674 (1922).
13. Judgment in the Case of Emil Muller (30 May 1921), *id.*, at 684-696.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

Muller, was required to have possessed the position, power, capacity and knowledge to have prevented the crimes committed by his subordinates.[14]

3. THE CASE OF GENERAL YAMASHITA

The modern law of command responsibility is rooted in the principles pronounced in the war crimes prosecution of Japanese General Tomoyuki Yamashita.[15]

General Yamashita assumed the Japanese Supreme Command in the Philippines on 9 October 1944. Following the war, he was charged, convicted and sentenced to death by a United States military war crimes commission which determined that he had disregarded and failed to discharge his duty to control his command.[16]

It was alleged that as American forces invaded the Philippines that Japanese troops under Yamashita's command had engaged in numerous war crimes. Sixteen thousand non-combatants were killed in Batangas Province, Luzon Island alone between November 1944 and April 1945. Civilians were shot, bayoneted and buried alive. Three hundred Filipinos were forced to leap into a deep well into which heavy weights were dropped. Those who survived were shot. In another incident, three to four hundred individuals were bayoneted, shot, and immolated. Prisoners of war were mistreated and were compelled to catch and consume cats, pigeons, and rats. Over fifteen hundred Americans were crowded into the cramped cargo hold of a Japanese steamship where they were starved and driven to dementia, wildly attacking one another and sucking their victims' blood.[17]

The American military commission concluded that the war crimes had been so widespread, similar and systematic, that Yamashita, as an experienced officer, must have known and ordered, or at least tacitly condoned, the actions of the Japanese troops.[18] The commission concluded that "where murder and rape and vicious, revengeful actions are widespread [...] and there is no [...] attempt by a commander to discover and control the criminal acts, such a commander

14. *See supra notes* 5-13 and accompanying texts..
15. *See* In Re Yamashita, 327 US 1 (1945). *See generally,* A F. Reel, The Case of General Yamashita (1949).
16. General Headquarters United States Army Forces, Pacific Office of the Theater Judge Advocate, *Review of the Record of Trial of a Military Commission of Tomoyuki Yamashita, General Japanese Army, reproduced in* C. Whitney, The Case of General Yamashita: A Memorandum 60, at 69 (1950) [hereinafter Military Commission].
17. *Id.*, at 63-69.
18. *Id.*, at 80.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."[19]

In affirming Yamashita's conviction, the United States Supreme Court observed that unrestrained and unsupervised military operations inevitably result in violations of the code of armed conflict, undermining the protection afforded civilian populations and prisoners of war.[20] The majority opinion pointed out that the central role of a commanding officer in protecting civilians, wounded and captured enemy belligerents was recognized in the Hague Convention of 1907. For instance, Article 1 establishes as a condition of lawful belligerency that troops are to be "commanded by a person responsible for his subordinates."[21] The court cited additional provisions which provided support for the conclusion that the humanitarian law of war "presupposes that its violation is to be avoided through the control of the operations of war by commanders who are [...] responsible for their subordinates."[22]

The majority ruled that Yamashita had failed to fulfill his "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[23]

In his dissent, Justice Frank Murphy argued that international law did not provide a precedent for the charge against Yamashita. According to Murphy, in holding Yamashita culpable for the criminal conduct of his subordinates, the court had abrogated the principle of individual responsibility. There was no evidence that Yamashita had personally participated in the acts of atrocity or had ordered or condoned their commission. Yamashita was not even alleged to have been aware of these acts. He was simply accused of having unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, thus permitting them to commit acts of atrocity. As a result of this pronouncement, the entire American military command, ranging from sergeants and generals to the president, were potentially subject to criminal prosecution.[24]

Murphy noted that the Japanese forces had been disorganized and in disarray at the time that they engaged in widespread atrocities. He pointed out that there was no evidence that these barbarities had resulted from Yamashita's conduct; it merely was assumed that they had occurred as a consequence of his failure to direct and to discipline his troops. This struck Murphy as particularly unfair given that Yamashita's inability to control and communicate with his scattered forces

19. United States *v.* General Tomyuki Yamashita (8 October -- 7 December 1945), IV L. Rept. Trials War Crim. 1, at 35 (1945).
20. 327 US 15.
21. Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations (18 October 1907), 36 Stat. 2277, TS No. 539, Art. 1 *quoted in id.*
22. *Id.*
23. *Id.*, at 16.
24. *Id.*, at 26, 28 (Judge Frank Murphy, Dissenting Opinion).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

had resulted from the massive American assault.[25] He objected that to "use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."[26] He further noted that subjecting a vanquished commander to a standard of strict liability for the conduct of his troops created the potential for prosecutions based on the pursuit of retribution and revenge rather than justice.[27]

In summary, the United States Supreme Court held Yamashita vicariously liable for the widespread commission of war crimes by troops under his command. The court imposed an affirmative duty upon commanding officers to prevent and to punish violations of the humanitarian law of war. Yet, Yamashita was not aware of and could not have prevented the criminal conduct of his troops. In addition, the Supreme Court failed to specify the nature and scope of Yamashita's affirmative duty to intervene. This was an unprecedented decision to hold a commander liable for the acts of his subordinates despite the absence of proof of criminal intent or conduct.[28]

4. THE NUREMBERG AND TOKYO TRIBUNALS

4.1. The Nuremberg Tribunal

The Nuremberg Tribunal was charged with prosecuting those Nazi leaders responsible for organizing and directing Germany's aggressive wars and atrocities. The tribunal proclaimed that individuals possess international duties which transcend the obligations of national obedience. Those acting on behalf of the state may not cloak themselves with immunity if the state, "in authorizing action, moves outside its competence under international law."[29] This clearly meant that officials might be prosecuted for ordering, condoning, planning or participating in war crimes or in crimes against humanity.[30]

The tribunal implicitly invoked the doctrine of command responsibility in convicting several civilian officials. The defendants in these cases were determined to have been well-aware of the intransgressions of individuals under their command. Wilhelm Frick was Minister of the Interior during the war. He pos-

25. *Id.*, at 34-35.
26. *Id.* at 35.
27. *Id.*
28. *See supra* notes 15-27 and accompanying texts. *See* A.M. Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyki Yamashita,* 14 Hum. Rts. Q. 303 (1992). An actual knowledge standard was applied in the related prosecution of Admiral Soemu Toyada for events in the Philippines. *See id.*, at 330-334.
29. United States *v.* Hermann Goring, XXII Trials of the Major War Crim. before the Int'l Milit. Trib. 411, at 446 (1948).
30. *Id.*

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

sessed jurisdiction over nursing homes, hospitals and asylums in which euthanasia was practiced. The tribunal determined that Frick possessed knowledge that mentally challenged, sick and aged 'useless eaters' were being systematically killed. He disregarded complaints concerning these murders and permitted them to continue. The Czechoslovak War Crimes Commission estimated that, in the end, 275,000 mentally challenged and aged individuals had been killed.[31] Fritz Saucel was Plenipotentiary General for the Utilization of Labor. Saucel claimed that he had not been responsible for the manner in which workers had been conscripted, transported and mistreated. The tribunal, however, determined that Sauckel possessed overall responsibility for the slave labor program and was aware of and supported the pernicious methods which were used to obtain laborers.[32]

The Frick and Sauckel decisions extended the doctrine of command responsibility to civilian officials. At the same time, these cases narrowed the intent standard. Frick and Sauckel, unlike Yamashita, clearly possessed knowledge of the crimes committed by their subordinates.[33] However, the equitable issue as to whether a superior should be held accountable for the collective conduct of subordinates remained. The notion of command responsibility was more fully developed in the trial of Japanese war criminals before the International Military Tribunal for the Far East.

4.2. The Tokyo Tribunal

The Allied Powers charged the Japanese cabinet and high-level military officers and administrative officials with varying degrees of responsibility for safeguarding prisoners of war.[34]

Military and civilian officials who exercised direct authority over prisoners who possessed actual or constructive knowledge of mistreatment, or would have acquired such knowledge absent their own negligence, were under an obligation to take such steps as were within their power to prevent the commission of such crimes. Actual knowledge was established in those instances in which an individual planned, ordered or was informed of a course of criminal conduct. In imputing knowledge to officials, the tribunal held that it would consider whether the crimes were notorious, numerous and widespread as to time and place and whether they were memorialized in official documents. It was not deemed to be

31. *Id.*, at 546-547.
32. *Id.*, at 566, 567. Hans Frank was Governor General of the occupied Polish territory. The judgment suggested that Frank would not be held liable for the crimes committed by the police which were under the control of Heinrich Himmler. The tribunal noted that many of these crimes were committed without the knowledge of Frank and, occasionally, despite his opposition. *Id.*, at 543.
33. *See supra* notes 29-32 and accompanying texts.
34. International Military Tribunal for the Far East, *The Tokyo War Crimes Trial*, *in* L. Friedman (Ed.) The Law of War: A Documentary History, Vol. 1, at 1029, 1038-1039 (1948).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

a defense that a cabinet official relied upon assurances offered by subordinates directly associated with the control of prisoners in those instances in which the official possessed actual or constructive grounds to question the veracity of such representations [35]

The Tokyo tribunal thus refined and replaced the *Yamashita* standard with an actual or constructive knowledge requirement. For instance Shimada Shigetaro, Navy Minister in the Tojo Cabinet between 1941 and 1944, was acquitted on the grounds that he had neither ordered, authorized, permitted or had been aware of the murders of prisoners in the Pacific.[36]

However, the court was willing to impute knowledge to Kuniaki Koiso, who was appointed Prime Minister in 1944. The tribunal ruled that atrocities and other war crimes had been committed by the Japanese troops in every theater of war and were so infamous that it was 'improbable' that Koiso would not have been aware of their occurrence. This criminal conduct was the subject of detailed discussion in governmental communications. In addition, Koiso attended a meeting of the Supreme Council for the Direction of War at which the Foreign Minister requested the issuance of a directive prohibiting the mistreatment of prisoners of war. Koiso nevertheless remained in office for an additional six months and took no action to prevent the mistreatment of internees. The tribunal noted that this constituted a "deliberate disregard of his duty."[37]

As indicated by the *Koiso* judgment, a government official with knowledge of war crimes was required to act in an affirmative fashion. Hikecki Tojo was named Minister of War in 1940, and thereafter was appointed Prime Minister in October 1941, a position in which he continued until July 1944. Tojo was aware, in 1942, of the Bataan Death March and of the resulting death and depredations. He nevertheless failed to request a report, made only perfunctory inquiries, and took no action to enforce the law of war against the Japanese troops involved. Tojo's only reaction was to bring a company commander to trial while failing to make a concerted effort to improve conditions. He also advised that prisoners should be used to construct the Burma-Siam Railway. At the same time, Tojo made no effort to improve their billeting, food and hygiene; he passively permitted the prisoners deployed on the project to die of exhaustion, starvation and disease. Despite the fact that alarm was expressed at cabinet meetings over the inordinate number of prisoners who were dying of malnutrition and disease, Tojo failed to provide internees with sustenance or care.[38]

The tribunal also held that a high-ranking official who receives assurances that criminal conduct will be curtailed may not ignore continued reports of criminal conduct. Japanese troops entered Nanking, in December 1937, and im-

35. *Id.*
36. *Id.*
37. *Id.*, at 1141.
38. *Id.*, at 1154-1155.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

mediately executed an estimated twelve thousand non-combatants. In addition, roughly twenty thousand were raped during the initial month of occupation. The death toll of civilians and prisoners of war in the first six weeks reached two hundred thousand.[39] Foreign Minister Koki Hirota learned of the atrocities through diplomatic reports and newspaper accounts. The War Ministry assured Hirota that the atrocities would cease. The brutalities nevertheless continued for an additional month. The tribunal ruled that Hirota was derelict in failing to take all available actions, including demanding that the cabinet expeditiously end the atrocities. He was content to rely on assurances while hundreds of murders, acts of sexual molestation, and other atrocities were committed. This, according to the court, amounted to criminal negligence.[40]

Finally, the Tokyo court ruled that an official who orders a halt to criminal conduct has a duty to ensure compliance with his commands. Heitaro Kimura assumed the position of Commander-in-Chief of the Burma Area Army, with full knowledge that atrocities were being committed in all military theaters. His first act was to admonish his forces to act in a professional fashion and to demonstrate respect for prisoners. However, atrocities continued, in many cases, within a few miles of his headquarters. The tribunal ruled that Kimura had deliberately disregarded his legal duty to halt war crimes and to ensure that his orders were carried out.[41]

In summary, in addition to narrowing the intent standard to actual or constructive knowledge or negligent indifference, the Tokyo Tribunal imposed a duty upon civilian and military officials to take such steps as were within their power and authority to investigate, prevent, halt and to punish war crimes. An official was not permitted to rely on assurances that widespread crimes were being corrected or that his orders were being implemented. A failure by an official to investigate or to take preventive steps was considered criminally negligent.[42]

4.3. Prosecutions under Control Council Law No. 10

Various subsidiary Nazi war criminals were brought to trial under Control Council Law No. 10. This was an agreement between the Allied Powers which established procedures and standards for the prosecution of war criminals in occupied Germany.[43]

In the *Hostage* case, the American tribunal ruled that the commanding general of an occupied territory is charged with the responsibility for maintaining

39. *Id.*, at 1061-1062.
40. *Id.*, at 1134.
41. *Id.*, at 1140.
42. *See supra* notes 35-41 and accompanying texts.
43. Control Council Law No. 10, *reproduced in* VI Trials of War Crim. before the Nuernberg Milit. Trib. under Control Council L. No. 10, at 17 (1952).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

peace and order and is accountable for the conduct of all military units within the scope of his territorial jurisdiction, regardless of whether they are within his chain of command. A military officer is considered to possess constructive knowledge of reports transmitted to his headquarters and is charged with notice of events within his territorial command. An officer may require reports of all events that fall within the scope of his authority and, if such reports are incomplete or otherwise inadequate, he is obligated to require supplementary information to apprise him of all relevant facts.[44]

The tribunal elaborated upon the scope of command responsibility in convicting Field Marshal Wilhelm List, Commander of German forces in Greece and Yugoslavia. List's absence from headquarters was not deemed to relieve him of responsibility for acts carried out in accordance with his orders. However, he was not considered to be culpable for crimes committed in his absence by troops in response to orders issued outside his chain of command. But, he was required to rescind illicit orders which were brought to his attention and to take steps to prevent a recurrence of such activity.[45]

In addition, the tribunal ruled that List was under a duty to remain informed of events within his territorial command which were recorded within communiques and to request additional information to supplement facially inadequate or incomplete reports. The court noted that military reports were for the special benefit of commanding officers and that a lack awareness of a report or a failure to investigate a facially deficient communique constituted a dereliction of duty. List received reports recounting the killing of thousands of innocents in reprisal for the acts of partisans. These executions had been carried out by troops within the scope of his territorial authority which were not within his direct chain of command. The tribunal nevertheless rejected List's claim of an absence of authority: "[t]he primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators."[46] The tribunal held that List was obligated to condemn such acts, to prosecute and punish the perpetrators and to take adequate steps to prevent their recurrence.[47] Defendant Hermann Foertsch was chief of staff under List. Foertsch was aware of the execution of reprisal prisoners, but was acquitted on the grounds that he lacked command authority.[48]

Defendant Walter Kuntze was appointed Deputy Armed Forces Commander Southeast in October 1941. Although Kuntze neither ordered the shooting nor the transfer of Jews to the camps, he was cognizant from reports that his troops

44. United States *v.* Wilhem List, XI Trials of War Crim. before the Nuernberg Milit. Trib. under Control Council L. No. 10, at 1230, 1271 (1950).
45. *Id.*, at 1271.
46. *Id.*, at 1272.
47. *Id.*
48. *Id.*, at 1286.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

were detaining and deporting Jews. Yet, he "acquiesced in their performance when his duty was to intervene to prevent their recurrence."[49] Defendant Hubert Lanz's explanation that while being commander of the XXII Mountain Corps in Greece that he had been too preoccupied to halt illegal reprisals by his troops was dismissed as a "lame excuse. The unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army. This defendant, with full knowledge of what was going on, did absolutely nothing about it."[50]

The *High Command* case further refined the notion of command responsibility and explicitly deviated from the *Yamashita* standard by limiting liability to military commanders with actual or constructive knowledge of criminal activity. The court noted that modern war entailed a large degree of decentralization and that a military commander lacked the ability to monitor the details of the operations of subordinates or to remain aware of every administrative measure. A commanding officer had the right to assume that his subordinates would legally execute military plans and programs. In rejecting the *Yamashita* standard, the tribunal noted that criminality does not attach by reason of an individual's position in the chain of command. There must be personal dereliction or criminal negligence in the supervision of subordinates. The latter is required to amount to more than mere negligence; it must constitute a wanton, immoral disregard of the actions of subordinates amounting to acquiescence.[51]

The tribunal followed the *Hostage* case in recognizing a commander's territorial responsibility for troops not attached to his command. The court stated that a military superior is endowed with executive authority and is obligated to maintain order and to protect the civilian population. Absent a directive limiting a commander's executive powers, he is charged with the right and duty to curb crime within the scope of his territorial control. However, liability is only attached in those instances in which a ranking officer possessed either actual or constructive knowledge of criminal offenses and acquiesced or participated in or neglected to interfere in the criminal conduct.[52]

The *High Command* decision noted that actual knowledge could be established by two reliable sources of information: superior orders issued from headquarters and reports from subordinate units. In those cases in which such information was not available to establish a commander's awareness of the activities of killing squads, the prosecution was required to establish that the defendant possessed constructive knowledge. However, the court narrowly applied the constructive knowledge standard and resisted imputing knowledge to military commanders. In many instances, the executions carried out by killing squads

49. *Id.*, at 1279-1280.
50. *Id.*, at 1311.
51. United States *v.* Wilhelm von Leeb, XI Trials of War Crim. before the Nuremberg Milit. Trib. under Control Council L. No. 10, at 462, 543-544 (1950).
52. *Id.*, at 545.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

were far removed from military headquarters and reports were routed through the security police in Berlin. The intelligence services also typically covered-up the most visible and notorious mass murders by attributing them to local pogroms and ethnic persecutions.[53]

Georg Karl Friedrich-Wihelm von Kuechler, was appointed Commander of Army Group North in 1942. Numerous reports indicating that illegal executions had taken place were made to Von Kuechler. The tribunal presumed, and Von Kuechler conceded, that this information had been brought to his attention. There was no evidence that he had taken any corrective action and the court concluded that he had "not only tolerated but approved the execution of these orders."[54] Henry Hoth, Commander of the 17th Army attached to Army Group South, was informed of the activities of police killing squads within his territorial command. He instructed his chief of staff to halt the squads' activities. Hoth's troops nevertheless continued to transfer prisoners and Jews to the security police for execution and Hoth was convicted of having failed to safeguard the civilian population.[55]

Absent reports, it was difficult to establish actual or constructive knowledge. Prisoners of war within Field Marshal Wilhem von Leeb's territorial command, for instance, were under the supervision of the quartermaster general who relied on officers subordinate to Von Leeb. The tribunal ruled that Von Leeb had the right to assume that his officers were properly performing their assignments and were safeguarding prisoners. There also was no evidence that the illegal employment of prisoners had been brought to the defendant's attention. In addition, Von Leeb was determined to have been unaware of the activities of the killing squads. Only the murder of forty thousand at Kovno (Riga) had been indisputably brought to his attention, and intelligence reports attributed this atrocity to a local Latvian self-defense organization. In this instance, Von Leeb fulfilled his duty and affirmatively acted to prevent a recurrence of such incidents.[56]

In summary, the Control Council No. 10 cases applied and advanced the doctrine of command responsibility. Military officials were held responsible for violations of the humanitarian law of war within the scope of their operational and territorial command. This extended to units outside their chain of command, other than in those instances in which the commanders were absent from headquarters. The strict liability standard of *Yamashita* was abandoned in favor of an actual or constructive knowledge test. A commander was presumed to have knowledge of reports. A superior could not place complete confidence in internal communications; factually deficient communiques were required to be investigated and amplified. Constructive knowledge was established by the sus-

53. *Id.*, at 547-549.
54. *Id.*, at 568.
55. *Id.*, at 595-596.
56. *Id.*, at 558, 561-562.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

tained, widespread and notorious nature of war crimes. Courts, however, varied on their willingness to impute such knowledge to defendants. Officials were permitted to safely assume that their subordinates were legally carrying out commands. Subordinates were not deemed to possess the authority and power to halt war crimes.[57]

4.4. Other Allied war crimes prosecutions

Other allied tribunals issued decisions which were inspired by the broad view of command responsibility articulated in *Yamashita*. In these judgments, courts willingly imputed knowledge of war crimes to military commanders. *SS Brigadefuhrer* Kurt Meyer was convicted by a Canadian military court of the killing of prisoners of war. Evidence was adduced that Canadian prisoners had been interrogated and then shot within one hundred meters of Meyer's headquarters. Meyer claimed to have been unaware of the killings. The proximity of the killings to Meyer's command persuaded the panel that he had either ordered or had condoned the murders.[58] Kurt Student, the commander-in-chief of the German forces in Crete, was convicted by a British court of the killing and employment of prisoners on prohibited work. The court determined that these executions would not have occurred absent a belief by the German troops that such conduct either had been ordered or condoned by Student.[59]

In the Pacific theater, Takashi Sakai, commander of Japanese forces in South China, between 1941 and 1943, was convicted of inciting or permitting his troops to engage in atrocities. The tribunal rejected Sakai's claim that he had been unaware of these acts and therefore should be exonerated. "That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed by his subordinates."[60] Lieutenant General Baba Masao, commander of the 37th Japanese Army in Borneo, implemented an order which had been issued prior to his assumption of command which called for the transfer of one thousand American and British prisoners. Masao was aware of the prisoners' dilapidated condition, but nevertheless permitted the sixty-five mile march to proceed. Many died of disease and ill-treatment while others were shot. Six months later, Masao ordered the evacuation of the remaining 540 prisoners; only 183 of whom reached their destination. The thirty-three who managed to survive the next two months in captivity were summarily shot. Masao claimed that communications had been cut off by the allied invasion and that he had been unaware of the killings. He nevertheless was convicted

57. *See supra* notes 44-56 and accompanying texts.
58. Trial of S.S. Brigadefuhrer Kurt Meyer (10-28 December 1945), IV L. Rept. Trials War Crim. 97, at 101-104, 106-108 (1948).
59. Trial of Kurt Student (10 May 1946), IV L. Rept. Trials War Crim., at 118-120 (1948).
60. Trial of Takashi Sakai (19 August 1946), XIV L. Rept. Trials War Crim. 1, at 7 (1949).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

and executed. The military panel followed *Yamashita* and determined that Masao had an affirmative duty to take such measures as were within his power and appropriate under circumstances to protect the prisoners.[61]

In summary, World War II provided impetus for the development of the law of command responsibility. The doctrine was extended to encompass military and civilian officials who failed to intervene to prevent or to punish the commission of war crimes. Three basic tests were utilized by courts: strict liability; actual and constructive knowledge; and gross negligent disregard of facts sufficient to merit further investigation or remedial action. The constructive knowledge and negligence standards were flexible formulas. There was no certain standard for determining what facts constituted constructive knowledge or notice of war crimes. The scope of a commander's duty to affirmatively intervene also fluctuated with the facts and circumstances. In the four decisions discussed above, allied courts were willing to broadly impute knowledge to the defendants and to hold them vicariously liable for failing to take actions to prevent the commission of war crimes.[62]

Prior to the convening of the international criminal tribunals for Yugoslavia and Rwanda, the most significant discussions of command responsibility were the decisions by judicial and governmental panels examining the conduct of civilian and military officials during the Vietnam War, the American incursion into Haiti and the Israeli-Palestinian conflict.

5. AMERICAN COURTS AND COMMAND RESPONSIBILITY

5. 1. The Vietnam War

In the midst of the Vietnam War, presidential advisor Townsend Hoopes wrote an article in which he expressed outrage over the allegation by two young journalists that the actions of American civilian and military leaders were analogous to those of the defendants prosecuted at Nuremberg.[63] Nuremberg prosecutor Telford Taylor concluded that it remained an open question whether American civilian officials had the requisite depth and degree of knowledge to be held criminally culpable. However, he stressed that the military command structure in Vietnam possessed an unprecedented degree of mobility, resources and infor-

61. Trial of Lieutenant General Baba Masao (28 May 1947), XI L. Rept Trials War Crim., at 56-57, 59 (1949).
62. *See supra* notes 58-61 and accompanying texts.
63. T. Hoopes, *The Nuremberg Suggestion, in* R. Falk, G. Kolko & R.J. Lifton (Eds.), Crimes of War a Legal, Political- Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in War 233 (1971). *See* J.J. Paust, *My Lai and Vietnam: Myths and Leader Responsibility,* 57 Mil. L. Rev. 99 (1972); W.H. Parks, *Command Responsibility for War Crimes,* 62 Mil. L. Rev. 1 (1972).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

mation. This contrasted with the circumstances which confronted General Yamashita whose forces had been in full disarray and retreat.[64] Taylor argued that the moral health of America would not be redeemed until its leaders "are willing to scrutinize their behavior by the same standards that their revered predecessors applied to Tomayuki Yamashita 25 years ago."[65] Waldemar A. Solf, of the Judge Advocate General Department of the Army, disputed that *Yamashita* had established a strict liability standard. He contended that actual knowledge or a deliberate disregard was required. United States decision-makers, according to Solf, at most, had been mildly negligent and had exercised poor judgment; there was no evidence that they had harbored an evil intent. He pointed out that, in contrast to Yamashita, the American officer corps had issued directives designed to prevent war crimes.[66]

In 1973, First Lieutenant William Calley was convicted of the premeditated murder of Vietnamese civilians. The United States Court of Military Appeals, in reviewing the evidence, determined that Lieutenant Calley had directed and had personally participated in the intentional killing of men, women, and children who were in the custody of armed soldiers under Calley's command. In addition, the court confirmed that Calley had shot a Vietnamese monk whom he was attempting to interrogate and that he had seized and had intentionally shot a child.[67]

Captain Ernest Medina, Calley's company commander, was prosecuted, in 1971, for the involuntary manslaughter of one hundred human beings. Judge Kenneth Howard abandoned the *Yamashita* vicarious liability standard and instructed the jury that Medina only should be found criminally liable if he possessed actual knowledge that troops subject to his command were involved in committing or were about to commit a war crime; and that he had wrongfully failed to take necessary and reasonable steps to insure compliance with the law of war.[68] The court thus required that a commander possess "actual knowledge plus a wrongful failure to act [...]. [M]ere presence at the scene without knowledge will not suffice."[69] The military jury acquitted Medina after deliberating for two hours.[70]

Professor Roger Clark contrasted the strict liability standard imposed upon Japanese General Tomayuki Yamashita with the more narrowly crafted actual knowledge test applied against American Captain Ernest Medina. He observed that it was "hard to avoid the feeling that there is a certain amount of hypocrisy

64. T. Taylor, Nuremberg and Vietnam: An American Tragedy 180-181 (1970).
65. *Id.*, at 182.
66. W.A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 Akron L. Rev. 43, at 57-60 (1972).
67. United States *v.* Calley, 46 CMR 1131 (1971), *affirmed* 48 CMR 19, 24 (1973).
68. K. A Howard, *Command Responsibility for War Crimes*, 21 J. Pub.L. 7, at 10 (1972).
69. *Id.*, at 11.
70. *Id.*, at 8.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

lurking somewhere."[71] Clark argued that the law of war was designed to minimize the loss of human life and thereby to affirm the principle of humanitarianism. In his view, these values were best protected under a broad view of command responsibility. Clark concluded that the "actual knowledge test, in a context like My Lai, is an invitation to the commander to see and hear no evil. It is not consistent with a serious effort to make the command structure responsive to the humanitarian goals involved."[72]

The American military court in *Medina* took the unprecedented step of limiting command responsibility to those cases in which a commanding officer possessed actual knowledge of the commission of a crime and neglected to intervene. The tribunal's failure to follow the strict liability test articulated by the United States Supreme Court in *Yamashita* or a constructive knowledge or wanton and reckless disregard standard suggests that the military tribunal had modified the legal standard as an expression of solicitude and sympathy for American combatants.[73] Equally indicative of the military's protective attitude towards United States officers was the failure to bring to trial those high-ranking officers responsible for planning and supervising the operation.[74]

Samuel W. Koster, Commander of the 23d Infantry, American Division, was the commanding officer of the specially organized unit which launched the My Lai operation. His illustrious military career spanned World War II, Korea and Vietnam. Following Koster's service in Vietnam, he was appointed superintendent of the United States Military Academy at West Point. The United States Court of Claims, in reviewing a decision by the Army Board for Correction of Military Records to uphold administrative sanctions imposed on Koster, determined that various irregularities should have alerted Koster to the need to initiate a full and fair investigation.[75]

As the facts surrounding My Lai emerged, court-martial charges were brought against Koster. These allegations were dismissed, in 1971, in favor of administrative penalties. Secretary of the Army Stanley Resor concluded that Koster must be held responsible for having failed to competently carry out an investigation.[76] Resor stressed that the "test of commanders, especially those in the field in times of actual hostilities, has always been strict. Too much is at stake for it to be otherwise. General Koster must be measured by that test."[77]

---

71. R.S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide,* 5 Rt.-Cam. L.J. 59, at 72 (1975).
72. *Id.,* at 78.
73. *See supra* notes 68-72 and accompanying texts..
74. *See* United States Department of the Army, Preliminary Investigations into the My Lai Incident the Report of the Investigation, Vol. 1 (1970).
75. *See* Koster *v.* United States, 685 F.2d 407, 408-409 (1982).
76. *Id.,* at 409-410.
77. *Quoted in id.,* at 414. *See generally,* W.V. O'Brien, *The Law of War, Command Responsibility and Vietnam,* 60 Geo. L. J. 605 (1972).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

5.2. Haiti

In 1994, American military courts again confronted a case of command responsibility. The United States launched Operation Uphold Democracy in order to restore stability in Haiti. Captain Lawrence P. Rockwood, a counterintelligence officer for Joint Task Force (JTF) 190, believing that Haitian prisoners were being tortured and killed, left his place of duty and entered and inspected the National Penitentiary in Port-au-Prince, Haiti. A United States court-martial determined that Rockwood had acted on the basis of speculation and had unjustifiably left his place of duty.[78]

The court martial determined that any abuse which might have occurred in the prison had been committed by Haitian soldiers who were not subject to American operational or territorial command. Most importantly, Rockwood was a staff officer who possessed neither an international nor domestic obligation to act under the doctrine of command responsibility.[79] He was convicted despite the fact that he had a United States Department of State report in his possession which detailed the dilapidated conditions, inadequate diet and poor health care in Haitian prisons.[80]

These Vietnam and post-Vietnam American prosecutions illustrate the perils of domestic enforcement of the doctrine of command responsibility. The application of the actual knowledge standard in *Medina* appears to have been designed to insulate the accused from liability. General Koster suffered administrative sanctions for contravention of the doctrine of command responsibility, but was not criminally prosecuted for wanton disregard of facts which should have alerted him to the commission of war crimes. In *Rockwood,* the court-martial was able to avoid confronting the issue of command responsibility by ruling that Captain Rockwood had not occupied an authoritative position and that the Hatian forces were not within the American chain of command.[81] Politicalization thus appears to have been the rule in American prosecutions for contravention of command responsibility. In *Goldman,* another Vietnam era case, Captain Leonard Goldman countenanced the rape, sodomy and murder of two Vietnamese nurses by members of his company. The court martial determined that Goldman was an exemplary officer and sentenced him to a reprimand and forfeiture of one hundred dollars pay per month for twelve months, an insignificant sentence given the gravity of his crimes.[82]

78. E.J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood,* 149 Milit. L. Rev. 275-276, n.4 (1995).
79. *Id.,* at 278-279, 290-291.
80. *Id.,* at 275-276, n.4, 277.
81. *See supra* notes 68-80 and accompanying texts.
82. United States *v.* Goldman, 43 CMR 711, 715 (1970).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

6. SABRA AND SHATILLA

Lebanese President-elect and Christian Phalangist leader Bashir Jemayel was assassinated in a car bomb explosion in September 1982. Israeli defense forces immediately entered West Beirut in order to prevent an escalating cycle of religious violence. The Israelis, in an effort to control the conflict and to avoid placing their own troops in jeopardy, authorized Phalangist forces to enter the Sabra and Shatilla refugee camps in order to discover and to detain Palestinian guerillas. The leaders of the Jewish state were aware of the Phalangist's disdain and disregard for legalities and desire for revenge and cautioned the Lebanese Christians to respect the civilian inhabitants. Once inside the camps, the Phalangist passion erupted, resulting in the slaughter of between seven and eight hundred Muslim civilians.[83]

Some measure of responsibility was imposed on Prime Minister Menachem Begin who had been informed of the Phalangist incursion thirty-six hours following the entry into the camps. The Kahan commission concluded that he had demonstrated little interest or alarm over the obvious danger of sending the Phalangist forces into the camps and had relied on the calming reports issued by subordinates. The report faulted Begin for not continuing to monitor the incursion: an expression of concern on his part may have alerted the defense minister to the necessity of adopting protective measures.[84]

In the case of Defense Minister Ariel Sharon, the Kahan commission recommended dismissal. Sharon authorized the Phalangist entry into the camps and failed to fulfill his duty to admonish the Israeli defense forces or Phalangists to cautiously conduct the operation. He explained that he had not received a warning from the intelligence service concerning the danger of the operation. The commission, however, concluded that Sharon need not have possessed prophetic powers in order to have anticipated the possibility of slaughter since he was well-acquainted with the Phalangists. Foreign Minister Yitzhak Shamir was determined to have ignored a statement from a fellow minister concerning the danger posed by Phalangist forces. He failed to relay this information to the defense minister and instead contented himself with inquiring whether his staff had received any additional information from Beirut. He was determined to be guilty of inaction.[85]

Lieutenant General Rafael Eitan, Chief of Staff in the Defense Ministry, also was deemed to have breached his duty when, together with the minister of defense, he approved the entry of the Phalangists into the camps without insuring the safety of the residents or establishing an adequate system for monitoring the

83. Report of the Commission of Inquiry into the Events at the Refugee Camps in Beruit (7 February 1983), 22 ILM 473, at 478-481, 491 (1983).
84. *Id.*, at 501.
85. *Id.*, at 519.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

activities of the Lebanese military. Upon receiving the first reports of atrocity, Eitan immediately met with the Phalangist commanders. He testified that he believed the report to have been erroneous since the Phalangists failed to mention the killings. Instead of canceling the operation or contacting the defense minister, Eitan permitted additional Phalangists to enter the camp and provided tractors to bulldoze terrorist concentrations. The Kahan report concluded that the Phalangists may have reasonably concluded that the Israelis condoned or encouraged the killings.[86]

In summary, the Kahan Report held Israeli civilian and military decision-makers liable for having failed to anticipate the slaughter in the Sabra and Shatilla refugee camps. The commission did not question the decision to cleanse the camps of Palestinian guerillas. Instead, it held decision-makers accountable for having failed to anticipate that this was a dangerous situation which required the issuance of orders and policies intended to protect the civilian population. These officials also possessed an affirmative duty to monitor and to control Phalangist operations in the camps.[87]

The Kahan commission, of course, was not a criminal court. Nevertheless, the report made a major contribution to international criminal jurisprudence by emphatically establishing a gross negligence standard for command liability. This entailed a failure to take reasonable precautions or disregarding evidence of the likelihood of the killing of civilians. Prime Minister Menachem Begin, for instance, was held responsible for having failed to keep abreast of the incursion. There was no indication that he possessed either actual or constructive knowledge of the slaughter or that he had deliberately disregarded information. He, instead, was adjudged culpable for having failed to monitor an operation which possessed an obvious element of danger.[88] Other Israeli officials seemed to have not merely been grossly negligent, but appear to have intentionally dismissed the danger posed to the Palestinians. For instance, Chief of Staff Rafael Eitan rejected a report that atrocities had occurred, relied on the assurances of Phalangists that no killings had been committed, and augmented the Phalangist forces rather than initiating an independent investigation.[89]

86. *Id.*, at 505-507.
87. *See supra* notes 83-86 and accompanying texts. *See generally,* W.D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila And Sabra,* 107 Milt. L. Rev. 71 (1985).
88. *See supra* note 84 and accompanying text.
89. *See supra* note 86 and accompanying text.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

7. THE 1977 PROTOCOL TO THE GENEVA CONVENTION

The requirements of international law pertaining to command responsibility were clarified in Article 86(2) of the 1977 Protocol to the Geneva Convention.[90] This provision generally is viewed as a codification of customary international law.[91] Article 86(2) provides that the fact that a breach of the Geneva Conventions was committed by a subordinate does not absolve the superior from penal or disciplinary responsibility in those circumstances in which the superior "knew, or had information which should have enabled [the superior] to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach."[92] Superiors, under these conditions, are required to "take all feasible measures within their power to prevent or repress the breach."[93] According to a leading commentator, this provision incorporates the actual knowledge test and is sufficiently expansive to incorporate both a constructive knowledge and wanton reckless disregard standard. The latter goes beyond a mere negligent error in judgment and requires an indifferent disregard of a known threat. Article 86(2) also requires that a commander take all practicable steps which are within the scope of his or her authority.[94] This provision was incorporated, with slight modification, into the Draft Code Of Crimes Against The Peace And Security Of Mankind.[95]

The most comprehensive commentary on command responsibility is contained in a recent decision of the International Criminal Tribunal for Yugoslavia.

8. COMMAND RESPONSIBILITY AND THE WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA

The United Nations Commission Of Experts formed to investigate war crimes and crimes against humanity in the former Yugoslavia recommended that any international court which may be formed should be provided with jurisdiction over military leaders and public officials who contravened their duty under the

90. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (12 August 1949), Art. 86(2), 1125 UNTS 3 (1979) [hereinafter Protocol I].
91. *See* G.H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 Va. J. Int'l L. 693, at 719 (1986).
92. Protocol I, *supra* note 90, Art. 86(2).
93. *Id.*
94. *See* C. Pilloud *et al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1012 (1987).
95. Draft Code of Crimes Against the Peace and Security of Mankind, 1991 Rept. ILC Vol. 43, UN Doc. A/46/10 (1991), at 242, Art.12.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

doctrine of command responsibility as conceptualized in the Geneva Protocol.[96] The Statute of the International Criminal Tribunal for Yugoslavia (ICTY) accordingly provided that the fact that a crime punishable under the treaty 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."[97] The Secretary-General noted that this was consistent with the precedents established following World War II which imposed criminal responsibility on heads of state, government officials and persons acting in an official capacity. Such individuals, according to the Secretary-General, should be held individually responsible for issuing an unlawful order to commit a crime as well as for a failure to prevent a crime or to deter the unlawful behavior of subordinates.[98] This provision also was incorporated into the Statute of the International Criminal Tribunal for Rwanda.[99]

In *Delalić,* the Yugoslavian War Crimes Tribunal noted that the touchstone of command responsibility is the existence of a superior-subordinate relationship based on the capacity to control the actions of subordinates. The tribunal observed that this standard was particularly problematic to apply in instances in which command structures had broken down and had been replaced by newly created fluid and ill-defined organizations. The court nevertheless held that the absence of formal legal authority did not preclude the imposition of liability. It ruled that persons effectively commanding informal structures who possessed the power to prevent and to punish the crimes of persons who were under their control might, under certain circumstances, be held responsible for a failure to curb war crimes.[100]

The court also noted that the use of the generic term "superior" in Article 7(3), in juxtaposition with Article 7(2)'s affirmation of the criminal responsibility of a "Head of State", "Government official" or "responsible Government official," indicated that criminal liability extended beyond military commanders to encompass political leaders and other civilians in positions of authority.[101] The

96. Final Report Of The United Nations Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992), UN Doc. S/1994/674 (1994), at 16-17, paras. 55-60.
97. United Nations Secretary-General's Report on Aspects of Establishing An International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S/25704 (1993), at 15, Art.7(3), 32 ILM 1159 (1993).
98. *Id.*, at 14-15, para. 55 (commentary).
99. SC Res. 955, UN Doc. S/RES/955 (1994), at Art. 6(3), 33 ILM 1598 (1994).
100. Prosecutor *v.* Delalić, Mucić, Delić & Landžo, Judgment, Case No. IT-96-21-T, 16 November 1998 (unpublished), at para. 354 (http://www.unorg/icty)[hereinafter Prosecutor *v.* Delalić] . The Čelebići detention facility was located in the village of Čelebići which was located in the Konjić municipality in central Bosnia. *Id.*, at para. 3.
101. *Id.*, at para. 356.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

latter only were liable to the extent that they exercised a degree of control over their subordinates which was similar to that of a military commander.[102]

The trial chamber interpreted the requirements of Article 7(3) in light of customary international law, as embodied in the Geneva Protocol, and ruled that a superior possessed the requisite *mens rea* to incur criminal responsibility in those instances in which he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes. Criminal intent also was established where an official had information in his possession which, at a minimum, indicated the need for an investigation to determine whether crimes were being committed or were about to be committed. The trial chamber further ruled that the doctrine of command responsibility did not provide for strict liability.[103]

The court noted that in the absence of direct knowledge, that a commander's cognizance of the offenses committed by his subordinates may not be presumed. Instead, this awareness must be established by circumstantial evidence. In making a determination whether a superior officer possessed the requisite knowledge, the trial chamber enumerated various factors which should be considered: the type, scope, duration and time of the illegal acts; the number and character of the officers and troops involved; the ease of communication; the geographical location and widespread occurrence of the acts; the tactical tempo of the operations; the *modus operandi* of the criminal conduct; and the location of the commander at the time of the crimes.[104]

The trial chamber stated that under the 'had reason to know standard' a superior only could be held criminally responsible in those instances in which specific information was available which would provide notice of the crimes which had been, or may be, committed by subordinates. This information need not establish that crimes had occurred; it was sufficient that the superior was placed on notice that further investigation was required in order to determine whether offenses had been, or were about to be committed.[105]

The trial chamber also adopted the stance that a superior may not remain willfully blind to the acts of his or her subordinates. A superior who simply ignores information within his or her actual possession which compels the conclusion that a criminal offense is being committed, or about to be committed by his subordinates, commits a criminal dereliction of duty. What of a situation in which a commander lacks information by virtue of a failure to properly supervise subordinates? The trial chamber noted that the jurisprudence immediately following the Second World War affirmed the existence of the duty of commanders to remain informed of the activities of their subordinates and that the

102. *Id.*, at para. 378.
103. *Id.*, at para. 383.
104. *Id.*, at paras. 384-86.
105. *Id.*, at para. 393.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

absence of knowledge did not constitute a defense. However, the court ruled that the drafters of the Geneva Protocol, which was deemed to reflect customary international law at the time of the offenses at issue in *Delalić,* rejected the imposition of liability in those instances in which a superior should have possessed knowledge.[106]

The legal duty resting upon superiors required that they take all necessary and reasonable measures to prevent the commission of offenses. In the event that such crimes already have been committed, there is an obligation to punish the perpetrators. The trial chamber held that the action required of a superior was inextricably related to the facts of each situation and that it was difficult to formulate a general standard. The tribunal stressed that a superior was only obliged to take those remedial measures which were available under the circumstances. However, the tribunal did take the innovative step of ruling that a lack of legal competence to prevent or to repress a crime did not necessarily preclude command liability in those instances in which a superior was positioned to take effective action.[107]

The trial chamber held that proof of causation was not an independent requirement for the imposition of command reliability. It conceded that there may be an inherent causal connection between a commander's failure to fulfill his duty to intervene and the commission of war crimes by subordinates; and that there also may be a causal connection between the failure of an official to have punished past delicts and future war crimes. However, the chamber noted that there was no causal connection between an offense committed by a subordinate and the subsequent failure of a superior to sanction the offense. This, according to the trial chamber, demonstrated that causality was not a separate element of the doctrine of superior responsibility.[108]

The trial chamber imposed command responsibility on Zdraavko Mucić.[109] The exercise of authority and control, in the absence of formal appointment, was sufficient for the imposition of criminal responsibility. The court determined that Mucić was the acknowledged de facto commander of the camp.[110] This conclusion was based on Mucić's statements to prisoners, the observations of detainees and most importantly, his assumption of control over the guards. In short, Mucić was found to have manifested all the powers and functions of command.[111] He exercised his discretion to determine which Serbian prisoners would be permitted to be released or transferred, inspected detainees, and asserted authority over and disciplined guards.[112]

106. *Id.*, at paras. 388-391.
107. *Id.*, at paras. 394-395.
108. *Id.*, at paras. 399-400.
109. *Id.*, at para. 776.
110. *Id.*, at para. 735-737.
111. *Id.*, at para. 750.
112. *Id.*, at para. 764-767.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

Mucić conceded in interviews that he was aware of, and had personally observed, the abuse of detainees. Witnesses, in fact, testified that Mucić was present during the rape of female prisoners. The trial chamber also observed that the crimes committed in the Čelebići prison camp were so widespread and notorious that it would have been impossible for Mucić not to have known or to have heard about them. Despite this, he neglected to issue instructions to the guards on the treatment of detainees and made no effort to establish a system to monitor abuses. Mucić thus failed to take necessary or reasonable measures to prevent or to punish crimes committed within the Čelebići Camp. He also typically was absent from the camp during the evening which insured that any cautionary orders which he may have issued would prove ineffective.[113]

The *Delalić* decision, although arising under the statute of the Yugoslav War Crimes Tribunal, was intended to summarize the existing customary international law of command responsibility which had been incorporated into the Geneva Protocol. Three mental standards were recognized as carrying criminal liability, actual and constructive knowledge and gross reckless disregard of facts sufficient to constitute notice of war crimes or crimes against humanity. The trial chamber explicitly rejected the imposition of a strict liability requirement on superiors. The decision recognized that command responsibility attached to individuals exercising actual or *de facto* authority. The scope of an official's duty to act was left undefined. However, an individual's duty to intervene was not circumscribed by their formal position and authority. A superior presumably was obligated to undertake all feasible actions.[114]

9. THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court (ICC) of 17 July 1998, incorporated an article on command responsibility.[115] The ICTY's adjudication of command responsibility in *Delalić* is credited with influencing the decision to incorporate this clause. The inclusion of the latter provision, in turn, encouraged additional indictments premised on command responsibility before the Yugoslav and Rwandan tribunals; the most prominent was that lodged against Federal Republic of Yugoslavia President Slobodan Milošević and other Serbian leaders for international crimes in Kosovo.[116]

During the preparatory phase of the negotiations over Article 28 two issues dominated the deliberations. First, it was determined that the principle of command obligation was a form of criminal responsibility rather than an expression

113. *Id.*, at para. 769-773.
114. *See supra* notes 100-113 and accompanying texts.
115. Rome Statute, *supra* note 1.
116. I. Bantekas, *The Contemporary Law Of Superior Responsibility*, 93 AJIL 573, at 574 (1999).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

of the principle that commanders were vicariously liable for the acts of their subordinates. Secondly, liability was extended to civilian as well to military officials.[117]

Article 28 of the Rome statute provides that a military commander or an individual effectively acting as a military commander shall be criminally responsible for crimes committed by forces under his effective command and control or effective authority and control. These clauses impose legal responsibility on military leaders exercising *de facto* as well as *de jure* control. The qualification that the official must exercise "effective control" appears to limit command liability for the actions of troops which are recalcitrant, remote, subject to another chain of command or incommunicado.[118]

A commander under the statute shall be considered to be criminally culpable who "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such high crimes."[119] This language is generally drawn from the Geneva Protocol which, in the view of the *Delalić* decision, reflects current customary law.[120]

The term commander should be interpreted to encompass military superiors who possess personal responsibility and control over the perpetrators. Individuals in this position typically have access to information pertaining to the conduct of subordinates and exercise the requisite authority to prevent or to punish criminal conduct. The notion of commander thus is to be interpreted in terms of hierarchical control.[121]

Most problematic is the intent standard. The imposition of liability on a commander who knew of an offense would appear to be embraced within the familiar actual knowledge test. The "should have known standard" presumably encompasses constructive knowledge. This provision should be broadly interpreted in light of the fact that it was preferred over a narrower formulation which provided that a commander only "should have known" of crimes in those instances in which there has been "widespread commission of the offenses."[122]

The commentary to the Geneva Protocol, upon which the Rome requirement is loosely modeled, notes that a superior cannot absolve himself of responsibility by pleading ignorance of reports addressed to him or by invoking temporary absence as an excuse. In determining whether a commander was aware of depre-

117. *See* M. H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, at 37 (1999).
118. *See* B. Broomhall, *The International Criminal Court: Overview and Cooperation with States, in* M.C. Bassiouni (Ed.), ICC Ratification and National Implementing Legislation 45, at 62-63 (1999).
119. Rome Statute, *supra* note 1, Art. 28(1)(i).
120. Prosecutor *v.* Delalić, *supra* note 100, at para. 390.
121. Pilloud, *supra* note 94, at 1013.
122. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf. 183/2/Add.1 (1998), *reproduced in* M.C. Bassiouni (Ed.), The Statute of the International Criminal Court: A Documentary History 119, at 142, Art. 25(a) (1998).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

dations and delicts, consideration also should be given as to whether the violations were numerous, widespread and occurred over a lengthy period of time. Similarly, the tactical situation and the level of training and character of subordinate officers and troops are also facts of which a commander cannot claim to be unaware. As an illustration, the commentary to the Geneva Protocol notes that a commander should anticipate that breaches of the statute are going to be committed in those instances in which troops lack training in the law of war or in which there has been a lack of attention to the means of attack directed against a densely populated area. Other relevant facts include an absence of instructions relating to the treatment of prisoners or a failure to provide for medical services.[123]

The *Delalić* decision, which was informed by the Geneva Protocol, stressed that the information available only need be sufficient to place a commander on notice that war crimes may have been committed and need not constitute definitive proof.[124] The commentary to the Geneva Protocol notes that while a commander may be ignorant of events, that a superior cannot absolve himself from liability by deliberately avoiding knowledge of criminal acts. Such willful ignorance would satisfy the requisite standard of wanton recklessness; mere negligence is not sufficient.[125]

At the same, time, according to *Delalić*, the Geneva Protocol does not impose a duty upon a commander to affirmatively undertake an investigation in the absence of incriminating information, even in those situations in which this ignorance resulted from the officer's own delinquent performance. The latter interpretation would appear to present a major point of contention in future prosecutions.[126] The *Delalić* decision significantly suggested that the language of the Rome statute might be reasonably interpreted to impose an affirmative duty to remain informed of the activities of subordinates.[127] The "circumstances of the time" language requires that the commander's conduct should be examined in light of other events and developments which demanded the commander's attention, time and resources. Consideration also should be given as to whether the commander received the relevant information in time to take prophylactic steps.[128]

The military commander, under the ICC statute, is culpable if he fails to take necessary and reasonable measures within his or her power to prevent or repress war crimes or crimes against humanity or neglects to submit the matter to the competent authorities for investigation and prosecution. The duty to prevent or to punish criminal conduct is confined to acts which are within the commander's

123. *See* Pilloud, *supra* note 94, at 1014-1016.
124. *See supra* note 105 and accompanying text.
125. *See* Pilloud, *supra* note 94, at 1012-1014.
126. *See supra* note 106 and accompanying text.
127. Prosecutor *v.* Delalić, *supra* note 100, at para. 393.
128. *See* Pilloud, *supra* note 94, at 1014.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

scope of authority.[129] This is distinguished from the standard articulated in *Delalić* which imposed a duty to take measures which were outside of a commander's power of command. The "necessary and reasonable measures" standard likely will be interpreted to require action which is considered to be feasible under the facts.[130]

The Rome statute also imposed responsibility on civilian superiors for the acts of subordinates over whom they exercise effective authority and control. This liability was extended in those instances in which a superior either knew or consciously disregarded information which clearly indicated, that his subordinates were committing or about to commit crimes in contravention of the statute.[131] This was intended to impose a relaxed standard of liability on civilian officials. However, civilian officials arguably remain liable in those instances in which they possess actual or constructive knowledge of criminal conduct; consciously disregard this information; and fail to take necessary and reasonable measures to prevent or to punish such acts. This relieves superiors of the duty to investigate or to act on the basis of information which fails to "clearly" indicate the existence of criminal conduct. They thus are permitted to assume a passive stance towards the activities of the armed forces and only are liable when they intentionally decide to dismiss uncontroverted evidence of delicts. This is in contrast with military commanders who possess an affirmative duty to investigate when they possess information which provides notice of the possible commission of crimes under the statute.[132]

Civilian officials often lack the resources to fully investigate, prevent and to punish war crimes and crimes against humanity. Nevertheless, the imposition of a relaxed standard invites decision-makers to refrain from scrutinizing the activities of the armed forces. As the events surrounding the My Lai massacre suggest, the military cannot be depended upon to meaningfully monitor combat operations.[133]

The standard for command responsibility articulated in the Rome Statute suffers from the same ambiguity which characterizes other formulations. The actual knowledge requirement provides for a definite test. However, constructive knowledge as well as information which is sufficient to place a commander or superior on notice of criminal conduct are both dependent on the facts in a given situation. Equally ambiguous are the affirmative acts which are required to be undertaken.[134]

In the end, the Rome statute may result in a modest limitation on the scope of command liability. The vicarious liability standard was abandoned in favor of

129. Rome Statute, *supra* note 1, Art. 28(1)(ii).
130. *See* Pilloud, supra note 94, at 1015-1016. *See also supra* note 115 and accompanying text.
131. Rome Statute, *supra* note 1, Art. 28(2) (i).
132. Broohmhall, *supra* note 118, at 62-63.
133. *See supra* notes 68-77 and accompanying texts.
134. *See Command Responsibility for War Crimes, supra* note 4, at 278-287.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

more restrictive tests. Liability only extends to troops over whom an official exercises effective control and the obligation to intervene is limited to acts within an official's scope of authority.[135] The decision of the International Tribunal for Rwanda in *Kambanda* illustrates some of the possible perils of the ICC standard. The court, in acquitting Hutu leader Jean Kambanda of command responsibility for three counts of rape, noted that the defendant was aware that these acts were taking place in the vicinity of his headquarters and within the scope of his geographical authority. He nevertheless made no effort to prevent this sexual molestation. Although convicted of genocide, Kambanda was acquitted of command responsibility for the rapes based on the fact that the perpetrators were not within the scope of his command. A standard which absolves a political leader of the obligation to act under such circumstances and sanctions his sedentary stance lacks credibility. Kambanda was a high-ranking political figure who clearly commanded sufficient support to halt these delicts. In fact, in the early days of the Rwandan conflict he mobilized the Hutu population to prevent the militia's depredations. The moral logic of the decision is further undermined by the fact that Kambanda was held liable under the principle of command responsibility for the criminal conduct of militia members who were subject to his actual control.[136]

At the same time it must be stressed that the Rome statute was created to complement rather than to replace the jurisdiction of national courts. For instance, an individual may not be prosecuted before the ICC with respect to conduct which formed the basis of a prior domestic prosecution in which the defendant has been convicted or acquitted.[137] There is an exception in those instances in which the proceedings were intended to shield the accused from criminal responsibility for crimes within the jurisdiction of the court; or in which the proceedings were not conducted independently or impartially in accordance with "the norms of due process" recognized by international law or otherwise were carried out in a manner which was inconsistent with an intent to bring the person concerned to justice.[138]

Professor Jordan Paust notes that domestic courts have narrowly interpreted the scope of command liability in order to insulate domestic officials from criminal culpability. The issue arises whether a national tribunal's decision to impose a narrowly crafted intent standard which results in a defendant's acquittal would constitute an impermissible shielding of a defendant from liability under the ICC statute. Paust particularly points to the 1994 decision of the Canadian Supreme Court acquitting Hungarian émigré Imre Finta of the detention, deportation and extermination of Jews during World War II. He notes that the

135. *See supra* notes 118-134 and accompanying texts.
136. Prosecutor *v.* Jean Kambanda, Judgment and Sentence, Case No. ICTR-97-23-S, 4 September 1998, at 126-127, 129 (unpublished) (http://www.un.org/ictr).
137. Rome Statute, *supra* note 1, Art. 20(1).
138. *Id.*, Arts. 20(3)(a), 20 (3)(b).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

actual knowledge or wilfully blind test applied by the tribunal created an unreasonably high threshold for leader responsibility which "underscores the danger of using national tribunals for the prosecution of international crimes."[139] Another example of domestic deference is the French Court of Cassation's acquittal of Vichy police official Paul Touvier of crimes against humanity. The court ruled that this charge only applied to individuals acting on behalf of a regime practicing a policy of ideological supremacy and that the Vichy regime had not shared the anti-semitism and totalitarianism of the Third Reich.[140]

In summary, Article 28 of the ICC slightly, but significantly circumscribes the scope of command liability. In addition, a number of ambiguities remain unresolved which creates the risk that decisions will be tailored to fit political considerations. Professor Leila Sadat Wexler also expresses the apprehension that perplexing procedures created to challenge the international criminal court's assertion of jurisdiction and admissibility will overwhelm the tribunal's pursuit of justice. At the same time, the principle of complementary requires that the international court defer to domestic jurisdiction. In the past, national tribunals have narrowly interpreted legal doctrines in order to insulate officials from international liability. The question thus arises whether the statute of the international criminal court constitutes the shadow or the substance of reform?[141]

10. CONCLUSION

The penal doctrine of command responsibility is designed to provide military commanders and civilian superiors with an incentive to control the conduct of their troops. This is part of a constellation of rules which are intended to preserve the humanitarian impulse underlying the law of war. In addition to this utilitarian purpose, command responsibility is premised on efficiency; it provides a convenient mechanism to apportion responsibility for international crimes. It clearly would be time-consuming, complicated, impracticable and potentially unpopular to prosecute all the combatants who directly engaged in war crimes or crimes against humanity. These individuals also may come to be viewed as the victims of circumstance rather than as venal criminals. In addition, a full rendition of a country's conspiratorial design may not be clearly and coherently communicated in a prolixity of individual prosecutions. The imposition of responsibility upon those at the top thus provides an efficient and politically

139. *See* J. Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 NYUL Sch. J. Hum. Rts. 547, at 565-566 (1995). *See* R. *v.* Finta, 1 RCS 701, 829 (1994).

140. Touvier, 100 ILR 338, 352-356 (1992).

141. L.S. Wexler, *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court*, *in* M.C. Bassiouni (Ed.), International Criminal Law, Vol. III, 655, at 675-676 (1999).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

palatable mode of redress. This extension of culpability, of course, raises the intractable conflict between the patriotic pursuit of military victory and the preservation of international legal and moral principle. A commander who closely regulates his troops runs the risk of discouraging battlefield initiative and lowering military morale. On the other hand, the failure to impose legal controls corrodes the integrity of the code of conflict and could spark a military conflagration.[142]

It may be psychologically satisfying to cast culpability upon a single soldier or statesman. However, the interests in efficiency and utilitarianism may be outweighed by the fundamental unfairness of holding a civilian or military leader responsible for the collective criminal conduct of lower level combatants, particularly in those instances in which the official neither planned, ordered, caused nor explicitly condoned the delicts. There also may be a reluctance to prosecute high-echelon decision-makers. As a result, lower level officials may be singled out for prosecution and punishment. In the end, the international law of command culpability is caught in a conflict between expeditiously prosecuting officials through reliance on a presumption of knowledge and the equitable interest in requiring the establishment of a specific intent or reckless disposition. The former maximizes convictions, but involves a measure of unfairness; the latter limits convictions, but permits some culpable commanders to go free.[143]

The perimeters of command responsibility were initially articulated by the Commission on Responsibility following World War I.[144] The United States Supreme Court, in 1946, provided the first full statement of this doctrine in the *Yamashita* decision.[145] The harshness of the *Yamashita* strict liability standard was ameliorated by the Tokyo International Military Tribunal which explicitly established an actual or constructive knowledge test. Individuals with notice of war crimes also were held liable for relying on the assurances of subordinates and negligently failing to fulfill their duty to investigate.[146] These standards were variously applied by other post-World War II international and national war tribunals.[147] As suggested by the prosecution of Ernest Medina for the My Lai massacre, domestic courts were tempted to tailor the intent standard to the political self-interest of the ruling regime.[148] The applicability of the gross and wantonly negligence standard was reinforced by the Kahan commission.[149] The

142. *See generally* M. Walzer, Just and Unjust Wars a Moral Argument with Historical Illustrations (1977).
143. Various psychological experiments document the influence of authority in controlling conduct, *see generally* S. Milgram, Obedience to Authority an Experimental View (1969); H.C. Kelman & V.L. Hamilton, Crimes of Obedience (1989).
144. *See supra* notes 5-13 and accompanying texts.
145. *See supra* notes 16-33 and accompanying texts.
146. *See supra* notes 35-41 and accompanying texts.
147. *See supra* notes 44-56 & 58-61 accompanying texts.
148. *See supra* notes 68-77 and accompanying texts.
149. *See supra* notes 83-86 and accompanying texts.

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

Geneva Protocol of 1977 provided some uniformity by setting forth an actual knowledge or "information which should have enabled them [military commanders] to conclude" standard.[150] The trial chamber in *Delalić* viewed the Geneva Protocol as embodying the requirements of customary international law and relied on the treaty to inform its interpretation of command responsibility under the statute of the Yugoslavian war crimes tribunal.[151]

The International Criminal Court likely will follow *Delalić* in holding that command responsibility encompasses an actual and constructive knowledge standard as well as a duty to investigate facts which provide grounds for believing that international crimes may be occurring or may have occurred. Civilian superiors under the Rome statute are subject to a more modest test. Their liability is limited to actual knowledge or a conscious disregard of information which clearly indicates that subordinates are committing or about to commit crimes. The nature of the required affirmative ameliorative acts required under the ICC statute remains uncertain and appears to depend upon the facts of each case. There may be a temptation to assume that a commander's failure to prevent war crimes indicates that additional steps could have been undertaken.[152]

The doctrine of command responsibility is based on the presumption that military officers and civilian officials possess the knowledge, authority and power to curb the transgressions of their troops. The application and scope of this doctrine in the future is dependent on the interpretation of the newly-established ICC. The primary uncertainty concerns the degree of information which is required for a duty to arise to intervene to prevent or to punish international crimes. It may be unrealistic to require a military commander or civilian official to be aware of every possible, large-scale contravention of human rights. However, the failure to adopt a strict vicarious liability standard invites superiors to assume a disinterested and silent stance. This is of particular concern in light of the destructive consequences of modern armed conflict.[153]

A host of additional questions require clarification. For instance, can the standards for de facto authority, constructive knowledge and notice and remedial action be more fully articulated? How much weight should be accorded to reports, communiques and media accounts in calibrating an official's actual or constructive knowledge? May commanders rely on assurances from subordinates? Are territorial commanders liable for units outside their chain of command? Under what circumstances may staff officers and civilian officials and administrators fall within the circumference of command responsibility? Should military commanders and civilian officials continue in command in those instances in which they find themselves helpless to control their troops? May an

150. *See supra* notes 91-95 and accompanying texts.
151. *See supra* notes 100-113 and accompanying texts.
152. *See supra* notes 115-134 and accompanying texts.
153. *See generally* J.J. Paust, *Superior Orders and Command Responsibility in* M.C. Bassiouni (Ed.), International Criminal Law, Vol. 1, at 223, 228-237 (1999).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press

individual be held liable for both command responsibility and substantive offenses arising out of the same transaction? In addition, the application of command responsibility to the rough and tumble of loosely organized partisan warfare and internal strife requires considerable clarification. The jurisprudence of the international tribunals on Yugoslavia and Rwanda may provide some answer to these questions.[154]

In the end, command responsibility is not merely of academic interest. It provides the primary mechanism through which to bring the high-level perpetrators of international crimes before the bar of justice. This threat of criminal trial promises to provide the best prospect for discouraging dictators from violating human rights. On the other hand, in reaction to the prospect of penal prosecution, regimes are likely to destroy documents, insulate civilian and military officials from formal responsibility for command and control, limit media access and conceal killings. The extension of international criminal culpability to civilian and military officials also may merely encourage leaders to remain in office and to repress opposition forces.[155]

The scope of the doctrine of command responsibility is likely to continue to be debated and discussed; the obligation of officials who are confronted with delicts and depredations remains one of the central conundrums of our increasingly bureaucratic age. This conflict of loyalties likely will be exacerbated by the increasing tension between the national and international obligations of individuals. The debate over command responsibility thus promises to be a central battleground in the skirmish over the enforcement of international criminal law. At the same time, international efforts must be devoted to safeguarding individuals who fulfill their obligation to vindicate the rule of transnational law.[156]

154. *See* Bantekas, *supra* note 116.

155. *See generally* Regina *v.* Bartle and the Commissioner of Police for the Metropolis and Others, *Ex parte* Pinochet, (United Kingdom, House of Lords, (25 November 1998), 37 ILM 1302 (1998).

156. *See* D. Luban, A. Strudler & D. Wasserman, *Moral Responsibility in The Age of Bureaucracy,* 90 Mich. L. Rev. 2348 (1992); D. Luban, *Contrived Ignorance,* 87 Geo. L.J. 957 (1999).

https://doi.org/10.1017/S0922156500000108 Published online by Cambridge University Press