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Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia

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I. Introduction

When the United Nations established a war crimes tribunal for the former Yugoslavia in 1993,[1] international attention focused on the laws of war and humanitarian concerns in a manner unseen since the 1940s.[2] Not since the post-World War II tribunals at Nuremberg and Tokyo had an international court sat in judgment of individuals for their conduct in the course of armed conflict.[3] Among the multitude of legal topics revisited by the most recent tribunals is the doctrine of superior-subordinate liability. Generally speaking, this doctrine provides that a subordinate cannot escape liability merely because he or she was following the orders of a superior.[4] Similarly, under certain circumstances, a superior will be liable for the unlawful acts of a subordinate.[5] In the military context, the latter situation is commonly referred to as the command responsibility doctrine.[6] This term, and the liability

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[1] The United Nations Security Council established the Yugoslavia tribunal in May of 1993. *See* S.C. Res. 827, U.N. SCOR,___ Sess.,___mtg., U.N. Doc. s/25626 (1993) [following consideration of Report of the Secretary-General Pursuant to Paragraph 2 of S. C. Res. 808, U.N. SCOR, 48th Sess.,____ mtg. at 56, U.N. Doc. S/25704 (1993)].

[2] The tribunal for the former Yugoslavia is the first international war crimes tribunal since the Nuremberg and Tokyo tribunals that followed the Second World War. *See infra* notes 127-34 and accompanying text. The decisions of the World War II tribunals led to an explosion in the codification of international laws of war, especially those dealing with "humanitarian" issues. *See infra* notes 55-66 and accompanying text.

[3] *See infra* notes 55-66.

[4] *See infra* notes 69-70 and accompanying text. The "just following orders" defense was made infamous in the United States by the actions of U.S. Army Lieutenant Calley at My Lai during the Vietnam War. *See* U.S. v. Calley, 46 C.M.R. 1131 (1973).

[5] *See infra* note 71 and accompanying text. The responsibility of a superior actually encompasses two obligations: the first is liability for issuing an unlawful order and the second is liability for failure to prevent or stop the commission of war crimes by subordinates. *See id.* This Comment focuses only on the latter branch of the command responsibility doctrine.

[6] *See* W.J. Fenrick, *Some International Law Problems Related to Prosecutions*

that follows it, may apply to both political or administrative leaders, as well as military officers.[7]

In November of 1998, the International Criminal Tribunal for the Former Yugoslavia[8] (hereinafter ICTY) handed down a final judgment in *Prosecutor v. Delalic.*[9] This decision marks the first time an alleged war criminal has been found guilty under the command responsibility doctrine by an international tribunal since the end of World War II.[10] The ICTY held Zdravko Mucic, the warden of the Celebici prison camp, responsible for the atrocious treatment of prisoners by the camp guards.[11] The tribunal, however, ultimately acquitted military commander Zejnil Delalic, whose area of responsibility included the Celebici camp.[12]

This Comment focuses on the development of the command responsibility doctrine as a part of international and domestic laws of war. First, it briefly outlines the development of internationally codified laws of war.[13] Next, this Comment discusses the emergence of the command responsibility doctrine as a distinct basis for liability in the prosecution of war crimes.[14] It then focuses on the *Celebici* judgment, discussing the facts and analyzing the Tribunal's bases for its decisions concerning

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Before the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT'L L. 103, 110 (1995).

[7] *See id.*

[8] The full name of the tribunal is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. *See* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 3 (1998).

[9] *See U.N. Judges Sentence Three for War Crimes Against Bosnian Serbs*, BOSTON GLOBE, Nov. 17, 1998, at A29 [hereinafter "*U.N. Judges Sentence Three*"]. The full name of the case is Prosecutor v. Delalic, et. al., (IT-96-21-T) (16 Nov. 1998) [hereinafter "*Celebici* Judgment"]. The ICTY, however, often refers to a case by the name of the prison camp involved. *See The International Criminal Tribunal for the former Yugoslavia: Trial Chambers* (visited Mar. 21, 1999) <http://www.un.org/icty/cases-te.htm>. In this case, the Celebici prison camp was a Bosnian camp, located in the Konjic municipality in central Bosnia and Herzogovina, used for the detention of Serbian prisoners. *See Celebici* Judgment at 46.

[10] *See U.N. Judges Sentence Three*, *supra* note 9.

[11] *See id.*

[12] *See id.*

[13] *See infra* notes 17-68 and accompanying text.

[14] *See infra* notes 69-126 and accompanying text.

command responsibility.[15] Finally, this Comment compares the Tribunal's recent decision with the historical concept of command responsibility.[16]

II. Development of the Command Responsibility Doctrine as Part of the Laws of War

A. Evolution of the Laws of War

1. From Customs to Codes

Although international codification of laws of war did not take place until the mid-nineteenth century,[17] many cultures have had customary principles of war since ancient times.[18] One early example is *Sun-Tzu*, a Chinese text over two thousand years old that describes strategies for aggressive military action.[19] Although this book devotes most of its text to military tactics, certain passages foreshadow modern laws of war:

"So, in chariot battles when chariots are captured, the ten-chariot unit commander will reward the first to capture them and will switch their battle standards and flags; their chariots are mixed with ours and driven; their soldiers are treated kindly when given care."[20]

Similarly, Greek soldiers in the period from 700 to 450 B.C.

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[15] *See infra* notes 127-254 and accompanying text.

[16] *See infra* notes 255-73 and accompanying text.

[17] *See* Adam Roberts, *Land Warfare: From Hague to Nuremberg, in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 116, 119 (Michael Howard et al. eds., 1994). Codification of international, as opposed to domestic, laws of war began with the 1856 Paris Declaration on Maritime Law and continued with the 1868 Saint Petersburg Declaration. *See id.*

[18] *See generally* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994) (providing analysis of the laws of war from classical Greek times, through medieval culture, early modern Europe, and colonial America).

[19] SUN-TZU: THE NEW TRANSLATION 15, 22-23 (J.H. Huang trans., William Morrow and Company 1993) (484-474 B.C.). *Sun-Tzu* is the book's original title, following a custom in early China of naming a book after its author. *See id.* at 15. However, at a later date it was renamed *Sunzi bingfa*, which translates into "The Art of War." *See id.* at 25.

[20] *Id.* at 46-47.

had unwritten, customary rules of engagement.[21] Among these was the recognition of the noncombatant status of religious sites, a practice that endures in the modern era: "[h]ostilities against certain persons and in certain places are inappropriate: the inviolability of sacred places and persons under protection of the gods, especially heralds and suppliants, should be respected."[22]

The Chinese and Greek cultures yield just a small sample of the customary rules of war that existed in ancient societies.[23] Nonetheless, even until the mid-nineteenth century, laws of war existed mainly as domestic regulations, military practices, and religious principles.[24] Although individual countries may have had their own methods for regulating warfare, the first sign of international agreement began surfacing with the Declaration of St. Petersburg, signed in 1868.[25] The substance of the agreement concerns a ban on certain types of projectiles;[26] however, the declaration is famous today for its statements reflecting modern concerns with the practice of increasingly sophisticated warfare. The Preamble eloquently sets forth these concerns:

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[21] *See* Josiah Ober, *Classical Greek Times, in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 12, 13 (Michael Howard et al. eds., 1994).

[22] *Id.* at 13. This type of protection for places bearing religious markers is embodied in the modern Hague conventions. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regulations), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention IV]. Article 27 of the Convention provides that "all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes." *Id.* at 2203, 1 Bevans at 648.

[23] *See generally* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994) (providing analysis of the laws of war from classical Greek times through medieval culture, early modern Europe, and colonial America).

[24] *See* Roberts, *supra* note 17, at 119. One example of the United States' domestic laws of war is General Order No. 100, known as the Lieber Code. This code formed the framework for identifying war crimes violations during the American Civil War. *See* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 7 (1973). For example, Captain Henry Wirz, commandant of the infamous Confederate prisoner of war camp at Andersonville, Georgia, was convicted and hung for violating the Lieber Code for his mistreatment of Union prisoners. *See id.*

[25] The Declaration of St. Petersburg, 1 A.J.I.L. (Supp.) 95-96 (1907), Nov. 29, 1868 [hereinafter The Declaration of St. Petersburg].

[26] The declaration specifically banned "any projectile of less weight than four-hundred grammes, which is explosive, or is charged with fulminating or inflammable substances." The Declaration of St. Petersburg, *supra* note 25, at 96.

> [T]he progress of civilization should have the effect of alleviating, as much as possible the calamities of war....
>
> ...[T]he only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy....
>
> [T]his object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable....[27]

Thirty years later, Czar Nicholas II and the Russian government called for an international conference at The Hague to discuss disarmament.[28] Although on its face The Hague conference called for the avoidance of war, Russia's real concern was with Western innovations in weaponry and warfare.[29] Thus, the conference consisted of two bodies: a First Committee that discussed the limitation of certain weapons, and a Second Committee that worked on codifying laws of war.[30] Although publicly considered a failure in the area of disarmament,[31] the 1899 Hague Conference represented the first codification of international laws of war.[32] The 1899 Hague Convention on the Law and Customs of War on Land, and the Convention on Maritime War are the earliest examples of laws of war codified in the form of a multinational treaty.[33]

This use of the multilateral treaty as a basis for international rules and conventions on warfare continued with the second Hague Peace Conference of 1907.[34] This conference adopted thirteen conventions, ten of which dealt with laws of war.[35] The Hague Convention IV of 1907[36] specifically addressed land

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[27] *Id.* at 95.

[28] *See* Roberts, *supra* note 17, at 119.

[29] *See id.* at 120.

[30] *See id.* at 121.

[31] *See id.* According to one commentator, "the peace conference achieved nothing in the field of disarmament and was thus dismissed as a complete failure by most of the journalists covering it—an early example of the perennially poor coverage of the laws of war in the press." *Id.*

[32] *See id.*

[33] *See* Roberts, *supra* note 17, at 121.

[34] *See id.* at 122.

[35] *See id.*

[36] *See* Hague Convention IV, *supra* note 22.

warfare, and its standards were later incorporated into the military manuals of individual nations.[37] Thus, although the second Hague Conference, like its predecessor, did not lead to any disarmament among nations, the conventions it promulgated began to form a basis for military training on the laws of war.[38]

2. *The Nuremberg Effect*

The next significant development in the evolution of international laws of war came toward the end of the Second World War.[39] In August of 1944, the United States Army Office of the Judge Advocate General (JAG) began ordering field commanders to detain enemy soldiers and commanders who might have committed war crimes.[40] Around the same time, the United States was consulting with Great Britain and its allies to determine how to deal with alleged war criminals.[41] The result was the first International Military Tribunal for the prosecution of war crimes, better known as the Nuremberg trials.[42] Indeed, the Nuremberg trials are so famous that many mistakenly believe that these trials were the source of modern laws of war.[43] Rather, the tribunal had the task of taking the then-existing laws, both the customary unwritten rules of engagement[44] and codified treaties such as the Hague conventions,[45] and applying them to the unique task of

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[37] *See* Roberts, *supra* note 17, at 122. The land warfare provisions of the Hague Conventions found their way into the military manuals of both Great Britain and the United States. *See id.;* BRITISH WAR OFFICE, III MANUAL OF MILITARY LAW (LAW OF WAR ON LAND) (1958); U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

[38] *See* Roberts, *supra* note 17, at 122.

[39] *See generally* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992) (discussing the workings of the Nuremberg tribunal from the perspective of the American Chief Counsel).

[40] *See id.* at 35.

[41] *See id.* at 34-38.

[42] *See id.* at 5. The tribunal held court and kept its Nazi prisoners in the German city of Nuremberg. *See id.* at 61. Nuremberg prosecutor Telford Taylor comments that the tribunal was "the most important and, I believe, successful new entity in the enforcement of the laws of war." *Id.* at 5.

[43] *See id.* at 5.

[44] *See supra* notes 23-24 and accompanying text.

[45] *See supra* notes 28-38 and accompanying text.

prosecuting the Third Reich.[46]

Eventually the four delegations involved—the United States, France, Great Britain, and the Soviet Union—came up with the London Charter of the tribunal, named for the city in which it was drafted.[47] Article Six of the charter enumerated the crimes over which the tribunal would have jurisdiction, and divided these crimes into three broad categories: Crimes Against Peace, War Crimes, and Crimes Against Humanity.[48] The first category, Crimes Against Peace, went beyond the scope of the St. Petersburg Declaration[49] to make the waging of aggressive war a crime in itself.[50] The War Crimes category covered "violations of the laws or customs of war," including such acts as "murder or ill-treatment of prisoners of war . . . killing of hostages, plunder of public or private property . . . or devastation not justified by military necessity."[51] Crimes Against Humanity addressed directly the genocide issue, defining such crimes as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[52]

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[46] *See generally* TAYLOR, *supra* note 39 (discussing the workings of the Nuremberg tribunal from the perspective of the American Chief Counsel). Telford Taylor's account of the establishment of the International Military Tribunal describes in detail the responsibility facing the United States, France, Great Britain, and Russia in establishing the first international war crimes tribunal. *See id.* Only months before the end of World War II, Winston Churchill advocated gathering Nazi war criminals and summarily executing them. *See id.* at 34. The subsequent decision to grant hearings to all defendants, in an adversarial setting, brought forth a host of legal and political questions. *See id.* at 50-55. Chief among these questions was how to avoid the ex post facto problem involved in charging the German defendants with waging of aggressive war as a crime. *See id.* at 51. Compounding these difficulties were procedural issues; namely, the American adversarial system seemed foreign, if not entirely counterproductive, to some of the other parties involved. *See id.* at 64.

[47] *See id.* at 59-61.

[48] *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 6 [hereinafter London Charter].

[49] *See supra* note 25.

[50] *See* London Charter, *supra* note 48, art.6.

[51] *Id.*

[52] *See id.*

More than the London Charter's definition of war crimes, it was the actual prosecution of the Nazi war criminals that set significant precedents in the development of laws of war.[53] Put another way, the real impact of the Nuremberg tribunal was not in the definition of war crimes, but in their application to criminal defendants.[54]

3. Post World War II Developments

The atrocities of World War II brought war crimes, especially those of humanitarian nature, into the international spotlight. The result was an explosion in the codification of customs of warfare.[55] Of these codifications, some of the most influential ones have been the Geneva Conventions of 1949.[56] These four conventions were promulgated by the International Committee of the Red Cross, and voted upon and implemented by delegates from most nations of the world.[57] Together, they form a stable base from which twentieth century laws of war have evolved and matured.[58] The Geneva Conventions deal mainly with humanitarian aspects of warfare, such as treatment of wounded soldiers in the field[59] and at sea,[60] prisoners of war,[61] and protection of civilians in wartime.[62]

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[53] *See* Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 1 (1996).

[54] *See id.* A full discussion of the actual prosecution of the various Nazi war criminals is beyond the scope of this Comment. Naturally, much has been written on this topic. *See* TAYLOR, *supra* note 39; *see also* ROBERT E. CONOT, JUSTICE AT NUREMBERG (1983); ROBERT W. COOPER, THE NUREMBERG TRIAL (1947). Additionally, the United Nations later issued a resolution formally recognizing the war crimes defined by the London Charter. *See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

[55] *See* Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 721 (1997). For example, the United Nations, in its first session, adopted a resolution on genocide and eventually developed a genocide convention. *See id.*

[56] *See infra* notes 59-62 and accompanying text.

[57] *See* W. MICHAEL REISMAN AND CHRIS T. ANTONIOU, THE LAWS OF WAR xxix (1994).

[58] *See id.*

[59] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115 [hereinafter Geneva Convention (I)].

[60] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick

The Geneva conventions were signed just a few short years after the end of World War II. The decades following, however, saw the development of unprecedented types of warfare, including guerilla tactics and internal, or non-international, conflicts.[63] In the late 1970s, the International Committee of the Red Cross sought to address these changes by convening a new Geneva conference, which eventually produced two additional protocols to the Geneva Conventions.[64] Protocol I contained a controversial provision classifying persons not in uniform, but carrying weapons during or preceding an attack, as combatants.[65] Protocol I also reflected post-Vietnam concerns for environmental preservation by containing an article that prohibited use of weapons which may damage the natural environment and prohibited destruction of the environment as a means of reprisal.[66]

4. Summary

This broad overview of the development of laws of war has been limited primarily to discussing the trend toward codification. Factors completely separate from the formal treaty process have also greatly influenced the customs of warfare. The influence of the media in bringing atrocities into the international spotlight and the resultant influence of public outcry are such examples.[67]

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and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219 [hereinafter Geneva Convention (II)].

[61] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 [hereinafter Geneva Convention (III)].

[62] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention (IV)].

[63] *See* REISMAN, *supra* note 57, at xxix.

[64] *See id.*

[65] Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 44, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Naturally, this provision was sympathetic to guerilla fighters, affording them the rights of combatant status without the traditional requirement of wearing distinctive military uniforms or carrying arms openly all the time. *See* REISMAN, *supra* note 57, at 43-44. The blurring of the distinction between guerilla fighters and the civilian population, however, can lead to greater civilian casualties. *See id.* This concern has prevented many nations from becoming parties to Protocol I, including the United States (which is also not a party to Protocol II). *See id.*

[66] *See* Protocol I, *supra* note 65, art. 55.

[67] *See* REISMAN, *supra* note 57, at xxiv. For example, American journalists in Vietnam had great control over the selection of images broadcast to the American public,

Another example is the quality of instruction on laws of war given to soldiers and military officers in their initial training.[68] Nonetheless, the treaties and conventions provide concrete documentation of the changing principles of warfare over time.

B. Emergence of the Doctrine of Command Responsibility

1. The Doctrine Defined

The command responsibility doctrine is unavoidably dualistic in nature, for it concerns both the commander and the subordinate.[69] Thus, it presents two sides of the coin—the commander's responsibility for war crimes committed by a subordinate, and the plea of the subordinate that he or she was "acting in accordance with orders."[70] Furthermore, the commander's responsibility is twofold: commanders may be directly liable for issuing illegal orders and may also be liable for the unlawful acts of subordinates, if the commanders knew or should have known about the illegal acts, but failed to prevent or punish them.[71] This Comment focuses on the latter aspect of a commander's responsibility.

2. Historical Developments

The beginnings of the command responsibility doctrine can be seen as far back as the time of Sun-Tzu.[72] During that time, the primary focus was on the commander's duty to lead and control those under his command.[73] In that sense, a commander's liability could flow not only from an improper order but also from failure

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as well as the moral characterization of these images. *See id.*

[68] *See id.* at xxvii. "It is patent that if those engaged in hostilities have not been exposed to the prescriptions of the law of armed conflict, then they hardly can be expected to comply with them." *Id.* For example, since the 1950s, the United States Army has had a manual dedicated solely to the laws of war. *See* FM 27-10, *supra* note 37.

[69] *See* L.C. Green, *Symposium: International Criminal Law: Command Responsibility in International Humanitarian Law*, 5 TRANSNT'L L. & CONTP. PRBS. 319, 320 (1995).

[70] *See id.*

[71] *See id.*

[72] *See* Parks, *supra* note 24, at 2, 3; *supra* notes 19-20 and accompanying text.

[73] *See* Parks, *supra* note 24, at 4. Note that the use of the male gender to indicate the commander is solely in keeping with the historical context.

to properly lead or control his troops by allowing them to commit unlawful acts.[74]

The development of laws of war in the United States demonstrates how the command responsibility doctrine gradually took shape over the last two hundred years.[75] For example, scarcely a few months after the signing of America's Declaration of Independence, the American Articles of War were enacted.[76] Among their provisions, the Articles required military officers to keep their troops in "good order," and provided that officers who failed to punish the misconduct of their soldiers could themselves be punished for the offenses committed.[77]

Perhaps the first international recognition of the command responsibility doctrine occurred in the Hague Convention IV of 1907.[78] This convention, which dealt with land warfare, defined lawful combatants in part as being commanded by a responsible superior.[79] One of the command responsibilities designated by the Hague Convention IV is insuring "public order and safety" in areas occupied by military troops.[80] Most significantly, the provisions of the convention hold belligerent nations responsible for the acts of their armed forces.[81] This obligation foreshadows the modern notion of holding heads of state accountable under the command responsibility doctrine.[82] Despite the Hague Conventions of 1907, however, World War I failed to see any major war crime prosecutions of military commanders for acts in

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[74] *See id.*

[75] *See id.* at 5-10.

[76] *See id.* at 5 (citing the American Articles of War, sec. IX, Sept. 20, 1776).

[77] *See id.* The Articles addressed misconduct such as "riots," "abuses," and "disorders." *Id.* An example of such misconduct includes stealing the officers' whiskey and straggling on road marches; as a militia captain during the Black Hawk War, Abraham Lincoln was court-martialed for failing to prevent these types of misconduct. *See id.* at 6. His punishment was to wear a wooden sword for two days. *See id.*

[78] *See* Fenrick, *supra* note 6, at 112; *supra* note 22.

[79] *See* Fenrick, *supra* note 6, at 113; Hague Convention IV, *supra* note 22, art. 1, 36 Stat. at 2295, 1 Bevans at 643-44.

[80] Fenrick, *supra* note 6, at 113; Hague Convention IV, *supra* note 22, art. 43, 36 Stat. at 2306-08, 1 Bevans at 651-53.

[81] *See* Hague Convention IV, *supra* note 20, art. 3, 36 Stat. at 2296, 1 Bevans at 644; Green, *supra* note 69, at 325.

[82] *See* Green, *supra* note 69, at 329.

violation of the laws of war.[83]

3. Post-World War II Developments

Toward the end of World War II, the Allied powers faced two problems: how to punish Nazi crimes against Jews that took place *before* World War II, and how to deal with potentially thousands of Nazi defendants who might be responsible for these and other crimes.[84] Murray Bernays, a United States Army Colonel and lawyer, came up with the idea of charging Nazi organizations and their leaders with criminal conspiracy.[85] This way, these defendants could be charged not only with actual violations of the laws of war, but with the act of conspiring to commit these violations in the pre-war period.[86] Thus, the war crimes committed against German Jews before the outbreak of the war could be punished as "preparatory conduct."[87] Furthermore, the conspiracy charges could also resolve the difficulty of indicting the vast number of potential defendants.[88] Once an organization was convicted of being part of the conspiracy, proof of membership in the organization alone could be enough to convict an individual.[89]

Nevertheless, Bernays' conspiracy idea was not adopted in its entirety into the London Charter.[90] Rather, the conspiracy theory

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[83] *See id.* at 324.

[84] *See* TAYLOR, *supra* note 39, at 35. The problem with addressing the prewar crimes was that they were potentially outside the jurisdiction of the Nuremberg tribunal. *See id.* Additionally, the number of potential defendants, "numbered in six or seven figures, a ghoulish *embarras de richesses.*" *Id.* at 36. It would have been time-consuming to try these defendants individually and difficult to obtain the necessary evidence. *See id.* at 35.

[85] *See id.* at 35.

[86] *See id.* at 36.

[87] *Id.* at 36.

[88] *See id.*

[89] *See id.* Admittedly, the "guilt by association" theory had little precedent in American law and to modern eyes may seem to controvert American ideals of civil liberties. *See id.* at 41. Telford Taylor points out, however, that "it is difficult for many of today's readers to grasp the utter hatred of the SS which its actions had spread throughout the Western world, especially during the last two years of the war, when there was incontrovertible proof of the wholesale massacre of Jews." *Id.* at 41-42. Indeed, Bernays' plan was "far less arbitrary or draconian" than other proposals of how to deal with Nazi war criminals, including execution. *Id.*; *see also supra* note 46.

[90] *See* TAYLOR, *supra* note 39, at 76. The London Charter functioned as the statute

was applied only to the charge of Crimes Against Peace, as a conspiracy of the European Axis to wage aggressive war.[91] Once limited to this charge alone, the conspiracy theory became too weak to encompass the pre-war harassment of German Jews by Nazis.[92] Eventually, the Nuremberg tribunal found that there was no single conspiracy to wage an aggressive war, but many separate plans to do so.[93]

Despite the failure to obtain a conviction based on a Nazi conspiracy, the conspiracy idea represents a significant step in the evolution of the command responsibility doctrine. Article 6 of the London Charter contains the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[94]

Article 7 of the London Charter continues: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[95] From this language, one can infer the following propositions:

1. Government leaders could be held responsible for conspiring to engage in aggressive war, even if they did no specific acts in furtherance of the waging of war;[96]

2. Leaders and organizers could be charged for the crimes of subordinates committed in following the leaders' order;

3. Government officials could not declare themselves immune from punishment by virtue of their political position.

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of the tribunal, from which the famous Nuremberg Principles later developed. *See supra* notes 47-54 and accompanying text.

[91] *See id.*; London Charter, *supra* note 48, art. 6(a).

[92] *See* TAYLOR, *supra* note 39, at 76.

[93] *See id.* at 582. It must be remembered that "conspiracy" was an Anglo-American doctrine that was met with distaste by the European lawyers working on the tribunal. *See id.* This distaste may explain why the tribunal failed to give the conspiracy charge the broad scope advocated by American prosecutors. *See id.*

[94] *See* London Charter, *supra* note 48, art. 6.

[95] *Id.* art. 7.

[96] The Anglo-American crime of conspiracy, upon which Bernays based his formulation of conspiracy charges, is defined as an agreement to do an unlawful act, or a lawful act by unlawful means. *See* MODEL PENAL CODE § 5.03(1) (1962). It is not required that the act actually be committed. *See* MODEL PENAL CODE § 5.03(5) (1962).

These propositions deal mainly with a commander's responsibility for issuing an unlawful order.[97] The London Charter did not deal specifically with command responsibility as it relates to the failure to prevent or punish unlawful acts of subordinates, mainly because the Nazi defendants at Nuremberg could be held directly liable for their participation in wartime atrocities.[98]

A post-World War II trial that provides a somewhat controversial modern application of the command responsibility doctrine is that of Japanese General Tomoyuki Yamashita.[99] General Yamashita served as commander of Japanese forces in the Philippines from October 9, 1944, until his surrender on September 3, 1945.[100] During this time the soldiers under General Yamashita's ultimate command were alleged to have committed atrocities against both United States soldiers in the Philippines and Filipinos.[101] The Military Commission appointed to try General Yamashita after his capture convicted him for violating laws of war and sentenced him to death by hanging.[102] Yamashita's specific charge was that,

> While commander of armed forces of Japan at war with the United States of America and its allies, [he had] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.[103]

This charge did not allege that Yamashita ordered the commission of atrocities or that he personally committed atrocities. Rather, the court based liability on Yamashita's failure to act, which was characterized as a breach of his duty as a

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[97] *See supra* notes 70-71 and accompanying text.

[98] *See* Fenrick, *supra* note 6, at 112.

[99] *See In re* Yamashita, 327 U.S. 1 (1946).

[100] *See id.* at 31, 33.

[101] *See id.*

[102] *See id.* at 5. Following the Military Commission's sentence, the United States Supreme Court granted judicial review over the power of the commission to try General Yamashita for his alleged crimes. *See id.* at 8.

[103] *Id.* at 13-14.

commander to control his troops.[104] The United States Supreme Court acknowledged that precedent for imposing such a duty existed in the Hague Convention IV of 1907.[105] As to whether such a duty applies to a military commander under attack by invading forces,[106] the Court stated in dicta:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[107]

Thus, although the Court could neither create a new law of war[108] nor point to an exact precedent for the *Yamashita* situation,[109] it was able to extrapolate a duty to control based on the purposes of the laws of war.[110] In reaffirming the validity of the actions of the military commission that tried Yamashita, the Supreme Court further helped establish not only the duty of the commander, but also his liability for violating a law of war for failing to properly discharge this duty.[111]

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[104] *See id.*

[105] *See id.* at 15-16; *see also supra* notes 78-82 and accompanying text.

[106] *See In re* Yamashita 327 U.S. 1, 32 (1946). The alleged atrocities that occurred under General Yamashita's command took place during MacArthur's invasion of the Philippines. *See id.*

[107] *Id.* at 15.

[108] *See id.* at 16. "We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution." *Id.*

[109] *See id.* at 15-16. The conventions that the majority cited established a basis for finding a commander's duty to lead troops, see that laws of war are obeyed, and insure the safety of civilians. *See id.* However, none of the laws cited provided that a commander who failed to prevent his troops from committing violations could be punished as if he had so committed them. *See id.*

[110] *See id.* at 15.

[111] *See id.* at 16 ("[The Hague Conventions] plainly imposed on petitioner . . . an 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."); Parks, *supra* note 24, at 37.

In his dissent in *Yamashita*, Justice Murphy made an impassioned argument that the charge against General Yamashita lacked legal precedent.[112] Many believe Justice Murphy's dissent in *Yamashita* argued against a strict liability standard for military commanders.[113] At least one commentator, however, reasons that Justice Murphy's position may be characterized as an objection to charging a commander with failure to properly control his troops after the accusing party had effectively defeated the commander and cut off his lines of communication.[114] Although the parties in this case may have been sharply divided over the procedural and evidentiary issues,[115] the command responsibility doctrine as defined in *Yamashita* was to become more accepted in the latter half of the twentieth century.

4. Modern Permutations: The ICTY's Definition

Although *Yamashita* fleshed out the command responsibility doctrine as it pertained to liability for failure to act, many questions remained unresolved. One important issue was the mens rea required of the accused commander. The first international treaty to codify the command responsibility doctrine after World War II was Protocol I to the Geneva Conventions of 1949.[116]

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[112] *Yamashita*, 327 U.S. at 28 (Murphy, J., dissenting). He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. *Id.*

[113] *See* Fenrick, *supra* note 6, at 114.

[114] *See* Parks, *supra* note 24, at 35-36; *see also Yamashita*, 327 U.S. at 34-35 (Murphy, J., dissenting). Justice Murphy put it succinctly:

> Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. 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.

Id. at 35.

[115] *See* Fenrick, *supra* note 6, at 114.

[116] *See* Protocol I, *supra* note 65, art. 86; Timothy Wu and Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 276 (1997).

Protocol I, article 86, states:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, *if they knew, or had information that should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[117]

The second paragraph above indicates that the mens rea for command responsibility is not strict liability. Rather, it is based on either actual knowledge or knowledge implied from the circumstances, given the information the commander had access to. It appears that actual or implied knowledge under Protocol I triggers a commander's duty to act "feasibly," and "within [his] power," to prevent the subordinate from committing a war crime.[118]

The influence of Protocol I became apparent two decades later when the U.N. adopted the Statute of the International Criminal Tribunal for the former Yugoslavia.[119] Article 7, section 3 of that statute specifically covers the command responsibility doctrine.[120]

In some respects, the language of the ICTY Statute is clearer than Protocol I. Rather than requiring a superior to take "all

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[117] Protocol I, *supra* note 65, at 42-43 (emphasis added).

[118] *Id.*

[119] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/PV.3217 (1993) [approving the Report of the Secretary-General Pursuant to Paragraph 2 of S. C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 and ADD.1 (1993)] [Hereinafter ICTY Statute].

[120] ICTY Statute, *supra* note 119, art. 7, sec. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute were 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. *See id.*

feasible measures within [his] power,"[121] the statute requires more objective "necessary and reasonable measures."[122] Furthermore, the mens rea standard is couched in standard legal terminology: "knew or had reason to know."[123] Again, this language suggests that the mens rea requirement of the command responsibility doctrine may be either actual or constructive knowledge.

The Commission of Experts on the Former Yugoslavia elaborates the level of mens rea required to trigger the command responsibility doctrine.[124] This report suggests a third type of mens rea, distinct from actual or constructive knowledge, in which a commander can be held responsible for the actions of his subordinates. This standard, enumerated in section (b) in the excerpt above, would prohibit a commander from taking advantage of his "willful blindness."[125]

5. Summary

The command responsibility doctrine developed over the years from ancient principles to modern international treaties. The *Yamashita* case identified some troubling aspects in applying the doctrine, especially when the outcome seems to base the commander's responsibility on a theory of strict liability. Although commentators are divided over whether *Yamashita* actually set a strict liability standard, the command responsibility doctrine in the ICTY Statute has rejected that standard by requiring a mens rea component of "knew or had reason to know."

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[121] Protocol I, *supra* note 65, art. 86.

[122] ICTY Statute, *supra* note 119, art. 7, sec. 3.

[123] *Id.*

[124] U.N.S.C, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, U.N. Doc. S/1994/673, at 16-17 (1994).

> It is the view of the Commission that the mental element necessary is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offenses charged and acquiesced therein.

Id.

[125] *See* Wu, *supra* note 116, at 287.

III. Application of the Command Responsibility Doctrine in the International Tribunal for the Former Yugoslavia: The *Celebici* Judgment

A. Overview of the ICTY

A complete discussion of the issues surrounding the establishment of the ICTY is beyond the scope of this Comment, but a basic overview of the formation and workings of the Tribunal is helpful. The Security Council of the U.N. resolved in 1993 to create an international tribunal to adjudicate human rights breaches that occurred in the former Yugoslavia.[126] The ICTY differs from the Nuremberg tribunal in at least two significant aspects. First, the United Nations, a community of nations that were not parties to the Bosnian conflict, created the ICTY.[127] This avoided the criticism after the Nuremberg tribunal; that the tribunal dealt "victor's justice" to a vanquished enemy.[128] Second, the United Nations established the ICTY during the Bosnian conflict so that the Tribunal could be used to further the peace process between the warring ethnic groups.[129] Indeed, the Security Council based its authority to convene the Tribunal upon this goal of furthering peace.[130] Chapter VII of the United Nations' charter concerns action to be taken relative to threats to peace and acts of aggression.[131] Article 39 calls upon the Security Council to "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[132] Article 41 enables the Council to take "measures not involving the use of armed force," and lists some non-exclusive

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[126] *See* ICTY Statute, *supra* note 120. The Tribunal's jurisdiction extends only over crimes "committed in the territory of former Yugoslavia which represents the former Socialist Federal Republic of Yugoslavia," and committed after January 1, 1991. KARINE LESCURE AND FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA 17 (1996).

[127] *See* LESCURE, *supra* note 126, at 3-4.

[128] *See id.*

[129] *See id.*

[130] *See id.* at 6.

[131] U.N. CHARTER ch. VII.

[132] U.N. CHARTER art. 39, para 1.

means of establishing peace.[133] These Articles formed the basis of the Security Council's decision to establish the Tribunal.[134]

Two lower courts (Trial Chambers I and II) and a Court of Appeals comprise the ICTY.[135] The judges and prosecutor come from a variety of nations, including South Africa, Australia, the United States, China, and Canada.[136] Both ratione loci and ratione temporis limit the Tribunal's jurisdiction to crimes committed in the former Yugoslavia (land, air, and territorial waters) since January 1, 1991.[137]

B. Factual Background of the Celebici *Judgment*

Several aspects make the *Celebici* Judgment unusual. First, the ICTY obtained its first conviction of a Bosnian Croat and Bosnian Muslims for atrocities committed against Bosnian Serbs.[138] Second, the decision represented the first time the ICTY found a defendant guilty of rape and classified it as a war crime.[139] Finally, the *Celebici* case was the first international judgment since World War II holding a superior liable for the crimes of his subordinates.[140]

The trial concerned actions taken in 1992 at the Celebici prison camp, located in the Konjic municipality.[141] Bosnian Croat and Muslim forces invaded Konjic and used the barracks and warehouses at Celebici to house Serbian prisoners.[142] In describing the overall nature of Celebici, the Tribunal stated "that an atmosphere of fear and intimidation prevailed at the prison-camp, inspired by the beatings meted out indiscriminately upon the prisoners' arrest, transfer to the camp and their arrival."[143]

The Tribunal tried four defendants concurrently for atrocities

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133 *Id.* at art. 41.

134 *See* LESCURE, *supra* note 126, at 6.

135 *See id.* at 14.

136 *See id.* at 14-15.

137 *See id.* at 17-18.

138 *See U.N. Judges Sentence Three*, *supra* note 9.

139 *See id.*

140 *See id.*

141 *See Celebici* Judgment, *supra* note 9, at 38.

142 *See id.* at 56.

143 *Id.* at 59-60.

committed at Celebici: Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo.[144] Esad Landzo, the youngest of the defendants,[145] worked as a guard at the prison camp.[146] Mucic was the alleged commander of the camp, and Delic was his deputy commander until Mucic's departure in November of 1992, at which time Delic became commander.[147] Delalic was commander of the military forces in the Konjic area and was alleged to have authority over the Celebici camp.[148] Of the defendants, only Delic, Mucic, and Delalic were charged under the command responsibility doctrine.[149] Thus, the following discussion deals only with their charges.

C. Command Responsibility as Applied in the Celebici *Judgment*

In the *Celebici* Judgment, the ICTY lists the elements of command responsibility as follows:

(i) the existence of a superior-subordinate relationship;

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[150]

These three elements summarize the language in Article 7, section 3 of the statute, which deals with superior-subordinate liability.[151] Nonetheless, both the prosecution and defense in the *Celebici* case had the opportunity to argue their proposed interpretation of the command responsibility doctrine. The prosecution contended that the elements of the command responsibility doctrine should be that the superior exercise direct and/or indirect command or control over the subordinates who

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[144] *See id.* at 1.

[145] *See id.* at 3. Landzo was born in 1973 and was nineteen years old during the events in question. *See id.*

[146] *See id.*

[147] *See id.* at 6.

[148] *See id.* at 9.

[149] *See id.* at 3.

[150] *Id.* at 128.

[151] *See* ICTY Statute, *supra* note 119, art. 7, sec. 3.

commit serious violations of international humanitarian law; the superior must know or have reason to know that these acts were about to be committed, or had been committed, even before he assumed control; and the superior must fail to take the reasonable measures within his power or at his disposal, to prevent or punish these subordinates for these offences.[152] By including those who exercised de facto control over the Celebici camp, which allows even informal commanders to fall within the doctrine, the prosecution desired an expanded definition of "superior."[153] Furthermore, element (2) put forth by the prosecution interpreted the "reason to know" mens rea requirement to encompass superiors who were derelict in their duty to supervise, and thereby failed to inform themselves of possible violations of the laws of war.[154]

The defense countered this characterization by putting forth five factors to consider in determining command responsibility:

(1) The status of the accused as a commander or a civilian exercising the equivalent of military command authority over a person who committed a violation of the law of war;

(2) That a violation of the law of war actually occurred or was about to occur;

(3) That the commander had either actual knowledge of the commission of the violation of the law of war or that the

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[152] *See Celebici* Judgment, *supra* note 9, at 127. The elements of the command responsibility doctrine, as contended by the prosecution, are as follows:

> (1) The superior must exercise direct and/or indirect command or control whether de jure and/or de facto, over the subordinates who commit serious violations of international humanitarian law, and/or their superiors.
>
> (2) The superior must know or have reason to know, which includes ignorance resulting from the superior's failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.
>
> (3) The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.

Id.

[153] *See id.* at 129. The prosecution asserted that the authority of the superior over the subordinate could take many forms, including "operationally, tactically, administratively, executively in territories under the control of the superiors, and even through influence." *Id.*

[154] *See id.* at 145.

commander had knowledge enabling him to conclude that the laws of war had been violated;

(4) That the commander failed to act reasonably in suppressing violations by investigating allegations and punishing perpetrators or by taking action to prevent future violations;

And that the commander's failure to act was the cause of the war crime that actually was committed.[155]

Naturally, the defense desired a stricter mens rea requirement, limited to either actual knowledge of the war crime, or actual possession of information that would put the superior on notice that the crime had been committed.[156] Furthermore, the defense introduced a causation element: that omission by the superior be the cause of the actual violation.[157] Applying these five elements in lieu of the three put forth by the prosecution would likely result in fewer superiors being found liable.

In discussing which elements of command responsibility to apply to the facts before it, the ICTY emphasized that the prosecution had properly distilled the doctrine into three elements.[158] Subsequently, the tribunal discussed each of the requirements in turn, starting with the existence of a superior-subordinate relationship.[159] The tribunal agreed with the prosecution that de facto commanders could be liable under the command responsibility doctrine, especially given the breakdown in formal, legal command structures caused by the nature of the conflict in the former Yugoslavia.[160] The tribunal stated that it looked more to authority, as embodied in the ability to control the action of subordinates, rather than the formal status of an individual as a commander, in determining the existence of a superior-subordinate relationship.[161] Nonetheless, the tribunal was careful to note "that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of

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155 *See id.* at 128.

156 *See id.*

157 *See id.*

158 *See id.* at 128.

159 *See id.*

160 *See id.* at 139-40.

161 *See id.*

military commanders."[162]

Next, the tribunal addressed the mens rea element of the command responsibility doctrine. The tribunal recognized, as did both the defense and the prosecution, that actual knowledge of war crimes would be sufficient to trigger a superior's duty to take reasonable measures to prevent or punish them.[163] Furthermore, the tribunal elaborated on the standard of proof required in finding that a superior had actual knowledge of the commission of war crimes by subordinates.[164] First, the tribunal acknowledged that direct evidence was admissible to make a finding of actual knowledge.[165] Additionally, the tribunal noted that circumstantial evidence was also admissible, and provided non-exclusive examples of circumstantial evidence that could permit a finding of actual knowledge.[166]

The tribunal also considered the more controversial issue of whether a mens rea standard short of actual knowledge could trigger command responsibility.[167] After considering the arguments of both the defense and the prosecution,[168] the tribunal concluded that "a superior can be held criminally responsible only if some specific information was *in fact* available to him which would provide notice of offences committed by his subordinates."[169] Thus, the tribunal rejected the prosecution's contention that ignorance resulting from a failure to supervise

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[162] *Id.* at 140.

[163] *See id.* at 142.

[164] *See id.* at 142-44.

[165] *See id.* at 142.

[166] *See id.* at 143-44. The twelve factors listed by the tribunal included the following:

> (a) The number of illegal acts; (b) The type of illegal acts; (c) The scope of illegal acts; (d) The time during which the illegal acts occurred; (e) The number and type of troops involved; (f) The logistics involved, if any; (g) The geographical location of the acts; (h) The widespread occurrence of the acts; (i) The tactical tempo of operations; (j) The modus operandi of similar illegal acts; (k) The officers and staff involved; (l) The location of the commander at the time.

Id.

[167] *See id.* at 140.

[168] *See id.* at 140-42.

[169] *Id.* at 146 (emphasis added).

could trigger a superior's liability.[170] Nonetheless, the tribunal was careful to note that willful blindness was no excuse; once a superior had information providing him notice of war crimes, he could not choose to simply disregard that information.[171]

After a brief discussion of the definition of "necessary and reasonable measures" as it pertains to command responsibility,[172] the tribunal addressed the defense's assertion of the necessity of a causation element.[173] The tribunal essentially rejected this additional element, concluding that the prosecution need not show that a superior's failure to act caused the commission of a war

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[170] *See id.* at 141-42. The tribunal noted that it was under an obligation to apply the law as it existed at the time the alleged offenses were committed. *See id.* at 145. Accordingly, the tribunal looked to the language of Article 86 of Protocol I Additional to the Geneva Conventions for guidance on the "reason to know" standard of command responsibility. *See id.*; Protocol I, *supra* note 65. Examining the language of this Protocol, the tribunal concluded that it requires that commanders "in fact" have some knowledge available to them. *See Celebici* Judgment, *supra* note 9, at 146.

[171] *See Celebici* Judgment, *supra* note 9, at 144 ("the Trial Chamber takes as its point of departure the principle that a superior is not permitted to remain willfully blind to the acts of his subordinates."). Note, however, that the tribunal distinguished the "willful blindness" situation from that of General Yamashita. *See supra* notes 99-115 and accompanying text. Part of General Yamashita's dereliction of duty involved his *lack* of knowledge of crimes being committed by his subordinates. *See id.* Under the ICTY's formulation, however, this would not have been a sufficient mens rea to find General Yamashita liable as a commander:

> There can be no doubt that a superior who simply ignores information *within his actual possession* compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.

Celebici Judgment, *supra* note 9, at 144 (emphasis added).

[172] *Celebici* judgment, *supra* note 9, at 147. The tribunal acknowledged that no bright-line test could be established to determine what "necessary and reasonable" means; the evaluation must be fact-specific: "[A]ny evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard in abstracto would not be meaningful." *Id.* The tribunal did note, however, that it could only impose a duty upon commanders to do what is "within his material possibility": "It must, however, be recognised that international law cannot oblige a superior to perform the impossible." *Id.*

[173] *See id.* at 148.

crime by a subordinate.[174] Although the tribunal conceded that some element of causation exists when a superior fails to prevent the commission of a crime,[175] requiring proof of causation would be logically incompatible with holding a superior responsible for failing to punish subordinates who have already violated laws of war.[176] Therefore, to establish liability under the command responsibility doctrine, the prosecution need only prove the superior-subordinate relationship,[177] the requisite knowledge (actual or constructive),[178] and the superior's failure to act.[179]

D. Superior Responsibility of Hazim Delic

In discussing the criminal liability of each defendant, the tribunal first examined whether those defendants charged with superior responsibility met the three-part test outlined above.[180] After deciding whether superior responsibility existed, the tribunal determined the criminal liability for each of the detailed offenses alleged against each of the defendants.[181]

The indictment charged Hazim Delic both with direct responsibility for crimes in which he was an alleged participant and with superior responsibility for crimes committed while he served as deputy commander and, later, as commander of

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[174] *See id.* The tribunal stated that

> [C]ausation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.

Id.

[175] *See id.* ("[T]he superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.").

[176] *See id.* at 149 ("[N]o such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.").

[177] *See id.* at 128; *supra* notes 159-62 and accompanying text.

[178] *See Celebici* Judgment, *supra* note 9, at 128.

[179] *See id.*

[180] *See id.* at 215.

[181] *See id.*

Celebici.[182] To support these charges, the prosecution contended that Delic, in his role as deputy commander, had the authority of the full commander in the latter's absence.[183] Furthermore, the prosecution argued that Delic had authority over the prison guards and the ability to punish or prevent their criminal acts and that he failed to do so because he also participated in these acts.[184] As proof of his status as a superior within the camp hierarchy, the prosecution noted that Delic was responsible for administrative matters in the camp.[185]

In response to these allegations, the defense contended that the prosecution failed to distinguish between the concepts of "command" and "rank."[186] Namely, the defense asserted that superior responsibility attaches only by virtue of a position of command.[187] Indeed, deputy commanders like Delic, while perhaps higher in "rank" than another soldier, was not in the actual chain of command.[188] Thus, the defense argued Delic could only have been a conduit to transfer orders from the commander and lacked the true authority to have superior responsibility.[189]

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[182] *See id.* at 6-8. Delic was alleged to have directly participated in the beating deaths of several individuals. *See id.* Further, he was alleged to have raped two women and to have tortured at least two individuals with electric devices. *See id.* at 7. The crimes allegedly committed by his subordinates include beating or shooting to death eight prisoners, placing a prisoner in a manhole for a week without food or water, placing a burning fuse around the genitals of another prisoner, and forcing persons to commit fellatio upon each other. *See id.* at 9-11.

[183] *See id.* at 281 ("[T]he Prosecution asserts that [the camp commander] was often absent from the prison-camp. It is alleged that the evidence shows that when [the camp commander] was absent, Hazim Delic was in charge and exercised full authority, that is, he was the acting commander in [the camp commander's] absence.").

[184] *See id.*

[185] *See id.* Administrative matters include "organizing documents and logistics." *Id.* at 280.

[186] *See id.* at 283. The defense "contend[ed] that command is a right exercised by virtue of office, the key elements of which are authority and responsibility. Military rank, on the other hand, is characterised as the relative position or degree of precedence granted military persons marking their stations in military life." *Id.*

[187] *See id.*

[188] *See id.*

[189] *See Celebici* judgment, *supra* note 9, at 283-84. In addition to this argument, the defense asserted that the prosecution failed to meet its factual burden of proof. *See id.* The defense argued that Delic's criminal liability could be determined only relative to that of Mucic, his commander, and that absent proof of Mucic's liability, the prosecution

The tribunal recognized that the prosecution was not asserting that Delic could be held responsible even if he did not command anyone, but rather, that Delic could be responsible even while lacking formal command status.[190] Therefore, the tribunal proceeded under the de facto command doctrine and inquired as to whether the prosecution had met its factual burden in proving that Delic exercised command authority over the Celebici prison guards.[191] First, the tribunal acknowledged the testimony of several eyewitnesses who stated that Delic appeared to be the "boss" of the guards.[192] Nonetheless, the tribunal conceded that this alone was not sufficient evidence of Delic's authority.[193] Second, the tribunal considered additional eyewitness testimony from former prisoners, who testified to seeing Delic give orders and exercise apparent influence, possibly through coercion and intimidation, over the prison guards.[194] Still, the tribunal felt this evidence was not dispositive and went on to examine the acts and responsibilities of Delic in his role as deputy commander.[195] The evidence tended to show that Delic was in charge of organizing the day-to-day affairs of the camp and assisting the commander in arranging for interrogation of prisoners.[196] Still, the tribunal could not pin superior responsibility on these actions, emphasizing that his assistance in organizing daily activities did not "indicate that he had actual command authority in the sense that he could issue

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would necessarily fail to prove Delic liable. *See id.* Furthermore, the defense argued that the prosecution could not prove that Mucic was absent and Delic acted as commander during the times when individual offenses were alleged to have occurred. *See id.*

[190] *See id.* at 285 ("Notwithstanding the submissions of the Defence, the Prosecution does not argue that the doctrine of command responsibility applies to those who do not exercise command and asserts as a *matter of fact* that the evidence demonstrates that Hazim Delic did exercise command in the Celebici prison-camp.").

[191] *See id.* at 285-89.

[192] *See id.* at 285-86. For example, one eyewitness stated, "I asked, 'who is this man?', and the people who were already sitting there said it was Hazim Delic, he is number two, he is God and your life depends on him." *Id.* at 286.

[193] *See id.* at 286 ("While this evidence is relevant to the Trial Chamber's consideration, it is not dispositive of Mr. Delic's status.").

[194] *See id.* at 287.

[195] *See id.* at 288. The tribunal indicated that compliance of the guards may have resulted from intimidation by Delic, and not from actual command authority. *See id.*

[196] *See id.* at 289.

orders and punish and prevent the criminal acts of subordinates."[197]

After examining all the evidence, the tribunal concluded that the prosecution had not met its burden in establishing Delic as a superior with the power to prevent or punish acts of his subordinates.[198] Accordingly, Delic was not convicted of any war crimes in his capacity as deputy commander of Celebici.[199] Delic was found guilty, however, of several crimes in which he was allegedly a direct participant, including murder.[200]

E. Superior Responsibility of Zdravko Mucic

Mucic was alleged to have been the commander of Celebici, and as such, was charged as a superior for every offense contained in the indictment.[201] As in the case of Hazim Delic, the tribunal first considered evidence of whether Mucic was indeed a superior with authority over the camp's prison guards before it examined the facts of the underlying offenses.[202]

The prosecution presented both eyewitness testimony and documentary evidence that demonstrated Mucic was indeed Celebici's commander during the period in which the atrocities took place.[203] The witnesses, mainly former prisoners, stated that Mucic was generally known as the camp commander.[204] The evidence included documents from the Bosnian Army indicating that Mucic was commander of the prison camp.[205] Furthermore,

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[197] *Id.*

[198] *See id.* The tribunal judge found that the

> Prosecution has failed to establish beyond reasonable doubt, that Hazim Delic lay within the chain of command in the Celebici prison camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates. Accordingly, he cannot be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute.

Id.

[199] *See id.* at 443-46.

[200] *See id.*

[201] *See id.* at 262. The ramifications of this level of potential liability were huge, given the offenses, ranging from murder to torture to rape. *See id.* at 461-76.

[202] *See id.* at 262.

[203] *See id.* at 263.

[204] *See id.*

[205] *See id.*

the prosecution alleged that conditions were such at Celebici that Mucic knew that violations were taking place.[206] To prove this, the prosecution pointed out that the prisoners suffered visible injuries, and Mucic neither inquired into their cause, nor took reasonable steps to prevent guards from abusing prisoners.[207]

The defense countered the prosecution's assertions by arguing alternative facts. First, the defense pointed out the absence of official records appointing Mucic commander of Celebici and argued that the prosecution could not prove what responsibilities or duties he held within the camp.[208] Furthermore, the defense alleged that different military and non-military groups had access to the camp, and it was not proven that Mucic had any command authority over these various groups.[209] Finally, the defense asserted that Mucic did not have the requisite knowledge of, or a duty to prevent, war crimes, and he did what he could to prevent mistreatment of individuals.[210]

Given the positions of both sides, the tribunal stressed again the essence of command responsibility as embodied in the superior-subordinate relationship, as evidenced by an actual exercise of authority and power of control, even without formal appointment.[211] In the words of the tribunal, "where there is de facto control and actual exercise of command, the absence of a de jure authority is irrelevant to the question of the superior's criminal responsibility for the criminal acts of his subordinates."[212] With that proposition in mind, the tribunal examined carefully the defense argument and found that by insisting that Mucic did what he could to prevent mistreatment of prisoners, the defense conceded that he had some type of authority over Celebici prison

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206 *See id.* at 264.

207 *See id.*

208 *See id.* at 265 ("Specifically, the Defence asserts that it has not been proven whether Mr. Mucic was a military commander or a civilian warden or administrator, nor what powers were given to him to investigate and punish those who mistreated detainees.").

209 *See id.*

210 *See id.* The defense contended that Mucic gave orders not to mistreat the prisoners. *See id.*

211 *See id.* at 267.

212 *Id.*

guards.[213] Furthermore, because the defense argued that the absence of formal authority should relieve Mucic from command responsibility, an argument the tribunal explicitly rejected in adopting a de facto approach, the tribunal found the defense's argument to lack legal merit.[214] After analyzing the considerable witness testimony produced by the prosecution, the tribunal concluded that Mucic had superior authority over the prisoners and guards in Celebici prison camp.[215]

Having found the existence of de facto command, the tribunal's next step was to consider Mucic's knowledge of the offenses.[216] The tribunal examined evidence of both the widespread nature of the torture and mistreatment at Celebici and the testimony of several eyewitnesses who claimed Mucic was present during their torture.[217] In the end, the tribunal did not have trouble concluding that Mucic had the requisite level of knowledge; given the "frequent and notorious" nature of the crimes committed, the tribunal decided "there [was] no way that Mr. Mucic could not have known or heard about them."[218]

The final element of the tripartite standard for command responsibility is the commander's failure to act.[219] Again, the tribunal had little trouble concluding that Mucic failed to take the necessary measures to prevent or punish crimes at Celebici.[220] In

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213 *See id.* at 268.

214 *See id.* at 269. "The Defence misconceives the correct legal position when it assumes that 'without the formal authority' Mr. Mucic 'has no duty to maintain peace and order within Celebici.'" *Id.*

215 *See id.* at 271-272.

216 *See id.* at 276.

217 *See id.* at 276-77. For example, one prisoner claimed that Mucic was present when he was placed in a manhole, where he was to remain for seven days without food or water. *See id.* at 276. Other prisoners claimed Mucic was present when they were released from this manhole, after a period of confinement. *See id.* at 277.

218 *See id.* at 277. The tribunal based Mucic's actual knowledge on the widespread nature of the crimes themselves, which is reminiscent of the situation in *Yamashita*. *See supra* notes 96-115 and accompanying text. The crucial difference is that the ICTY used the nature of the crimes to conclude that Mucic had actual knowledge, not that he should have known but failed to properly supervise in order to find out. *See Celebici* Judgment, *supra* note 9, at 277.

219 *See supra* note 152 and accompanying text.

220 *See Celebici* Judgment, *supra* note 9, at 278.

There is no doubt that Zdravko Mucic had the authority to prevent the violations

reaching this conclusion, the tribunal cited evidence that Mucic never punished guards,[221] was frequently absent from the camp at night,[222] and failed to enforce any instructions which he did happen to give out.[223] Having found all three elements of the command responsibility doctrine present, the tribunal concluded that Mucic was indeed criminally responsible for the offenses of his subordinates at Celebici.[224]

F. Superior Responsibility of Zejnil Delalic

The tribunal's discussion of Delalic's charge of command responsibility was the most lengthy and complicated.[225] Delalic was a direct participant in only one offense, the unlawful confinement of civilians; the rest of his charges rested on the command responsibility doctrine.[226] The analysis of his responsibility was complicated by the fact that Delalic occupied more than one position of command; he was a regional coordinator of the Konjic area for a period and later was appointed commander of Tactical Group 1.[227]

The prosecution asserted that although Delalic was not formally designated as a commander of Celebici, his command over the Konjic region placed him in a position of authority over Mucic and consequently the guards in the prison camp.[228] Furthermore, the prosecution contended that, even if Delalic did not exercise direct authority over the camp's personnel, his

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of international humanitarian law in the Celebici prison camp. There is no evidence before the Trial Chamber that he made any serious effort to prevent these continued violations or punish his subordinates for such crimes during his tenure.

Id.

221 *See id.* at 277.

222 *See id.* at 278.

223 *See id.*

224 *See id.* at 279. The crimes that Mucic was charged with as a superior include those described in note 182, *supra.*

225 Discussion of Delalic's alleged command responsibility encompassed 47 pages of the opinion, compared with 11 for Delic and 18 for Mucic. *See id.* at 215-89.

226 *See supra* note 182 (discussing some of the crimes committed by guards at Celebici, for which Delalic was allegedly responsible).

227 *See Celebici* Judgment, *supra* note 9, at 216. Tactical Group 1 was a military unit of the Bosnian Muslim forces. *See id.*

228 *See id.* at 217.

position of authority within the Konjic region vested him with responsibility for the offenses perpetrated within Celebici.[229] To support these contentions, the prosecution produced evidence tending to show that Delalic was considered to be a commander of Celebici both in his role as regional coordinator,[230] and by virtue of his position as commander of Tactical Group 1.[231]

The defense conceded that Delalic had occupied these positions, but argued that he did not have authority or control over the personnel at Celebici prison camp.[232] In his position as coordinator, the defense argued, Delalic acted in an administrative capacity and not as a commander.[233] Furthermore, the defense argued that although Delalic was commander of Tactical Group 1, no member of the staff of Celebici was in this military unit.[234] Any orders that Delalic may have issued to the Celebici personnel, the defense asserted, were transmitted from a higher command and not specifically ordered by Delalic in his capacity as commander.[235]

Before analyzing the factual evidence in support of each side, the tribunal discussed some of the legal issues.[236] Namely, the

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[229] *See id.* at 218.

> In [the prosecution's] view, it is clear that [Delalic] was one of the leading figures of authority in the region at that time, and that his power and influence extended to matters pertaining to the Celebici prison-camp and at the very least to the classification and release of detainees.

Id.

[230] *See id.* at 218-20. For example, the prosecution cited evidence that in his role as regional coordinator, Delalic visited the prison camp and was given the deference expected by a commander. *See id.* at 220.

[231] *See id.* at 220-24. The prosecution contended that the order designating Delalic as commander of Tactical Group 1 made him the commander of all troops in the region, including those stationed as guards at Celebici. *See id.* at 220. The prosecution further argued that Delalic continued to exercise the same level of authority in this new role, as he had as regional commander. *See id.* at 221.

[232] *See id.* at 225.

[233] *See id.* at 227 ("In the view of the Defence, co-ordination implies, by definition, mediation and conciliation, and does not connote command authority or superior authority.").

[234] *See id.* at 229.

[235] *See id.* ("Mr. Delalic, on these occasions, acted merely as a conduit and that he transmitted these orders pursuant to orders issued to him by the Supreme Command.").

[236] *See id.* at 231-32 ("The Trial Chamber deems it convenient and appropriate to discuss a few preliminary issues which it considers necessary for the elucidation of its

tribunal expressed its concern with the prosecution's apparent contention that Delalic, as a superior, could be held criminally responsible even without establishing a chain of command or the existence of subordinates under his control:

> The view of the Prosecution that a person may, in the absence of a subordinate unit through which the authority is exercised, incur responsibility for the exercise of superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. *The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops.* It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a sine qua non for superior responsibility.[237]

Having emphasized this point, the tribunal then examined Delalic's activities to determine if the superior-subordinate relationship did indeed exist.[238] In examining his duties as coordinator, the tribunal found that this position did not confer command responsibility upon Delalic.[239] Rather, the tribunal found that as coordinator, his duties consisted of "mediation and conciliation" and that he had "his functions prescribed."[240] The tribunal also found that the role of coordinator was not recognized in the Bosnian military, and that Delalic, as coordinator, was not part of a military chain of command.[241] Rather, he acted as a mediator between military and civilian groups in the Bosnian government and exercised no independent judgment.[242] Therefore, the tribunal concluded that Delalic did not acquire command responsibility by virtue of his role as coordinator in the Konjic municipality.[243]

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reasoning.").

[237] *Id.* at 232 (emphasis added).

[238] *See id.* at 233-61.

[239] *See id.* at 249.

[240] *Id.* at 238.

[241] *See id.*

[242] *See id.*

[243] *See id.* at 249. In reaching this conclusion, the tribunal rejected evidence such as Delalic's signature on various written orders to Celebici personnel, and activities such as

Next the tribunal looked at Delalic's activities in his capacity as commander of Tactical Group 1.[244] First, the tribunal pointed out that Tactical Group 1 was strictly a temporary combat unit, and did not include non-combat institutions such as prisons.[245] Next, the tribunal examined the prosecution's key evidence as to Delalic's authority over Celebici, which was a set of orders issued to the commander of Celebici requiring him to appoint a commission to interrogate prisoners.[246] The tribunal, however, rejected the prosecution's contention that the issuance of these orders provided incontrovertible proof of Delalic's authority over Celebici.[247] Rather, the tribunal focused on the nature of a tactical group, which exists only to carry out specific, combat-related missions.[248] Any exercise of authority outside that narrow mission would have to be conferred from some higher source.[249] Thus, the tribunal concluded, Delalic acted as a conduit in transmitting those orders to the Celebici commander from the Bosnian Supreme Command.[250] The tribunal also relied on evidence of the limited nature of Delalic's command to defeat or reject the prosecution's contention that Delalic was a regional commander, and thereby acquired the Celebici camp as part of his command.[251]

Having examined Delalic's functions as coordinator and tactical commander and finding no existence of authority over

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issuing uniforms. *See id.* at 246-48. The tribunal found that these activities were consistent with his administrative and logistical functions and did not imply any exercise of authority or command. *See id.*

[244] *See id.* at 249-61.

[245] *See id.* at 249.

[246] *See id.* at 251. These orders, issued by Delalic, "required the Military Investigating body of the Konjic OSOS to undertake interrogation of prisoners at Celebici. It required Zdravko Mucic to establish a commission of three members to undertake the interrogation of prisoners." *Id.*

[247] *See id.* at 255.

[248] *See id.* at 251-52.

[249] *See id.* at 252 ("The commander of a tactical group, when so ordered by his superior, must perform missions or tasks outside the scope of his specific authority as a tactical group commander.").

[250] *See id.* ("These are not the orders of Mr. Delalic, who, as commander of [Tactical Group 1], could not issue any orders outside those concerning his command. Mr. Delalic was in this case performing as a mere conduit or a ministerial functionary.").

[251] *See id.* at 253 ("The commander of [Tactical Group 1] had authority only over the formations that were directly subordinated to him by order of the Supreme Command.").

Celebici in either of these roles, the tribunal concluded that Delalic could not be held responsible as a commander for the acts committed by prison guards within Celebici.[252] Again, the tribunal reiterated that international law did not allow a commander to be held responsible for acts of individuals not within his command.[253] Ultimately, the tribunal also found Delalic not guilty on his one direct charge, unlawful confinement of civilians.[254]

G. Analysis of the ICTY's Application of the Command Responsibility Doctrine

Now that the tribunal's decisions in relation to the command responsibility of the three accused have been summarized, it is appropriate to compare these decisions with the development of the command responsibility doctrine discussed in this Comment. First, in regard to Hazim Delic, it is apparent that the tribunal was quite strict in its formulation of de facto command. The evidence tended to show that Delic, as deputy commander, did indeed order the prison guards around, and they generally obeyed his orders.[255] The tribunal, however, was careful to make the distinction between compliance achieved through fear and bullying and the exercise of actual authority.[256] Although the de facto doctrine allows for even informal commanders to be held responsible, these commanders still must exercise the same type of authority as a de jure commander.[257] One could argue that the very fact that Delic had to resort to bullying and intimidation indicates that he did not

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[252] *See id.* at 261.

[253] *See id.*

> The courts have not accepted the proposition that a commander be held responsible for the war crimes of persons not under his command. In the instant case, the Trial Chamber has found that the Prosecution has failed to prove that Mr. Delalic had command authority and, therefore, superior responsibility over Celebici prison camp, its commander, deputy commander or guards. Mr. Delalic cannot, therefore, be held responsible for the crimes alleged to have been committed in the Celebici prison-camp by Zdravko Mucic, Hazim Delic, Esad Landzo or other persons within the Celebici prison-camp.

Id.

[254] *See id.* at 440.

[255] *See id.* at 281-82.

[256] *See id.* at 288.

[257] *See id.* at 139-40.

have legitimate authority over the prison guards.

If the analysis of Delic's responsibility serves to underscore the importance of the element of command and control, the tribunal's discussion of Delalic's responsibility emphasizes the significance of the superior-subordinate relationship. The prosecution and defense both admitted that Delalic was indeed a commander in the usual sense of the word, especially when he took command of Tactical Group 1.[258] The fatal flaw in the prosecution's case, however, was their inability to prove that the prison guards at Celebici were in any way Delalic's subordinates.[259] The essential element is not whether a commander controls a certain geographic area, but whether he controls the *individuals* who commit the war crimes. This approach may seem at odds with the *Yamashita* decision, in which General Yamashita's overall responsibility for the Philippines was a key factor in finding him criminally responsible for the actions of Japanese soldiers in that region.[260] However, the difference lies in the charge involved. General Yamashita was charged with a failure to discharge his duty as commander, which would have required him to control his troops and prevent their commission of atrocities.[261] Under the facts of *Yamashita*, assuming the charge was proper, his conviction seems rightly decided. On the other hand, Delalic was charged with the underlying offenses of the guards at Celebici, including rape, torture, and murder.[262] He was not alleged to have directly participated in any of these acts.[263] In this situation, the establishment of a superior-subordinate relationship would have been a necessary prerequisite to pinning any liability on Delalic.[264]

Yet, Mucic's conviction demonstrates the classic operation of the command responsibility doctrine. His actions fit the three elements of the command responsibility doctrine perfectly.[265]

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258 *See supra* notes 230-32 and accompanying text.

259 *See supra* notes 245-51 and accompanying text.

260 *See supra* notes 103-07 and accompanying text.

261 *See supra* note 103 and accompanying text.

262 *See supra* note 226 and accompanying text.

263 *See id.*

264 *See supra* note 236 and accompanying text.

265 *See supra* notes 150-51 and accompanying text.

Mucic was inarguably the commander of Celebici, he did not act to prevent or punish the prison guards' atrocities, and he knew that these atrocities were taking place.[266] This last element provides some insight into the tribunal's theory of how the command responsibility doctrine should operate. The tribunal imputed actual knowledge to Mucic after examining the evidence that torture and beatings were doled out frequently at Celebici, and that the prisoners were constantly in a state of injury.[267] In effect, this decision tells commanders that they may not choose to avoid the obvious or their knowledge will be presumed. This gives some teeth to the "willful blindness" doctrine embodied in Protocol I.[268]

In more general terms, the *Celebici* decision indicates the utility of the command responsibility doctrine in light of the circumstances of modern warfare. The shift from international toward internal conflict that made Protocols I and II so appropriate in the late 1970s[269] also increases the need for a system of enforcing the responsibility of leaders outside the formal military structure. The de facto arm of the command responsibility doctrine, articulated for the first time in the international context in the *Celebici* judgment, directly addresses this need.[270]

This is not to say, however, that the *Celebici* formulation of the command responsibility doctrine is perfect. It has the potential danger of creating extensive liability for an especially poor or dull commander, one who lacks the expertise, influence, or experience to effectively control his subordinates. In such a case, it is possible that a conviction would appear to fault the commander more for his lack of know-how than for a true disregard for humanity or the law.[271] Since neither the tribunal's three-part formulation of the command responsibility doctrine nor the

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266 *See supra* notes 217-23 and accompanying text.

267 *See Celebici* Judgment, *supra* note 9, at 277.

268 *See supra* notes 117-25 and accompanying text.

269 *See supra* notes 63-66 and accompanying text.

270 *See supra* notes 160-62 and accompanying text.

271 *See supra* note 172 and accompanying text. The tribunal noted it could only impose a duty upon commanders to do what is "within his material possibility," but it did not speak to whether the individual's intelligence or skill was a factor in determining what is materially possible. *Celebici* Judgment, *supra* note 9, at 147. However, the tribunal did consider the mental state of Esad Landzo, one of the defendants not charged with superior responsibility, in determining a sentence. *See id.* at 438.

opinion itself discusses this possibility, it will be up to future tribunals to determine how to resolve this issue. Nonetheless, despite this potential drawback, the ICTY's definition of the command responsibility doctrine is relevant, extensively explained,[272] and most importantly, has been applied in practice to three very different defendants.

IV. Conclusion

This Comment has provided a broad summary of the development of laws of war, especially during the last two centuries. It has also discussed the emergence of the command responsibility doctrine and its most recent application in the ICTY. The tribunal's thorough discussion of the doctrine in general, and its careful application of the doctrine to three very different types of commanders, provides a valuable precedent to war crimes tribunals in the future (national and international). Furthermore, the ICTY's acknowledgement of Protocol I of the Geneva Conventions as a primary source of international law confers weight and authority upon that treaty, even though several international superpowers, including the United States, Great Britain, France, and Japan, have not ratified it.[273] The future will undoubtedly see further application of the command responsibility doctrine, both in international war and internal armed conflicts. Like any doctrine in the laws of war, however, the command responsibility doctrine must remain flexible, as the nature of warfare inevitably changes over time.

ANN B. CHING

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[272] The tribunal's discussion of the correct formulation of the doctrine covers nearly 29 pages of the 484-page opinion. *See id.* at 121-49.

[273] *See* REISMAN, *supra* note 57, at 415-16, 428.