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Humanitarian Law: The Uncertain Contours of Command Responsibility

Matthew Lippman

HUMANITARIAN LAW: THE UNCERTAIN CONTOURS OF COMMAND RESPONSIBILITY

Matthew Lippman[†]

The doctrine of command responsibility imposes a duty on military commanders and civilian officials to ensure that subordinate troops adhere to the requirements of the law of war. These officers are presumed to possess the knowledge, authority and power to prevent and to punish the transgressions of combatants. The imposition of criminal culpability is intended to create an incentive to insure that subordinates abide by the humanitarian law of war. This extension of liability is necessitated by the lethal consequences resulting from the contravention of the code of conflict.[1]

The parameters of command responsibility remain imprecise. Legal decisions in this area, for the most part, have been the product of post-war prosecutions. These courts have not enjoyed the political insulation, inclination or opportunity to engage in the type of sustained deliberation which is required to draw detailed distinctions.[2]

The potential harshness of command responsibility is illustrated by the victorious Union government's 1865 prosecution of Confederate

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[†]Professor, Department of Criminal Justice, University of Illinois at Chicago; J.D., American; Ph.D., Northwestern; LL.M., Harvard. Affiliate member of the Departments of Political Science & Germanic Studies; Member of the Program on Jewish Studies.

1. *See* Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea For A Workable Standard,* 97 MIL. L. REV. 1, 4-11 (1982).

2. *See* Comment, *Command Responsibility for War Crimes,* 82 YALE L.J. 1274 (1973).

Captain Henry Wirz.[3] Wirz was convicted of conspiracy to injure the health and to destroy the lives of individuals interned in the Andersonville, Georgia prison camp as well as with direct acts of cruelty.[4] In February 1864, the newly-opened camp was placed under the command of General John H. Winder, Superintendent of the Military Prisons of the Confederacy, who was assisted by his son, Captain W.S. Winder.[5] A month later, German immigrant William Wirz was named to head the institution.[6] This appointment was an expression of appreciation by Confederate President Jefferson Davis for Wirz's loyal service to the confederacy on the battlefield as well as in diplomatic relations with Europe.[7]

Andersonville was constructed for 10,000 inmates, but within four months of Wirz's appointment, the population reached 33,000.[8] The prisoners found themselves in penal purgatory. The Southern forces were in rapid retreat and there was little food, clothing, medicine or shelter available for the captured combatants.[9] The prison had been built adjacent to a swamp and the inmates were overwhelmed by mosquitoes and flies which deposited maggots in the gangrenous wounds of the living and infested the corpses of the dead. As a result, diarrhea, dysentery, dropsy, pneumonia, gangrene and scurvy rapidly raged through the camp.[10] Nearly forty percent of the prisoners died during confinement; an additional 2,000 expired following release.[11] Corpses were carted off by the wagonload and buried without coffins.[12] The guards proved to be undisciplined, corrupt and ineffective in controlling the population.[13]

Wirz contended at trial that he had been helpless to alleviate the conditions in the camp, pointing out that that the Union blockade and lack of factory and farm labor had resulted in food shortages.[14] He pled that events were "beyond my power to control.... [T]he shortness of rations... the overcrowded state of the prison... the inadequate...

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3. *The Trial of Captain Henry Wirz for Conspiracy and Murder, Washington D.C., 1865 in* AMERICAN STATE TRIALS, VOL. VIII 657 (John D. Lawson ed. 1917) [hereinafter Wirz].

4. *Id.* at 659.

5. *Id.* at 658.

6. *Id.* at 658 n.1.

7. *See id.* at 658-59.

8. *Id.* at 658, 699.

9. *See* Wirz, *supra* note 3, at 660.

10. *Id.* at 660-61.

11. *Id.* at 658.

12. *Id.* at 772.

13. *Id.* at 701.

14. *Id.* at 662.

clothing, want of shelter . . . [I was] the tool in the hands of my superiors."[15] The Confederate government in Richmond disregarded a steady stream of reports by inspectors which described the depredations in the camp as a "'reproach to the Confederates as a nation.'"[16] Wirz reinforced these reports in a series of letters protesting the inferior quality of bread rations, the shortage of buckets to hold and store the inmates' food, the lack of shoes for paroled prisoners working in the prison[17] and the poor health care and the over-crowded conditions.[18]

Wirz pled that "'I was not the monster that I have been depicted as being; I did not cause or delight in the spectacle of . . . sufferings . . . on the contrary, I did what little lay in my power to diminish or alleviate them.'"[19] He queried how he could be held responsible for and remedy the lack of rations, overcrowded conditions, inadequate clothing and shortage of shelter.[20] Despite these protestations, Wirz was convicted of conspiracy as well as direct acts of cruelty and murder and was sentenced to death by hanging.[21] He was determined to have resided over a camp whose conditions contravened the international law of war.[22] The judge advocate insisted that the atrocities of Andersonville resulted from the "intrinsic wickedness" of a few "desperate leaders" who were assisted by heartless monsters" such as Henry Wirz.[23] The advocate inveighed that "there is no law, no sympathy, no code of morals" which can excuse the excesses of the accused.[24]

Wirz was held to a standard of strict liability and executed.[25] Was it equitable and just to hold Wirz responsible for the conditions and casualties in the camp? What additional avenues of redress were available?

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15. Wirz, *supra* note 3, at 684. Wirz engaged in acts of cruelty such as withholding rations, establishing a "dead-line" which resulted in the killing of individuals crossing the boundary, condemning individuals to chain gangs and confining prisoners in stocks and abusing, killing and flogging internees. *See id.* at 662.

16. *Id.* at 714 (supplemental letter, Sept. 9, 1864, from Acting Adjutant and Inspector-General Chandler to Colonel R.H. Chilton, Assistant Adjutant and Inspector-General, Richmond).

17. *Id.* at 739.

18. *Id.* at 732.

19. *Id.* at 861-62.

20. *Id.* at 684.

21. Wirz, *supra* note 3, at 873.

22. *Id.* at 807.

23. *Id.* at 808.

24. *Id.* at 832.

25. *Id.* at 667.

Should Wirz reasonably have been expected to elevate moral principle over patriotism? Were not those in Richmond who disregarded reports recounting the conditions in the camp equally guilty? Was the imposition of criminal culpability on Wirz merely an expression of retribution and revenge? Could the killing of this accented European be seen an exercise in selective and victor's justice?[26]

These questions are central to command responsibility. This article traces the development of the doctrine from World War I to the contemporary era in order to document the diverse strands which have shaped the newly-drafted article on command culpability in the Rome Statute of the International Criminal Court.[27] The latter, as will be seen, is the culmination of almost eighty years of debate, discussion and judicial decision concerning the contours and content of command responsibility.[28] This is no mere intellectual investigation; command responsibility is central to the campaign to bring high-ranking civilian and military leaders charged with war crimes and crimes against humanity before the bar of justice.[29]

I. WORLD WAR I

The Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to report on the responsibility for World War I and the breaches of the laws and customs of war committed by the German Empire and her allies.[30] The commission concluded that the conflict resulted from the premeditated plan of the Central Powers and Turkey and Bulgaria.[31] However, it determined that the initiation of a war of aggression was not prohibited under positive international law and

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26. *See generally* Heidi M. Hurd, *Justifiably Punishing The Justified,* 90 MICH. L. REV. 2203 (1992); David Luban et al., *Moral Responsibility in the Age of Bureaucracy,* 90 MICH. L. REV. 2348 (1992); David Luban, *Contrived Ignorance,* 87 GEO. L.J. 957 (1999).

27. *Rome Statute of the International Criminal Court,* art. 28 U.N. Doc. No. A/CONF. 183/9 (July 17, 1998), 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

28. *See* L.C. Green, *Command Responsibility in International Humanitarian Law,* 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995).

29. *See generally* Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, (1994); M. Feria Tinta, *Commanders on Trial: The Blaskic' Case and the Doctrine of Command Responsibility Under International Law*, 47 NETH. INT'L L. REV. 293 (2000).

30. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (March 29, 1919)*, 14 AM. J. INT'L L. 95 (1920) [hereinafter Commission on the Responsibility on the Authors of the War].

31. *Id.* at 107.

accordingly did not result in the imposition of international responsibility.[32] The commission also found that the German Empire and her allies had engaged in "outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and the laws of humanity."[33] These included the "most cruel practices which primitive barbarism" aided by the "resources of modern science" could devise for the "execution of a system of terrorism."[34]

The commission made the unprecedented proposal that individuals responsible for these atrocities should be subject to criminal prosecution, regardless of rank or status.[35] According to the commission, the immunity typically accorded to high-ranking officials under domestic doctrine was an expression of political self-interest which had no proper place in international law.[36] The commission explained that otherwise the "greatest outrages against the laws and customs of war and the laws of humanity . . . could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind."[37]

The vindication of the laws and customs of war and the laws of humanity also would be incomplete absent the prosecution of the smallest as well as the most substantial war criminals, including the ex-Kaiser.[38] Furthermore, the trial of offenders might be compromised in the event that they were able to plead as a defense the superior orders of a sovereign who, himself, was immunized from prosecution.[39]

Individuals were to be held accountable for affirmative acts as well as for a failure to intervene.[40] The commission, in explaining the rationale underlying the decision to punish omissions, stressed that the Kaiser and other civilian and military authorities were cognizant of and could have mitigated the barbarities: a "word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air."[41]

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32. *Id.* at 118.

33. *Id.* at 113.

34. *Id.*

35. *Id.* at 116.

36. Commission on the Responsibility on the Authors of the War, *supra* note 30, at 116.

37. *Id.*

38. *Id.* at 117.

39. *Id.* The commission observed that the relevant court should determine whether the superior orders defense would be admissible. *Id.* at 117.

40. *Id.*

41. *Id.*

The commission proposed that war crimes affecting nationals of several Allied countries should be tried before a multinational tribunal.[42] The consent of the defeated belligerent states to this jurisdiction was to be embodied in the treaty of peace.[43]

The American representatives, Robert Lansing and James Brown Scott, in anticipating subsequent debates over the contours of command responsibility, objected to the commission's initial formulation which posited that civilian and military authorities should be liable for a failure to act, regardless of their degree of knowledge or capacity to prevent the commission of crimes.[44] The Americans insisted that an official must have been aware of the criminal acts and have possessed the authority and power to prevent or to repress them; the duty or obligation to act was essential.[45] Lansing and Scott also stressed that the imposition of liability on individuals who failed to act did not exonerate those who directly engaged in the criminal conduct.[46] The United States representatives further objected to the abrogation of sovereign immunity and to the extension of liability to heads of states, arguing that the essence of sovereignty was that a head of state was neither subject nor subordinated to foreign control.[47]

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42. Commission on the Responsibility on the Authors of the War, *supra* note 30, at 121. The commission observed as to offenses affecting a single country that every belligerent possesses the prerogative under international law to prosecute individuals alleged to be guilty of violations of the laws and customs of war. *Id.* There was a provision for prosecuting individuals before an international tribunal in those instances in which it was viewed as advisable given the character of the offense or the law of any belligerent country. *Id.* at 121-22. The law to be applied shall be "the principles of the law of nations as they result from the usages established among civilized peoples from the laws of humanity and from the dictates of public conscience." *Id.* at 122.

43. *Id.* at 123.

44. Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, annex II, *supra* note 30, at 127, 143.

45. *Id.* at 143.

46. *Id.*

47. *Id.* at 148. The United States representatives also objected to the imposition of liability for violations of the laws of humanity since, according to the Americans, this constituted a novel, varying and uncertain standard. *Id.* at 144. Lansing and Scott also opposed international tribunals and advocated the creation of mixed tribunals which would be limited to affected States; contending that States were not authorized to assume jurisdiction over acts which did not fall within the traditional ambit of their international jurisdiction. *Id.* at 147.

The Treaty of Peace with Germany,[48] strained to preserve the sovereign immunity of the ex-Kaiser, holding him responsible for the heretofore unknown "supreme offense against international morality and the sanctity of treaties."[49] He was to be prosecuted before a special five judge international tribunal which was to be guided by the "highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."[50] The latter provision significantly omitted responsibility for war crimes.[51] Germany also recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.[52] Individuals accused of criminal acts against the nationals of a single Allied and Associated Power were to be prosecuted before a military tribunal of that Power.[53] Those charged with criminal acts which affected the interests of more than one of the Allied and Associated Powers were to be tried before military tribunals comprised of representatives of the Powers concerned.[54]

The Allied Powers developed a roster of 3,000 offenders which was gradually winnowed to 854 serious cases of criminal conduct; this included over eighty high-ranking civilian and military leaders.[55] The Allied Powers soon became convinced that conducting international trials would destabilize the Weimar regime and risk revolutionary insurrection.[56] The Germans ultimately were permitted to prosecute forty-five individuals before the Penal Senate of the Supreme Court (Reichsgericht).[57] These proceedings, for the most part, focused on lower-level combatants.[58]

The issue of command responsibility was presented in the prosecution of Emil Muller.[59] Muller was a captain in the army reserves who, between April and May 1918, who commanded a prison camp in France which

48. *Treaty of Peace with Germany*, 13 AM. J. INT'L L. 151 (Doc. Supp.) (1919).

49. *Id.* at 250, art. 227.

50. *Id.* art. 228.

51. *See id.*

52. *Id.*

53. *Id.*

54. *Treaty of Peace with Germany*, *supra* note 48, at 251, art. 229.

55. JAMES F. WILLIS, PROLOGUE TO NUREMBERG THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 119-20 (1982).

56. *Id.* at 124-28.

57. *Id.* at 130-31.

58. *See Judgment in the Case of Karl Heynen* (May 26, 1921), 16 AM. J. INT'L L. 674 (1922).

59. *Judgment in the Case of Emil Muller* (May 30, 1921), 16 AM. J. INT'L L. 684 (1922).

housed English POWs.[60] The camp was situated in a muddy unsanitary marsh; there was inadequate food, water and sanitation and disease was widespread.[61] The accused sent several memos demanding supplies and made ardent efforts to improve conditions.[62] He managed to arrange for medical treatment and, on his own initiative, succeeded in securing additional food as well as sinking wells, installing stoves and latrines and establishing disinfection stations to combat lice.[63]

Muller was acquitted of willful neglect, the Court determining that he was not responsible for these abominable conditions since "he had perceived the danger in good time and had done everything to prevent it."[64] In a relatively short period of time, Muller had accomplished an "astonishing amount" towards improving his camp.[65] Although he had not completely eradicated disease and depredation, the Court stressed that this was due to "circumstances which were beyond both him and also his immediate superiors."[66]

Muller also was charged with punishing prisoners by binding them to a post in violation of regulations.[67] In two instances, internees were tethered and secured so as to stare directly into the sun.[68] The Court determined that this had been carried out on the initiative of non-commissioned officers without Muller's knowledge.[69] However, in another instance, Muller witnessed a prisoner being harshly reprimanded by a Sergeant-Major, made an unrecorded remark, and the soldier then proceeded to fell the prisoner with his fist.[70] The Court concluded that the accused "at least tolerated and approved of this brutal treatment, even if it was not done on his orders."[71] Muller was convicted of the ill treatment of prisoners and subordinates and was sentenced to six months in prison.[72]

By 1928, virtually all of the remaining charges against German combatants had been dismissed and those who had been imprisoned had been

60. *Id.* at 685.
61. *Id.* at 685-86.
62. *Id.* at 686.
63. *Id.*
64. *Id.* at 687.
65. *Judgment in the Case of Emil Muller, supra* note 59, at 687.
66. *Id.* at 687.
67. *Id.* at 689.
68. *Id.*
69. *Id.*
70. *Id.* at 691.
71. *Judgment in the Case of Emil Muller, supra* note 59, at 691.
72. *Id.* at 685.

released. Several months following Hitler's ascendancy to power, the prosecutor's office in Leipzig formally quashed all outstanding war crimes proceedings.[73]

In summary, the issue of command responsibility arose during the debate over the prosecution of war crimes committed during World War I; there was strong sentiment for holding military officials liable for failing to intervene to halt war crimes.[74] In the prosecution of Emil Muller, the German Supreme Court followed the Commission on Responsibility and held that a conviction under command responsibility required that the accused had possessed the position, power, capacity and knowledge to halt the crimes.[75] An official was obligated to undertake aggressive remedial action, but was not required to fully ameliorate a situation which he, himself, had not created.[76]

II. GENERAL YAMASHITA

Following World War II, General Tomoyuki Yamashita, the former Japanese Supreme Commander in the Philippines, was charged, convicted and sentenced to death by a United States military war crimes commission which determined that he had failed to discharge his duty to control his troops.[77] This verdict was subsequently affirmed by the American Army command,[78] as well as by the United States Supreme Court.[79]

The indictment alleged that as American forces invaded the Philippines that Japanese troops under Yamashita's command fled in a rapid retreat during which they committed numerous war crimes, including the killing of non-combatants.[80] The Japanese depredations enumerated in the bill of particulars included the execution and massacre without trial of

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73. WILLIS, *supra* note 55, at 146.

74. *See supra* notes 40-41 and accompanying texts.

75. *See supra* notes 67-72 and accompanying texts.

76. *See supra* notes 64-66 and accompanying texts.

77. *Trial of General Tomoyuki Yamashita*, 1948 L. REP. WAR CRIM. 1, 35-37 (Oct. 8-Dec. 17, 1945).

78. General Headquarters United States Army Forces, Pacific Office of the Theater Judge Advocate, Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General Japanese Army (Dec. 26, 1945), *reprinted in* COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 60 (1950) [hereinafter Review of the Record].

79. In Re Yamashita, 327 U.S. 1 (1945). *See generally* A.F. REEL, THE CASE OF GENERAL YAMASHITA (1949).

80. *Trial of General Tomoyuki Yamashita*, *supra* note 77, at 5.

civilian internees and prisoners of war; the torture, rape and killing of women, children and members of religious orders through starvation, beheading, bayoneting, clubbing, hanging, immolation and the use of explosives; and the demolition without military necessity of large numbers of homes, businesses, places of religious worship, hospitals and educational institutions.[81]

Twenty-five thousand civilians were alleged to have been killed in Batangas Province, Luzon Island alone between October 1944 and May 1, 1945.[82] Individuals were shot, bayoneted and buried alive.[83] Three hundred Filipinos were forced to leap into a well into which heavy weights were dropped. Those who survived were executed.[84] In another incident, three to four hundred civilians were bayoneted, shot, and immolated.[85] Hundreds of women and young women were raped; their breasts and sexual organs mutilated. Babies were thrown into the air and spitted on bayonets; civilians were beaten, burned, hung by the limbs, blinded and large quantities of water was forced through their mouth and nostrils.[86] Prisoners of war were forced to survive on a diet of cats, pigeons, and rats.[87] Over fifteen hundred Americans were crowded into the cramped cargo hold of a Japanese steamship and were starved and driven to dementia; attacking one another and sucking their victims' blood.[88]

Yamashita, in his defense, claimed that the roughly 240,000 troops under his command had scattered in retreat and had lost communications with headquarters.[89] Yamashita's capacity to direct his forces also was impeded by the fact that his troops had been augmented by naval units over whom he exercised only limited command and control.[90] These troops disregarded Yamashita's orders to flee Manila and, as the Americans approached, destroyed large sections of the city.[91] Eight thousand residents were killed and over seven thousand were mistreated, maimed

81. *Id.* at 4.
82. *Id.* at 5.
83. Review of the Record, *supra* note 78, at 63.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 68.
88. *Id.* at 69.
89. Review of the Record, *supra* note 78, at 72-73.
90. *Id.* at 72.
91. *Id.* at 73.

and wounded during this orgy of violence; the bodies of the dead were dumped into rivers, discarded in mass graves or immolated.[92]

Yamashita contended that he neither ordered, authorized, tolerated nor had known of the crimes and atrocities catalogued in the indictment[93] The prosecution, however, alleged that these crimes had been so widespread, notorious and redundant that Yamashita must have been aware of them and that any ignorance on his part was due to the fact that he "'took affirmative action not to know.'"[94]

An American military commission stressed that Yamashita was an officer with a prodigious palette of prior military experience.[95] The panel noted that while a military commander possessed substantial power and responsibility that it would be unfair to hold an official liable for every murder and rape committed by combatants.[96] On the other hand, commanders were ceded broad powers for administering justice in order to maintain discipline and direction.[97] The commission, in balancing these considerations, concluded that it would be appropriate to hold officers criminally liable in those instances in which the catastrophic crimes of combatants had been widespread and there had been no "effective attempt" by a commander to "discover and control" this conduct.[98]

The commission concluded that a systematic pattern of atrocities had been committed by Japanese troops in the Philippine Islands and that Yamashita had failed to establish the type of effective control which was required under the circumstances.[99] He was sentenced to death by hanging.[100]

A board of review was convened by General Douglas MacArthur, Commander-in-Chief of the United States Armed Forces, Pacific.[101] The board determined that in light of the prodigious, prominent and persistent nature of the offenses committed by Japanese forces that the "conclusion is inevitable that the accused knew about them and either gave his tacit

92. *Id.* at 62.
93. *Trial of General Tomoyuki Yamashita*, *supra* note 77, at 18.
94. *Id.* at 17.
95. *Id.* at 35.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Trial of General Tomoyuki Yamashita*, *supra* note 77, at 35.
100. *Id.*
101. Review of the Record, *supra* note 78, at 60.

approval to them or at least failed to do anything either to prevent them or to punish their perpetrators."[102]

The United States Supreme Court, in affirming Yamashita's conviction, observed that unrestrained and unsupervised military operations inevitably result in violations of humanitarian law, undermining the protections afforded civilian populations and prisoners of war.[103] According to the majority, the central role of a commanding officer in protecting civilians and wounded or captured enemy belligerents was proclaimed in various international instruments which recognized that the violation of the law of armed conflict "is to be avoided through the control of the operations of war by commanders who are... responsible for their subordinates."[104]

The Court accordingly confirmed that a commanding officer possessed 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."[105] The majority avoided the thorny factual issue of the extent of Yamashita's knowledge of war crimes, holding that he was liable regardless of whether he possessed actual or constructive knowledge or was unaware of the atrocities committed by the Japanese troops; he had the duty under any circumstances to issue orders and to take steps to prevent violations of the law of war.[106] The Court noted that the prophylactic power of the humanitarian law of war "would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures" to protect civilians and prisoners of war.[107]

In dissent, Justice Frank Murphy contended that there was no precedent under international law for the charge against Yamashita.[108] According to Murphy, in holding Yamashita culpable for the criminal conduct of his subordinates, the Court had abrogated the principle of individual responsibility; there was no evidence that Yamashita personally participated in, ordered or condoned or was even aware of the atrocities.[109] He was simply accused of the unprecedented offense of disregarding and failing to discharge his duty to control his subordinates, thus permitting

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102. *Id.*
103. Application of Yamashita, 327 U.S. 1, 15 (1946).
104. *Id.*
105. *Id.* at 16.
106. *Id.* at 15.
107. *Id.*
108. *Id.* at 28.
109. *Yamashita,* 327 U.S. at 28.

them to commit crimes.[110] Justice Murphy noted that this elastic principle might someday result in the prosecution of the entire United States military command, ranging from sergeants and generals to the President and his advisors.[111] The verdict also risked further rupturing relations with Japan: "To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world."[112]

Murphy argued that Yamashita's conviction was particularly problematic given that the Japanese general's inability to control and communicate with his troops was a consequence of the massive American assault.[113] Yamashita's difficulties were exacerbated by the fact that he had had assumed command over an organizationally deficient force which was afflicted with defective equipment, supplies, training, discipline and morale.[114] This was exacerbated by the unanticipated assignment of naval and air force units to Yamashita's tactical command.[115] Murphy warned that the trial of a vanquished commander for violating such speculative and imprecise parameters created the potential for prosecutions based on the pursuit of retribution and revenge rather than justice.[116]

General Douglas MacArthur was the final reviewing authority and ratified Yamashita's death sentence.[117] MacArthur recalled that four days following the landing of American forces that he had warned that he would hold Japanese military authorities personally liable for the inhumane and improper treatment of prisoners of war, civilian internees or civilian non-combatants.[118] Yamashita had "failed his duty to his troops, to his country, to his enemy to mankind; has failed utterly his soldierly faith."[119] MacArthur concluded that Yamashita's actions were a "blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten."[120]

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110. *Id.*
111. *Id.*
112. *Id.* at 28-29.
113. *Id.* at 34-35.
114. *Id.* at 33.
115. *Yamashita,* 327 U.S. at 33.
116. *Id.* at 34.
117. Review of the Record, *supra* note 78, at 3.
118. *Id.* at 4-5.
119. *Id.* at 4.
120. *Id.*

In summary, the *Yamashita* decision issued by the United States Supreme Court imposed an affirmative obligation upon commanding officers to take prophylactic measures to prevent and to punish violations of the humanitarian law of war.[121] The details and context of this duty, however, remained uncertain and ill defined.[122] In the end, the Court avoided the thorny issue of the extent of Yamashita's knowledge and seemingly punished him for his passivity, holding him strictly liable for failing to anticipate and to take action to prevent and punish the widespread commission of war crimes.[123]

III. POST WORLD WAR II INTERNATIONAL TRIBUNALS: NUREMBERG, TOKYO, CONTROL COUNCIL NO. 10 AND RELATED PROSECUTIONS

A. The Nuremberg Tribunal

The International Military Tribunal at Nuremberg addressed the criminal culpability of twenty-two high-ranking Nazi leaders.[124] The Court made the unprecedented proclamation that individuals possessed international duties which transcended their national obligations.[125] Officials acting on behalf of the State, accordingly, may not cloak themselves with sovereign immunity in the event that the State, "in authorizing action, moves outside its competence under international law."[126] This clearly meant that those in authority might be prosecuted for authorizing, planning or participating in criminal conduct which was contrary to international law, including the Nuremberg crimes of waging a war of aggression, war crimes and crimes against humanity.[127]

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121. *See supra* note 105 and accompanying text.

122. *See supra* note 116 and accompanying text.

123. *See supra* notes 106-07 and accompanying texts. The proper interpretation of the Yamashita decision has been the subject of persistent debate. *See* William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 30-31 (1973); Crowe, *supra* note 29, at 206-08.

124. *See United States v. Hermann Goring, in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, XXII 411 (1948) [hereinafter Nuremberg Judgment].

125. *Id.* at 466.

126. *Id.*

127. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

The Tribunal implicitly invoked the doctrines of command responsibility in several cases involving military as well as civilian officials, the latter constituting an unprecedented extension of prevailing international legal doctrine.[128] The defendants in these decisions were determined to have been fully-apprised of the transgressions committed by their subordinates. Wilhelm Frick was Minister of the Interior during the war.[129] He exercised jurisdiction over nursing homes, hospitals and asylums in which euthanasia was practiced.[130] The Tribunal determined that Frick was well-aware that "insane, sick and aged people" and "'useless eaters,'" were being systematically put to death.[131] He nevertheless disregarded popular protests and the killings continued.[132] A report by the Czechoslovak War Crimes Commission estimated that 275,000 "mentally deficient and aged people" had been the victims of euthanasia.[133]

Ernst Kaltenbrunner, in January 1943, was appointed Chief of the Security Police and head of the Reich Security Head Office (RSHA).[134] As Chief of the RSHA, Kaltenbrunner possessed authority to order protective custody and to release detainees from concentration camps.[135] RSHA also was responsible for transferring ideologically suspect Soviet prisoners of war and Jews to concentration camps.[136] The Tribunal determined that Kaltenbrunner was conversant with the conditions in the camps from his visits to Mauthausen where he witnessed the execution of inmates.[137] Kaltenbrunner also was found to have been fully apprised of the extermination of Jews by RSHA directed killing squads which were responsible for the murder of as many as six million.[138] Kaltenbrunner explained that the organization's criminal conduct had been initiated prior to his appointment, that he generally was unaware of RSHA's activities, and that he had intervened to halt those atrocities which had been brought to his attention.[139] The Court, however, concluded that Kaltenbrunner

128. *See supra* notes 80-82 and accompanying texts.
129. Nuremberg Judgment, *supra* note 124, at 544.
130. *Id.* at 546.
131. *Id.* at 546-47.
132. *Id.* at 547.
133. *Id.*
134. *Id.* at 537.
135. Nuremberg Judgment, *supra* note 124, at 537.
136. *Id.*
137. *Id.*
138. *Id.* at 538.
139. *Id.*

"exercised control over the activities of the RSHA, was aware of the crimes it [RSHA] was committing, and was an active participant in many of them."[140] Fritz Saukel was Plenipotentiary General for the Utilization of Labor.[141] The Tribunal determined that Saukel possessed "overall responsibility for the slave labor program" and "was aware of [the] ruthless methods being taken to obtain laborers and vigorously supported them on the ground that they were necessary to fill the quotas."[142]

Konstantin von Neurath was Reich Protector for Bohemia and Moravia.[143] He drafted a memorandum which advocated the racial assimilation of the majority of Czechs into Germany and proclaimed that resistance by the intelligentsia and other groups would be met by expulsion.[144] Von Neurath, in his defense, contended that the implementation of this repressive regime was the responsibility of the Security Police and was not within his jurisdiction.[145] In addition, he argued that the Germany's anti - Semitic and economically exploitative policies were conceived and carried out by authorities in the Reich.[146] However, these arguments were not deemed exonerating; the Tribunal noted that von Neurath had functioned as "the chief German official in the Protectorate when the administration of this territory played an important role in the wars of aggression which Germany was waging in the East, knowing that war crimes and crimes against humanity were being committed under his authority."[147] The Tribunal thus determined that von Neurath had knowingly presided over a range of repressive and restrictive policies within his territorial command which involved the abrogation of the freedoms of association, equality, property, speech and fair trial.[148] The Court recognized in mitigation that von Neurath had attempted to gain the release of many of the Czechoslovaks who had been detained, including student activists.[149] He made efforts

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140. *Id.*

141. Nuremberg Judgment, *supra* note 124, at 566.

142. *Id.* at 566, 567. Hans Frank was Governor General of the occupied Polish territory. The judgment suggested that Frank would not be held liable for the crimes committed by the security police which were under the control of Henrich Himmler. The Tribunal noted that many of these crimes were committed without the knowledge of Frank, and even occasionally despite his opposition. *Id.* at 543.

143. *Id.* at 579-80.

144. *Id.* at 582.

145. *Id.*

146. *Id.*

147. Nuremberg Judgment, *supra* note 124, at 582.

148. *See id.*

149. *Id.*

to dissuade Hitler from adopting harsh occupation measures, attempted to resign and, when unsuccessful, quietly took a leave of absence.[150] Almost two years later, von Neurath's resignation was formally accepted.[151] He was sentenced to fifteen years imprisonment, the most lenient sentence meted out to any of the Nuremberg defendants.[152]

The Nuremberg Tribunal thus implicitly applied the concept of command responsibility in convicting various defendants of war crimes and crimes against humanity.[153] The attribution of a wide-range of repressive acts to a single individual, at times, seemed unduly harsh and unfair.[154] However, this was tempered by the Tribunal's tendency to limit individual liability to acts over which the defendant possessed knowledge and exercised direct or territorial authority.[155] In many instances, the defendant also was found to have encouraged or participated in these criminal acts.[156] Defendants also were considered culpable in those instances in which criminal conduct reasonably could have been anticipated and they failed to assert command and control.[157] Individual guilt was mitigated in those cases in which a defendant took firm and full steps to ameliorate the Reich's draconian decrees and depredations.[158] Nuremberg thus implicitly retreated from the *Yamashita* strict liability standard and quietly embraced the knowledge and authority standard.[159] This test was more fully developed in the trial of Japanese war criminals before the International Military Tribunal for the Far East.

B. The Tokyo Tribunal

The Tokyo Tribunal initially addressed the mistreatment and security of prisoners of war, arguing that governments were obligated under customary and conventional law to insure that internees were free from inhumane treatment.[160] Military and civilian officials were under a duty to

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150. *Id.*

151. *Id.*

152. *See id.* at 588-89.

153. *See supra* notes 129-51 and accompanying texts.

154. *See supra* note 138 and accompanying text.

155. *See supra* note 131 and accompanying text.

156. *See supra* note 140 and accompanying text.

157. *See supra* notes 136-37 and 141-42 and accompanying texts.

158. *See supra* notes 149-52 and accompanying texts.

159. *See supra* notes 105-07 and accompanying texts.

160. International Military Tribunal for the Far East, The Tokyo War Crimes Trial (Nov. 1948), *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY II 1029, 1038 (Leon Friedman ed. 1972) [hereinafter Tokyo Tribunal].

structure an efficient and effective system for monitoring and reporting on the well-being of prisoners.[161]

Military and civilian officials, exercising direct authority over prisoners who possessed knowledge of mistreatment, or would have acquired such knowledge but for their own negligence, indifference or indolence, were obligated to "take such steps as were within their power to prevent the commission of such crimes."[162] In imputing knowledge, consideration was to be given to factors such as whether the crimes were "notorious, numerous and widespread as to time and place."[163] Cabinet officials could not claim as a defense that they relied upon the assurances of individuals with close control over prisoners in those instances in which the official possessed an actual or constructive basis to make additional inquiries into the veracity of these representations.[164]

Authoritative military and civilian officials also were under a duty to anticipate the possible mistreatment of prisoners.[165] They were held responsible for crimes committed against internees under their control in those instances in which they knew or should have known in advance of these delicts and were obligated to take "adequate steps" to prevent the commission of such crimes in the future.[166]

The Japanese Cabinet was considered collectively responsible for the continuing care of internees.[167] Cabinet members, with knowledge of the ill treatment of prisoners, who lacked authority to curb such crimes were not immune from liability.[168] The preferred path was resignation; those who voluntarily remained were criminally culpable for any future mistreatment.[169]

Administrative officials below the cabinet rank responsible for administering the system for protecting prisoners of war, who possessed, or should have possessed, knowledge of abuse and who failed to take "effective" action to the "extent of their powers" were liable for future

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161. *Id.* at 1038-39.

162. *Id.* at 1039. The Tribunal imposed liability on an individual whose office "required or permitted him to take any action to prevent such crimes." *Id.*

163. *Id.*

164. *Id.* Relevant factors include the position of the individual offering the assurance and the frequency of reports of criminal misconduct towards prisoners. *Id.*

165. *Id.*

166. Tokyo Tribunal, *supra* note 160, at 1039.

167. *Id.* at 1039.

168. *Id.*

169. *Id.*

acts of criminal conduct.[170] Lower-level personnel in unrelated administrative units who possessed knowledge of the ill treatment of prisoners were not required to take action or to resign.[171]

In summary, the requisite criminal intent was established in those instances in which an individual occupying an authoritative position possessed actual or constructive knowledge or, but for their own negligence, would have possessed knowledge of war crimes, and failed to prevent or to punish the delicts.[172] This clarified that civilian as well as military officials were responsible for both condemning and controlling acts in contravention of the code of conflict.[173] The Tribunal also made a significant innovation in holding various cabinet officials and lower-level administrators criminally culpable who remained in office despite their awareness of the mistreatment of prisoners.[174] The former was posited on the Court's contention that cabinet officials were collectively concerned with the safety and security of detainees.[175] The Tribunal failed to completely clarify the scope of required remedial action. There, however, was language suggesting that individuals were required to take such reasonable steps as were within their formal and informal powers.[176]

The Tokyo Tribunal thus substituted an actual and constructive knowledge and indifference test for the *Yamashita* strict liability standard.[177] The Court imputed knowledge to Kuniaki Koiso, who was appointed Prime Minister in 1944.[178] The Tribunal noted that the atrocities and other war crimes committed by Japanese troops in every theater of war were so "notorious" that it was "improbable" that Koiso would not have been aware of these events by reason of their notoriety or as a result of inter-departmental communications.[179] The judges found it particularly significant that Koiso attended a meeting of the Supreme Council for the Direction of War, in October 1944, at which the Foreign Minister reported that information from enemy sources indicated "that the Japanese

170. *Id.* at 1039-40.

171. *Id.* at 1039.

172. *See supra* note 162 and accompanying text.

173. *See id.*

174. *See supra* notes 168-70 and accompanying texts.

175. *See supra* note 167 and accompanying text.

176. *See supra* note 162 and accompanying text.

177. *See supra* notes 105-07, 162-64 and accompanying texts.

178. Tokyo Tribunal, *supra* note 160, at 1141.

179. *Id.*

treatment of prisoners of war 'left much to be desired.'"[180] Koiso nevertheless remained in office for an additional six months during which prisoners and internees continued to be mistreated.[181] The Tribunal determined that this constituted a "deliberate disregard of his duty."[182]

The Court adopted a similar analysis in convicting Shunroko Hata, commander of the expeditionary forces in China.[183] The judges noted that the large-scale atrocities had been committed over a lengthy period of time by troops under his command.[184] Hata was determined either to have known of these delicts and to have taken no steps to prevent them, or to have been "indifferent" and to have "made no provision for learning whether orders for the humane treatment of prisoners of war and civilians" were being implemented.[185] In contrast, Shimada Shigetaro, Naval Minister in the Tojo Cabinet between 1941 and 1944, was acquitted.[186] He was determined to have neither ordered, authorized, permitted nor known of the murder of prisoners of war and survivors of torpedoed ships in the Pacific.[187]

In addition, the Tokyo Court clarified that a government official with knowledge of war crimes possessed a duty to take appropriate ameliorative action. Hidecki Tojo was named Minister of War in 1940, and subsequently was appointed Prime Minister, in October 1941, a position he held until July 1944.[188] The Tribunal concluded that Tojo was well aware of the mistreatment of prisoners of war and yet took no "adequate steps" to punish offenders or to "prevent the commission of similar offenses in the future."[189] Although he was aware, in 1942, of the brutal Bataan Death March, Tojo nevertheless neglected to demand an investigation, only undertook a superficial survey, and failed to punish the troops involved.[190] The Tribunal was not persuaded by Tojo's claim that Japanese commanders in the field were not subject to specific orders from Tokyo and concluded that the "head of the Government of Japan knowingly and

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 1131.
184. Tokyo Tribunal, *supra* note 160, at 1131.
185. *Id.*
186. *Id.* at 1149.
187. *Id.* at 1149-50.
188. *Id.* at 1153.
189. *Id.* at 1154.
190. Tokyo Tribunal, *supra* note 160, at 1154.

willfully refused to perform the duty which lay upon that Government of enforcing performance of the Laws of War."[191]

Tojo also advised that prisoners of war should be deployed in "the construction of the Burma-Siam Railway."[192] Yet, he failed to make proper provisions for billeting, food or hygiene.[193] Tojo responded to accounts of deteriorating conditions by assigning an officer to investigate.[194] The Prime Minister's only reaction to the report was to subject a company commander to trial.[195] As a result of Tojo's indifference and inaction, the Court concluded that "[d]eficiency, diseases and starvation continued to kill off the prisoners until the end of the project."[196] The Prime Minister was aware of these dramatic death rates; they were discussed at conferences over which he presided.[197] The Tribunal concluded that the continuation of these corrosive conditions and the numerous prisoners who died from a lack of food and medicine constituted "conclusive proof" that Tojo had failed to take "proper steps to care for them."[198]

All reasonable available avenues of redress were to be exhausted. Seishiro Itagaki, in April 1945, was appointed commander of the Seventh Army headquartered in Singapore.[199] The conditions in prisoner of war camps were catastrophic.[200] Itagaki explained in his defense that Allied attacks on Japanese shipping made the transportation of supplies difficult and that he was compelled to preserve provisions so that they would persist throughout the war.[201] The Tribunal, however, ruled that Itagaki was obligated to distribute the existing supplies and to implore his

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1154-55.

196. Tokyo Tribunal, *supra* note 160, at 1155.

197. *Id.*

198. *Id.* at 1155. Tojo also knew and approved of the "shocking attitude" that Chinese prisoners of war were not entitled to the status of prisoners of war. *Id.* Akira Muto was an officer on the staff of Iwane Matsui, who was in charge of the troops which occupied Nanking. Muto was found to have known of the atrocities, but as a result of his subordinate position was determined to have been powerless to prevent them. *Id.* at 1144. A related decision with a similar rationale was issued in acquitting Kenryo Sato of war crimes in China. *Id.* at 1146-47.

199. *Id.* at 1135.

200. *Id.* at 1136.

201. *Id.* at 1137.

superiors to provide for the prisoners.[202] His rationale, in the view of the judges, amounted to a justification for "treating the prisoners and internees with gross inhumanity."[203] The Tribunal concluded that it could not condone a course of conduct which had resulted in the "death or sufferings of thousands of people whose adequate maintenance was his [Itagaki's] duty."[204]

Mamoru Shigemitsu was appointed Foreign Minister in 1943.[205] His office received a series of protests from foreign countries concerning the mistreatment of prisoners of war.[206] The military rebuffed requests from outside powers to inspect the camps, arrange interviews with prisoners and to obtain the names of internees.[207] Shigemitsu nevertheless took "no adequate steps to have the matter investigated."[208] The Tribunal ruled that he "should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged."[209]

The Tribunal's third conceptual contribution was to rule, in the case of Foreign Minister Koki Hirota, that an official who receives assurances that criminal conduct will be curtailed may not disregard reports that the delicts continue.[210] Japanese troops, in December 1937, occupied Nanking and almost immediately executed an estimated twelve thousand non-combatants and raped roughly twenty thousand women.[211] The death toll in the first six weeks reached two hundred thousand.[212] Foreign Minister Koki Hirota learned of the atrocities through diplomatic documents and accepted assurances from the War Ministry that the brutalities would be curtailed.[213] He nevertheless continued to receive reports of these excesses

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202. Tokyo Tribunal, *supra* note 160, at 1137.

203. *Id.*

204. *Id.*

205. *Id.* at 1147.

206. *Id.* at 1148.

207. *Id.*

208. Tokyo Tribunal, *supra* note 160, at 1148.

209. *Id.* at 1148-49. Shigenori Tojo, as Foreign Minister, "endeavored" to insure the observance of the law of war. He passed on protests to the proper authorities and, in some instances, remedial measures were taken. The Tribunal failed to find "sufficient proof of Togo's neglect of duty in connection with war crimes." *Id.* at 1153.

210. *Id.* at 1132.

211. *Id.* at 1061.

212. *Id* at 1062.

213. *Id.* at 1134.

over the next month.[214] The Tribunal ruled that Hirota was derelict in failing to take "immediate action," including demanding that the Cabinet expeditiously end the atrocities.[215] He instead was content to rely on representations which he knew from reports were not being implemented while hundreds of murders, sexual assaults and atrocities were being committed: this "amounted to criminal negligence."[216] The extension of liability to Hirota was particularly significant since he exercised influence rather than formal authority over the military.[217]

Finally, an official who orders a halt to criminal conduct has a duty to ensure compliance with his commands. Heitaro Kimura assumed the position of Commander-in-Chief of the Burma Area Army, with knowledge that atrocities were being committed in all military theaters.[218] Although Kimura admonished his troops to demonstrate respect for prisoners, the atrocities continued, in many cases on a large-scale within a few miles of his headquarters.[219] Yet, he took no steps to curb the crimes.[220] The Tribunal ruled that Kimura deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war and failed to insure that these commands were implemented.[221]

The Tokyo Tribunal provided the first extended exposition of command responsibility. The Court held that civilian and military officials were legally liable in those instances in which they actually or constructively knew or, but for their own disregard or gross negligence, would have known of war crimes committed by those under their command.[222] In such instances, officials possessed a responsibility to exercise energetic ameliorative formal and informal action to remedy the situation.[223] The Court took the unprecedented step of imposing a responsibility on cabinet officials who satisfied the intent requirement to resign rather than to continue in office and countenance callousness towards prisoners, despite

214. Tokyo Tribunal, *supra* note 160, at 1134.

215. *Id.*

216. *Id.* Iwane Matsui was Commander-in-Chief of the Central China Area Army, which included the Shanghai Expeditionary force and the Tenth Army, which occupied Nanking. He was convicted of war crimes. The Tribunal determined that Matsui was aware of the atrocities and failed to discharge his duty. *Id.* at 1142.

217. *See id.* at 1132-33. *See also supra* notes 206-09 and accompanying texts.

218. Tokyo Tribunal, *supra* notes 160, at 1139.

219. *Id.* at 1140.

220. *Id.*

221. *Id.* at 1140.

222. *See supra* note 162 and accompanying text.

223. *See supra* note 199-209 and accompanying texts.

the fact that this was outside their scope of authority.[224] A cabinet official, with formal authority or informal influence, who received assurances that criminal conduct will be curtailed incurred legal liability for disregarding reports that the crimes continued.[225] Lastly, a civilian or military leader possessed the obligation to ensure that troops complied with commands to protect prisoners of war.[226] The Tribunal imposed responsibility on officials to take such steps as were within their power to prevent the continuation of crimes.[227] This was interpreted to include the obligation to go beyond the formal scope of an official's authority and to utilize informal influence and personal persuasion.[228]

C. *Prosecutions Under Control Council Law No. 10*

Various subsidiary Nazi war criminals were brought to trial by the Allied Powers under Control Council Law No. 10, which was drafted to provide a uniform basis and procedure for the Allied Powers' prosecution of alleged Nazi war criminals.[229] The decisions in the *Hostage*[230] and *High Command*[231] cases clarified that the *Yamashita* strict liability standard

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224. *See supra* notes 170-71 and accompanying texts.

225. *See supra* notes 210-21 and accompanying texts.

226. *See supra* notes 218-19 and accompanying texts. In 1949, an American military tribunal acquitted Admiral Soeumu Toyoda of disregarding his duty to prevent war crimes, most of which had been enumerated in the *Yamashita* judgment. *See* Parks, *supra* note 123, at 69. Toyoda served as Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval forces and the Naval Escort Command and was acquitted by an American military tribunal of disregard of his duty to prevent war crimes. The judges followed the Tokyo Court in establishing an actual or constructive knowledge or negligence standard. An officer, according to the Tribunal, was liable if he knew or should have known through the exercise of ordinary diligence of the commission of war crimes by his troops and he "did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and to punish the offenders." *See id.* at 73 *quoting* United States v. Soemu Toyoda 5006 (1949) (official transcript of record of trial).

227. *See supra* notes 162, 165-66, 188-89 and accompanying texts.

228. *See supra* notes 208-09, 215-16 and accompanying texts.

229. Control Council Law No. 10, *reprinted in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, XVIII (1952).

230. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, XI, 1230 (1950) (discussing United States v. Wilhelm List et al.) [hereinafter Hostage Judgment].

231. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, XI, 462 (1950) (discussing United States v. Wilhelm von Leeb) [hereinafter High Command Judgment].

would not be extended to territorial commanders and elaborated on the duty of these officials.[232]

In the *Hostage* case, an American Tribunal ruled that the commanding general of occupied territory possessed both executive and military authority and was charged with maintaining security and stability.[233] He was accountable for the conduct of all units within the scope of his territorial jurisdiction, regardless of whether they were within his direct chain of command.[234] In contrast to tactical commanders whose responsibility was premised on a unit's subordination within the chain of command, the liability of a territorial commander was based on the scope of his or her geographic authority.[235]

The Court explicitly rejected the defense that certain SS (*Die Schutzstaffeln der National Soczialistischen Deutschen Arbeiterpar*tei; the political and criminal police) units under the command of Heinrich Himmler had committed atrocities without the knowledge, consent or approval of the high-ranking military defendants.[236] The panel stressed that the "prevention of crime" was vested in territorial commanders and that these officers may not "ignore obvious facts" and plead a lack of knowledge as a defense.[237] For instance, the activities of the SS—the plunder of property, internment of innocents and the systematic murder and subjection of the population to slave labor—were recorded in the reports of subordinate units.[238] Military commanders were considered to possess constructive knowledge of reports received at their headquarters, these typically being specifically intended for their inspection.[239] Officers were authorized to require reports of all events that fell within the scope of their command and, if such transmissions were incomplete or inadequate, they were obligated to request supplementary information; a failure to obtain comprehensive and accurate data constituted a dereliction of duty.[240]

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232. *See supra* notes 105-07 and accompanying texts.

233. Hostage Judgment, *supra* note 230, at 1256.

234. *Id.*

235. *Id.* at 1260.

236. *Id.* at 1256.

237. *Id.*

238. *Id.*

239. Hostage Judgment, *supra* note 230, at 1260.

240. *Id.* at 1271. In the case of the German army (Wehrmacht), the Court noted that there was smooth and swift communication by telegraph, telephone, radio and courier and that units were required to submit regular reports. *Id.* at 1259.

Absence from headquarters was not a defense in those instances in which a military official instituted or acquiesced in a policy.[241] A commander, however, was not liable for orders issued in his absence which diverged from established practices.[242] However, time and circumstances permitting, a territorial commander was required to rescind or to impede these directives or, at a minimum, to prevent their recurrence.[243] The Court also limited a commander's liability for unanticipated "emergent" events other than in those instances in which the official neglected to act or had approved a course of action which condoned the criminal conduct.[244]

The Tribunal elaborated on the duty of territorial commanders in convicting Field Marshal Wilhelm List, the fifth ranking field marshal in the Reich and Commander of German forces in Greece and Yugoslavia.[245] List conveyed orders issued by Field Marshal Wilhelm Keitel, Chief of the High Command of the Armed Forces, which required executing the fixed figure of one hundred hostages in reprisal for the killing of a single German soldier.[246] The Tribunal determined that this order was based on a desire for revenge rather than as a deterrent to future illegal acts.[247] The number of hostages killed, in any event, was not calibrated to the character and nature of the civilian attack and there was no indication that the hostages to be executed were aligned with the partisan forces.[248] This, in the view of the Tribunal, was "nothing less than plain murder."[249]

List's absence from headquarters did not relieve him of responsibility for the thousands of unlawful reprisal killings carried out in accordance with these orders.[250] The executions were memorialized in reports received by List.[251] Yet, he failed to prevent or to punish the killings. Instead, he "complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory."[252] List was obligated to assure the protection of people and

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241. *Id.* at 1271. The defendants were absent for various reasons, including visitations to the command area, vacation leaves and due to illness. *Id.* at 1259.

242. *Id.* at 1271.

243. *Id.*

244. *Id.* at 1260.

245. Hostage Judgment, *supra* note 230, at 1262-63.

246. *Id.* at 1269. *See also id.* at 1264.

247. *Id.* at 1270.

248. *Id.*

249. *Id.*

250. *Id.* at 1271.

251. Hostage Judgment, *supra* note 230, at 1271.

252. *Id.* at 1272.

property within his territorial command and could not avoid responsibility by citing his lack of tactical authority over various units.[253]

Defendant Hermann Foertsch was chief of staff under List.[254] Foertsch signed and distributed orders on List's behalf, received reports documenting the execution of reprisal prisoners, and served as List's primary advisor.[255] He was fully apprised of the application of the illegal reprisal ratio, the deportation of Jews to concentration camps and the plunder of property.[256] Foertsch was acquitted on the grounds that he lacked command authority; mere knowledge of unlawful acts failed to satisfy the strictures of criminal law.[257]

Defendant Walter Kuntze was appointed Deputy Armed Forces Commander Southeast in October 1941.[258] Shortly after assuming command, he received reports that his troops were detaining, decimating and deporting Jews.[259] Yet, Kuntze "acquiesced in their performance when his duty was to intervene to prevent their recurrence."[260] The Court recognized that Kuntze protested and resisted the harsh measures instituted by his superiors and that many of the crimes committed within his command were implemented on the orders of Berlin.[261] The Tribunal also was sympathetic to the challenge confronting a commander engaged in combating partisan warfare.[262] Yet, the judges noted that Kuntze was a professional soldier of forty years experience who doubtlessly comprehended, or should have been clearly cognizant, that killing thousands under the guise of acts of reprisal and the collection and concentration of Jews and Gypsies contravened the code of armed conflict.[263] These acts were recorded in reports transmitted to him as Armed Forces Commander Southeast: Kuntze, simply "cannot close his eyes to what is going on around him and claim immunity from punishment because he did not know that which he is obliged to know."[264]

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253. *Id.* at 1272.
254. *Id.* at 1281.
255. *Id.* at 1281-82.
256. *Id.* at 1284.
257. Hostage Judgment, *supra* note 230, at 1286.
258. *Id.* at 1274.
259. *Id.* at 1279.
260. *Id.* at 1280.
261. *Id.* at 1280.
262. *Id.*
263. Hostage Judgment, *supra* note 230, at 1281.
264. *Id.*

Defendant Hubert Lanz was commander of the XXII Mountain Corps in Greece.[265] His troops engaged in acts of reprisal against innocent villagers which were disproportionate to the provocation and, in the view of the Tribunal, only could be explained as acts of vengeance.[266] These were meticulously recorded in reports received by Lanz's headquarters.[267] Lanz's explanation that as a tactical commander that he had been too preoccupied to halt the illegal reprisals was dismissed as a "lame excuse."[268] Lanz, although fully informed of these executions, "did absolutely nothing about it."[269] This clearly violated his duty and contributed to the continuance of this practice of "inhumane and unlawful killings."[270]

In sum, the *Hostage* case established that territorial commanders were responsible for knowingly failing to make an effort to halt, prevent and punish the criminal conduct of troops within and outside of their chain of command.[271] The Tribunal also charged a commander with constructive knowledge of the content of reports conveyed to his headquarters.[272] Absence and the constraints of time and resources were not recognized as defenses.[273]

The *High Command* decision followed the *Hostage* case in recognizing that a territorial commander was endowed with executive authority and, absent a directive limiting his executive powers, was obligated to maintain order and to protect the civilian population.[274]

The Court followed the *Hostage* decision in stressing that command culpability was premised on personal dereliction.[275] According to the Tribunal, this required that the criminal conduct of subordinates was directly traceable to a commander or resulted from the officer's wanton or immoral disregard or acquiescence.[276] A more expansive standard would contradict the basic principles of criminal law recognized by civilized

265. *Id.* at 1310.
266. *Id.* at 1311.
267. *Id.* at 1310-11.
268. *Id.* at 1311.
269. Hostage Judgment, *supra* note 230, at 1311.
270. *Id.*
271. *See supra* notes 233-35 and accompanying texts.
272. *See supra* notes 251-53 and accompanying texts.
273. *See supra* notes 250, 264 and accompanying texts.
274. *See* High Command Judgment *supra* note 231, at 544.
275. *Id.* at 543.
276. *Id.*

nations.[277] The Tribunal illustrated this limiting principle by noting that military officers were not obligated to affirmatively investigate and might rightfully and reasonably assume, in the absence of information to the contrary, that their subordinates were properly and prudently implementing military plans and programs.[278]

The Tribunal restricted the application of the *Hostage* decision and resisted imputing knowledge to territorial commanders based upon the size and scale of the atrocities committed by the *Einsatzgruppen* (police killing squads) and the ease of communication.[279] The panel pointed out that, in many instances, that the executions were far removed from military headquarters, that there was limited contact between the police units involved and high-ranking military officers, and that reports had been routed through the security police in Berlin rather than military channels.[280] The intelligence services also were able to conceal the Reich's role in the execution of Jews by organizing and orchestrating the local population to carry out pogroms and ethnic persecutions.[281] The Court thus refused to draw a general presumption concerning the scope of the knowledge of territorial commanders and, instead, concluded that it was necessary to examine the evidence pertaining to each defendant.[282]

Georg Karl Friedrich-Wihelm von Kuechler was appointed Commander of Army Group North in 1942.[283] He allegedly opposed, but nevertheless distributed, the Commissar Order, which required the summary execution of captured political officers attached to Russian troops.[284] Although subordinate units submitted reports documenting the execution of commissars, Kuechler denied knowledge of the killings.[285] The Tribunal, however, followed the decision in the *Hostage* case[286] and concluded that"[i]t was his [Kuechler's] business to know, and we cannot believe that the members of his staff would not have called these reports to

277. *Id.* at 544. A contrary interpretation would result in the President of the United States being charged with criminality resulting from the conduct of United States troops. *Id.* at 543.

278. *Id.* at 543.

279. *Id.* at 547. Roughly 90,000 were liquidated in the area of the 11th Army; 40,000 were liquidated in Riga within the area of the Army Group North. *Id.*

280. High Command Judgment *supra* note 231, at 547-48.

281. *Id.* at 548.

282. *Id.* at 549.

283. *Id.* at 566.

284. *Id.*

285. *Id.* at 567.

286. *See supra* note 265 and accompanying text.

his attention had he announced his opposition to the order."[287] The Court noted that the fact that expressions of overt opposition may have resulted in retribution was not a defense, but might be considered in mitigation.[288]

Once having acquired knowledge of the criminal activity of a unit subordinate to an outside command, as suggested in the *Hostage* decision, a territorial commander possessed the duty to energetically and effectively intervene.[289] Henry Hoth, was Commander of the "17th Army attached to Army Group South."[290] He was apprised, in December 1941, that a police killing squad had executed roughly 1,300 individuals within Hoth's territorial command.[291] His Chief-of-Staff, pursuant to Hoth's directive, issued an order suspending the operations of these units.[292] The evidence indicated that Hoth failed to take additional steps to monitor the matter and that his troops continued to transfer prisoners and Jews to the security police.[293] The Tribunal concluded that Hoth possessed "executive power" and the concomitant duty to protect the civilian population.[294] Despite his knowledge of the "character and functions of the SD (security police), his possession of the power to curb them and his duty to do so, he washed his hands of his responsibility and let the SD take its unrestrained course in his area of command."[295]

Field Marshal Wilhelm von Leeb was commander of Army Group North with operational authority over five to six thousand soldiers.[296] The complexity of this command necessitated vesting executive administrative authority in subordinate officers; von Leeb was not involved in daily decisions, but exercised the prerogative to intervene to implement or to adjust policy initiatives.[297] Authorities in Berlin directly issued the Commissar Order to von Leeb's subsidiary field units.[298] Despite von Leeb's vocal opposition, this directive was vigorously implemented by his subordinates.[299] Von Leeb was acquitted: "He [von Leeb] did not

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287. *See* High Command Judgment, *supra* note 231, at 567.
288. *Id.*
289. *See supra* notes 252-53, 260-61, 269-70 and accompanying texts.
290. High Command Judgment, *supra* note 231, at 581.
291. *Id.* at 595.
292. *Id.*
293. *Id.* at 596.
294. *Id.*
295. *Id.*
296. High Command Judgment, *supra* note 231, at 553-55.
297. *Id.* at 554.
298. *Id.* at 557-58.
299. *Id.* at 557.

disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his subordinate commanders disseminated it and permitted the enforcement, that is their responsibility and not his."[300]

Prisoners of war within Field Marshal Wilhem von Leeb's territorial command of Army Group North were under the supervision of the quartermaster general who was directly responsible to the central command of the armed forces.[301] The quartermaster, in turn, was authorized to exercise control over field officers subordinate to von Leeb.[302] The Tribunal ruled that there was no evidence that the illegal use of prisoners in dangerous occupations or locations was brought to von Leeb's attention; he had the right to assume that his officers were properly performing their assignments.[303] In addition, the Court observed that the pathetic plight of the prisoners encountered by von Leeb might well have stemmed from their condition when captured rather than from abuse by their captors.[304]

Von Leeb also was determined to have been unaware of the activities of the killing squads within his territorial command.[305] Reports recording exterminations either were ambiguous and uncertain as to time and place or were not forwarded to von Leeb's command.[306] Only the murder of forty thousand at Kovno (Riga) was indisputably brought to his attention, and this was attributed to a local Latvian self-defense organization.[307] Von Leeb fulfilled his duty by affirmatively acting to prevent a recurrence of such incidents.[308] The Tribunal thus concluded that von Leeb had not been apprised that killing squads were carrying out exterminations and, as a result, he was not determined to have acquiesced in the killings.[309]

In summary, the Tribunal in the *High Command* presumed that, in the absence of limiting legal authority, that a territorial commander was legally responsible for maintaining safety and security throughout the

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300. *Id.* at 557-58.

301. *Id.* at 558.

302. High Command Judgment, *supra* note 231, at 558.

303. *Id.*

304. *Id.* at 559.

305. *Id.* at 562.

306. *Id.* at 561-62.

307. *Id.* at 562.

308. High Command Judgment, *supra* note 231, at 562.

309. *Id.* at 561-62. Von Leeb, however, was found guilty of distributing the Barbaossa Jurisdiction Order, which condoned the killing of civilians suspected of guerilla activity. *Id.* at 560.

scope of his territorial command.[310] Knowledge was established by direct information,[311] the receipt of reports[312] or through the dissemination or awareness of facially illegal orders.[313] Liability arose in those instances in which an official either intentionally or grossly and wantonly failed to address evidence of criminal conduct; a mere failure to make reasonable inquiries or to take precautions was not sufficient.[314] Territorial commanders had the right to assume that their troops were acting legally and were not required to make inquiries.[315] Officials were not presumed to possess knowledge of all events within their territorial command, even acts amounting to notorious and systematic extermination.[316]

Other Control Council Law No. 10 judgments applied and extended the core components of the law of command responsibility to novel factual settings. An American Tribunal in the *Medical* case determined that defendant Karl Brandt, Reich Commissioner for Medical and Health Services, failed to fulfill his duty to monitor medical experiments.[317] Brandt received reports and attended meetings describing sulfanilamide experiments in which seventy-five persons had been intentionally and involuntarily infected and treated with various anti-infectious compounds; three of the subjects reportedly died.[318] Brandt neither objected, investigated nor made an effort to halt the experiments.[319] The Tribunal determined that had Brandt made the slightest investigation he would have determined that these protocols were being conducted on non-German nationals interned in concentration camps and that similar experiments were planned in the future.[320]

Brandt also headed the euthanasia program.[321] He conceded that this involved the extermination of so-called "incurables," but testified that he delegated responsibility to a subordinate and was unaware that this policy

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310. *See supra* note 274 and accompanying text.

311. *See supra* note 306 and accompanying text.

312. *See supra* note 285 and accompanying text.

313. *See supra* notes 284, 298 and accompanying texts.

314. *See supra* notes 275-78 and accompanying texts.

315. *See supra* note 278 and accompanying text.

316. *See supra* notes 279-82 and accompanying texts.

317. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 II, 171, 190-91, 193-94 (1950) (discussing United States v. Brandt) [hereinafter Brandt].

318. *Id.* at 193.

319. *Id.*

320. *Id.*

321. *Id.* at 196.

was subsequently extended to Jews and to other non-German internees.[322] The Tribunal ruled that Brandt's failure to investigate the euthanasia program constituted a grave breach of his duty and resulted in the extermination of innocents: "whatever may have been the original aim of the program, its purposes were prostituted by men for whom Brandt was responsible, and great numbers of non-German nationals were exterminated under its authority."[323]

Other civilian officials also were held liable under the doctrine of command responsibility. Hermann Roechling, Chair of the Reich Association Iron and General Director of the Stahlwerke Voelklingen steel works, was convicted by a French military court of war crimes.[324] He was determined to have been central in urging the conscription and deportation of involuntary foreign workers.[325] The French Court concluded that Roechling possessed a continuing duty to remain informed of the treatment of these deportees.[326]

Roechling and the other members of the directorate of the Roechling firm relied on the Gestapo to discipline workers in their factories who were subjected to beatings, abuse and starvation.[327] Roechling inspected the plants on various occasions and could not have failed to notice the plight of workers.[328] The Tribunal ruled that Roechling, as chief of the Voelklingen plants and Chair of the Reich Association Iron, possessed sufficient authority to intervene and to improve the plight of workers, despite the fact that he lacked the legal position to completely curb their mistreatment.[329] Roechling and the other accused executives thus were determined to have permitted and supported this "horrible treatment" and were convicted of not "having done their utmost to put an end to these abuses."[330]

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322. *Id.* at 197.

323. Brandt, *supra* note 317, at 197. The Tribunal noted that at the outset of the program that euthanasia was practiced against non-Germans. *Id.*

324. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, XIV, 1097, 1133, 1140 (1952) (discussing France v. Hermann Roechling et al.) [hereinafter Roechling].

325. *Id.* at 1132.

326. *Id.* at 1136.

327. *Id.* at 1135.

328. *Id.* at 1136.

329. *Id.*

330. Roechling, *supra* note 324, at 1136. For an additional case involving the imposition of command responsibility on industrialists, *see* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VI, 1187, 1202

The rulings in *Brandt* and *Roechling* affirmed the continuing responsibility of high-level civilian administrators to monitor the implementation of programs and to actively intervene to prevent and to punish abuses.[331] *Roechling* stands as a case in which a duty was placed on a defendant to utilize informal power and authority.[332]

The application of command responsibility under Control Council No. 10 remained unpredictable and was tailored to the facts of particular cases. At times, Courts seemed to strain to exonerate defendants of this charge.[333]

An American Tribunal determined that Field Marshal Erhard Milch, Under State Secretary of the Reich Air Ministry and Inspector General and Second in Command of the Luftwaffe, was unaware that high altitude and freezing experiments involved the involuntary participation of concentration camp inmates.[334] The Tribunal determined that Milch neither received the reports nor attended the conferences at which these protocols were discussed and that he had believed that the experiments had been terminated.[335] As a result of his responsibilities in insuring a steady supply of labor and material for the manufacture of aircraft, the Court concluded that Milch was unable to devote himself to monitoring a range of activities, including the high altitude and freezing experiments.[336] The Tribunal stressed that the experiments had been conducted by personnel "far removed from the immediate scrutiny of the defendant."[337] The Tribunal thus excused Milch's failure to satisfy the scope of his supervisory position in the Luftwaffe and absolved him of responsibility, noting that the experiments "engaged the attention of the defendant only perfunctorily, if at all."[338]

(1952) (discussing United States v. Friedrich Flick) (conviction for knowingly approving procurement of prisoners of war).

331. *See supra* notes 318-23, 327-30 and accompanying texts.

332. *See supra* notes 333-36 and accompanying texts.

333. For other decisions involving command responsibility, *see* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, V, 958 (1950) (discussing United States v. Oswald Pohl). *See also id.* at 992 (discussing August Frank), 1011 (discussing Erwin Tschentscher), and 1055 (discussing Karl Mummenthey).

334. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, II, 773, 774-75 (1949) (discussing United States v. Erhard Milch).

335. *Id.* at 777-78.

336. *Id.* at 776.

337. *Id.* at 775.

338. *Id.* at 776.

Three members of the I.G. Farben industrial firm were board members in the Degesch firm in which Farben possessed a forty percent interest.[339] The board, including defendants Wilhelm Mann, Heinrich Hoerlein and Karl Wurster, approved Degesch's sale of Cyclon-B gas.[340] The Tribunal further ruled that neither the volume of production nor the fact that large shipments were destined for concentration camps was sufficient to place the board of directors on notice that the gas was being used to exterminate inmates.[341] In addition, the meetings of the board were infrequent and the reports were sketchy and unenlightening.[342] The Court concluded that the defendants may have reasonably believed that the gas was being used to disinfect displaced persons in the congested concentration camps.[343]

In summary, the primary contribution of the Control Council No. 10 cases was to extend the doctrine of command responsibility to territorial commanders.[344] Military and civilian officials were held responsible for insuring lawful conduct within their territorial command by subordinate units as well as by those outside their chain of command.[345] The strict liability test for territorial commanders was abandoned in favor of the knowing or gross negligence standard.[346] Courts resisted presuming knowledge and examined the facts in each case.[347] Actual knowledge was difficult to establish absent reports[348] and courts were inconsistent in their application of the constructive knowledge standard; this may have

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339. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VIII, 1081, 1168-69 (1950) (discussing United States v. Karl Krauch).

340. *Id.*

341. *Id.* at 1169.

342. *Id.*

343. *Id.* The manager of Degesch, Doctor Gerhard Peters, was informed that Cyclon-B gas was being used to exterminate inmates. *Id.* at 1169. The same defendants were also charged with knowingly providing drugs which were used in spotted fever and typhus experiments in concentration camps. The Tribunal dismissed the charge and found that Farben had discontinued dispatching drugs as soon as the firm suspected that such activity was being conducted in the camps. *Id.* at 1171-72. A central question in determining whether the defendants were on notice of the experiments centered on whether the German word "*Versuch*" in the medical reports connoted "experiment" or the more limited notion of a "test." *Id.* at 1172.

344. *See supra* note 239 and accompanying text.

345. *See supra* notes 234-35 and accompanying texts.

346. *See supra* notes 276-78 and accompanying texts.

347. *See supra* notes 279-82 and accompanying texts.

348. *See supra* notes 238-39, 264 and accompanying texts.

reflected a reluctance to impute knowledge to military and governmental officials.[349] Officials possessed a duty to intervene to the extent of their authority and power to prevent and to punish war crimes.[350] In some instances, a duty was placed on individuals who exercised informal influence rather than authoritative power.[351] The obligation on a commander to take energetic and efficient affirmative action to prevent criminal conduct[352] was not qualified by the possibility that this might result in criminal prosecution for insubordination.[353]

World War II war crimes trials, as illustrated, heavily relied upon the doctrine of command responsibility to prosecute high-level military and civilian officials. The decisions were marked by a continuing conflict between the broad test articulated in *Yamashita* and the stricter knowledge or gross negligence standard set in the *Tokyo* and *High Command* cases. The expansive interpretation was most pronounced in a series of prosecutions before military tribunals of individuals alleged to have victimized nationals of the presiding court.[354]

IV. THE VIETNAM WAR

The issue of command responsibility was central in the controversy over the Vietnam War.[355] Presidential advisor Townsend Hoopes expressed outrage over the allegation that the actions of American civilian and military leaders were analogous to those of the defendants at

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349. *See supra* notes 334-42 and accompanying texts.

350. *See supra* notes 296, 300 and accompanying texts.

351. *See supra* notes 329-300 and accompanying texts.

352. *See supra* note 300 and accompanying text.

353. *See supra* note 288 and accompanying text.

354. *See* Trial Of S.S. Brigadefuhrer Kurt Meyer, 1948 L. REP. WAR CRIM. 97 (Dec. 10-28, 1945); Trial of Kurt Student, 1948 L. REP. WAR CRIM. 118 (May 10, 1946); Trial of Takashi Sakai, 1949 L. REP. WAR CRIM. 1 (Aug. 19, 1946); Trial of Lieutenant General Baba Masao, 1949 L. REP. WAR CRIM. 56 (June 2, 1947).

355. *See generally* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970). Some limited recognition of the principle of command responsibility was provided in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968. Article Two extended the Convention to representatives of the State authority who "tolerate" the commission of war crimes and crimes against humanity. Convention on the Non-Applicability of Statutory Limitations to War Criminals and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18), at 40, art. 2, U.N. Doc. A/7218 (1968).

Nuremberg.[356] Nuremberg prosecutor Telford Taylor opined that it was an open question whether American civilian officials possessed the requisite depth and degree of knowledge to be held criminally culpable.[357] Taylor, however, contended that a stronger case could be made for the criminal liability of the military command structure which possessed an unprecedented degree of mobility, resources and information with which to monitor and to control combat forces.[358] Taylor concluded that the moral health of America would not be redeemed until its leaders were "willing to scrutinize their behavior by the same standards that their revered predecessors applied to Tomayuki Yamashita 25 years ago."[359] This analysis was challenged by Waldemar A. Solf, of the Judge Advocate General Department of the United States Army, who contended that adequate procedural precautions to prevent and to punish war crimes had been established and that there was no evidence that high-echelon military officials had countenanced criminal conduct.[360] Solf disputed that *Yamashita* established a strict liability standard and argued that there was no evidence that American decision-makers either were aware of war crimes or had wantonly and immorally failed to curb such conduct.[361]

In 1971, First Lieutenant William Calley was convicted of the premeditated murder of Vietnamese civilians.[362] The United States Court of Military Appeals, in reviewing the evidence, determined that Lieutenant Calley had directed and had personally participated in the intentional killing of unarmed men, women, and children who were in the custody of combatants under Calley's command.[363] In addition, the Court confirmed that Calley had intentionally killed a Vietnamese monk and had shot a child.[364]

Several months later, Captain Ernest Medina, Calley's company commander who had been positioned outside My Lai, was acquitted of the

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356. Townsend Hoopes, *The Nuremberg Suggestion, in* CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WAR 233 (Richard A. Falk et al. eds. 1971).

357. TAYLOR, *supra* note 355, at 180.

358. *Id.* at 180-81.

359. *Id.* at 182.

360. Waldemar A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy,* 5 AKRON L. REV. 43, 58-59 (1972).

361. *Id.* at 59-60.

362. United States v. Calley, 46 C.M.R. 1131, *affirmed* 48 C.M.R. 19 (C.M.A. 1973).

363. *Calley*, 48 C.M.R. at 24.

364. *Id.*

involuntary manslaughter of a hundred human beings.[365] The prosecution alleged that Medina had been informed through sight, sound and radio transmission that his subordinates were killing noncombatants.[366] He was accused of having failed to exercise command responsibility and of having neglected to fulfill his duty to take necessary and reasonable steps to halt this activity.[367] A review of the evidence indicates that Medina must have been aware that the troops had detained [368] and were killing civilians.[369] As a ten year accomplished military veteran,[370] Medina must have found it curious that there was a lack of radio traffic from troops seeking tactical guidance at the same time that there was continuous automatic weapons fire from American troops.[371] He himself encountered the bodies of dead civilians at the outskirts of the village.[372] Two hours into the operation it was clear that there were no Viet Cong in the area and Medina ordered the Americans to cease fire.[373]

American military judge Kenneth Howard abandoned the *Yamashita* standard and instructed the jury that Medina should be found criminally liable in the event that he possessed actual knowledge that troops or others subject to his control were committing or were about to commit war crimes and that he wrongfully failed to take necessary and reasonable steps to insure compliance with the law of war.[374] The Court thus required that Medina possess "actual knowledge plus a wrongful failure to act.... [M]ere presence at the scene without knowledge will not suffice. [T]he commander-subordinate relationship alone will not allow an inference of knowledge."[375] Howard stressed that while a commander was not required to "actually see an atrocity being committed" that "it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities."[376]

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365. Kenneth A. Howard, *Command Responsibility for War Crimes,* 21 J. PUB. L. 7, 8 (1972).

366. *Id.* at 9.

367. *Id.*

368. MICHAEL BILTON & KEVIN SIM, FOUR HOURNS IN MY LAI 119 (1992).

369. *Id.* at 125-26, 128.

370. *Id.* at 52.

371. *Id.* at 128.

372. *Id.* at 126-27. Medina had viewed at least one hundred civilian corpses. *Id.* at 134. He, himself, had shot a woman in a rice paddy. *Id.* at 172-73.

373. *Id.* at 141, 145.

374. Howard, *supra* note 365, at 10-11.

375. *Id.* at 11.

376. *Id.* at 11-12.

Telford Taylor criticized the instructions, arguing that the knowledge standard was too strict.[377] Professor Roger Clark echoed these sentiments and contrasted the strict liability standard imposed upon General Yamashita with the narrowly crafted actual knowledge test applied in *Medina*: it is "hard to avoid the feeling that there is a certain amount of hypocrisy lurking somewhere."[378] Clark pointed out that the law of homicide encompassed a range of mental states and that the jury should have been instructed that "the incompetent commander who does not know, but ought to know, what his men are about is being culpably negligent and may be convicted of . . . manslaughter."[379] He noted that the law of war aspired to minimize the loss of human life and thereby to affirm the importance of humanitarianism.[380] These values, in Clark's view were best protected under a broad view of command responsibility.[381] Clark concluded that the "actual knowledge test, in a context like My Lai, is an invitation to the commander to see and hear no evil. It is not consistent with a serious effort to make the command structure responsive to the humanitarian goals involved."[382]

Medina thus limited command responsibility to instances in which a military official possessed actual knowledge of the commission of war crimes and failed to exercise control over subordinates subject to his command.[383] The Court's failure to follow the broad test articulated in *Yamashita* or a variant of the negligence standard suggests that the instructions were intended to insure that Medina was exonerated.[384] The instructions were particularly curious since the Army Field Manual on the Law of Land Warfare provided for liability in those instances in which a commander possessed "actual knowledge," or "should have knowledge through reports received by him" or through "other means."[385]

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377. *Id.* at 8.

378. Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide,* 5 RUTGERS-CAM. L.J. 59, 72 (1975).

379. *Id.* at 74.

380. *Id.* at 78.

381. *Id.*

382. *Id.* Clark advocated reliance on a negligence standard based on the departure from the standard expected from a reasonable person rather than the more demanding wanton and reckless test. *See id.* at 77.

383. Howard, *supra* note 365, at 12.

384. *See* Clark, *supra* note 378, at 72 n.50, *quoting* Telford Taylor.

385. *See* U.S. Dep't of Army, Field Manual 27-10, Law of Land Warfare, ¶ 510, at 178-79 (1956) *quoted in* Howard, *supra* note 365, at 15 n.15.

Equally as suggestive of a protective attitude was the failure to prosecute the high-ranking officers responsible for planning, supervising and subsequently concealing the My Lai massacre.[386] Only one officer accused of involvement in sequestering or destroying evidence was ultimately brought before a court-martial, and he was acquitted.[387] Charges against other officers of a dereliction of duty and of a failure to obey lawful regulations were dismissed.[388]

Samuel W. Koster, Commander of the 23rd Infantry (Americal) Division, was the commanding officer of the specially organized unit which launched the My Lai operation.[389] He compiled an illustrious military career which spanned World War II, Korea and Vietnam and, following service in Southeast Asia, Koster was appointed Superintendent at West Point.[390]

The Pentagon Peers Report on the My Lai incident concluded that Koster poorly prepared plans for handling prisoners, failed to respond to information that civilians had been killed, and may have initiated a conspiracy to conceal information concerning the My Lai massacre.[391] Lieutenant General Jonathan Seaman nevertheless dismissed the charges against Koster of failing to report civilian deaths and of neglecting to conduct a proper investigation while noting that Koster's performance "'did not meet the high standards expected of a division commander.'"[392] Critics complained that this decision was a disservice to the rule of international law, the law of war and the United States Constitution.[393]

Secretary of the Army Stanley Resor responded by imposing administrative sanctions on Koster.[394] These included vacating Koster's appointment as a temporary major-general, inserting a letter of censure into his personnel file, and withdrawing Koster's Distinguished Service Medal.[395] Resor stressed that Koster was not responsible for the "murders themselves" and that the sanctions were based on Koster's inadequate

386. *See* DEPARTMENT OF THE ARMY, REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT: THE REPORT OF THE INVESTIGATION (1970) [hereinafter Peers Report].

387. BILTON, *supra* note 368, at 325.

388. *Id.* at 325-26.

389. *See* Koster v. United States, 685 F.2d 407, 408 (U.S. Ct. Cl. 1982).

390. *Id.* at 409.

391. Peers Report, *supra* note 386, at 12-9-12-12.

392. BILTON, *supra* note 368, at 326.

393. *Id.* at 326-27.

394. *Koster*, 685 F.2d at 409.

395. *Id.* at 409-10.

investigation into the My Lai incident.[396] The Secretary elaborated that military commanders were not responsible for all the acts of their subordinates; they, for instance, clearly could not be held liable for isolated and occasional omissions.[397] However, Resor admonished that officers must be held accountable for matters of serious import over which they asserted personal charge and control.[398] A contrary "conclusion would render essentially meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority."[399]

Reasor recognized that Koster may not have intentionally presided over an inadequate investigation, but that as a result of inattentiveness or indifference that he did "permit this to happen" despite the significant resources at his disposal.[400] The Secretary emphasized that the expectations for commanders conducting investigations, particularly during armed conflict, have always been strict and stringent: "Too much is at stake for it to be otherwise. General Koster must be measured by that test."[401]

The United States Court of Claims affirmed the decision of the Army Board for Correction of Military Records upholding the administrative sanctions imposed on Koster.[402] The Court cited four irregularities that should have alerted Koster to the need for a fair and full investigation.[403] First, following the My Lai incident Koster was informed that 128 enemy and only two American soldiers had been killed; and a report recorded the death of twenty civilians from United States artillery fire, an unusually large number of casualties.[404] In addition, Koster received a report from an American helicopter pilot who had witnessed and attempted to halt the killings at My Lai.[405] A month later, a Viet Cong propaganda leaflet charged that United States troops had massacred some 500 civilians in and around My Lai.[406]

Koster initiated an investigation which failed to uncover the intricacies of the incident and, as a result, an accurate account of the events at the

396. *Id.* at 410.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Koster*, 685 F.2d at 414.
401. *Id.*
402. *Id.* at 408.
403. *Id.* at 409.
404. *Id.*
405. *Id.*
406. *Koster*, 685 F.2d at 409.

My Lai did not emerge for over a year.[407] The Court noted that the failure of this inquiry was due to a variety of circumstances, including what may have been a cover-up by subordinates within Koster's chain of command.[408] The Court of Claims approvingly quoted Secretary Resor's conclusion that there was no area in which a strict standard of command liability was as necessary as the investigation of misconduct and that the sanctions imposed on Koster were accordingly neither arbitrary or capricious.[409]

My Lai was not the only incident which resulted in charges of command culpability. In *Goldman,* The United States Court of Military Review convicted a company commander of dereliction of duty for failing to report the murder of an enemy female who was in the custody of American troops.[410] A member of Goldman's unit had compelled a male detainee to shoot the nurse and then had fired two shots into her head.[411] The defendant was situated sixty feet from the shooting and later reportedly was informed that a Vietnamese had grabbed a rifle and had shot one of the nurses.[412] The defendant undoubtedly heard the shots, saw blood on the perpetrator and remarked that they would all be punished in the event that the remaining female detainee reported what had transpired.[413] The Court determined that the defendant possessed full knowledge of this serious incident and had failed to meet his obligation to report the event to authorities.[414] In sentencing, the defendant to a reprimand and forfeiture of one hundred dollars per month for twelve months, the judges stressed that the defendant was the product of a military family, had proved an outstanding officer, and had been the recipient of numerous service awards.[415]

This lackadaisical leadership was all too typical. An analysis conducted by Guenter Lewy concluded that most of the prosecutions for willful killings of noncombatants, the abuse of prisoners or for the mutilation of corpses, resulted from complaints by individuals discharged from the service rather than from complaints by commanders.[416] Officers

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407. *Id.*
408. *Id.*
409. *Id.* 414.
410. United States v. Goldman, 43 C.M.R. 711 (C.M.A. 1970).
411. *Id.* at 714.
412. *Id.*
413. *Id.* at 715.
414. *Id.*
415. *Id.*
416. GUENTER LEWY, AMERICA IN VIETNAM 347 (1978). *See also id.* at 348-49.

charged with war crimes also received more lenient treatment than enlisted men: sixty-one percent of officers either had their charges dismissed, were acquitted or received an administrative sanction rather than being subjected to trial; the corresponding figure for enlisted men was thirty-four percent.[417] Lewy speculated that the actual knowledge test established in *Medina* may have effectively insulated military officials from trial and accounted for the limited prosecution of commanders.[418]

In 1994, American army Captain Lawrence Rockwood unsuccessfully attempted to rely on command responsibility to justify his effort to halt alleged violations of international human rights.[419] The United States, in 1994, invaded Haiti in Operation Uphold Democracy to restore order on the Caribbean island.[420] Captain Lawrence P. Rockwood, a counterintelligence officer for Joint Task Force (JTF) 190, believing that Haitian prisoners were being abused, tortured and killed, left his assignment and entered and inspected the National Penitentiary in Port-au-Prince, Haiti.[421] A United States court-martial determined that Rockwood had acted on the basis of speculation and had unjustifiably left his place of duty and disobeyed orders.[422] He was convicted of absence without leave, willful disobedience to an officer and of conduct unbecoming an officer.[423]

The Court Martial ruled that any abuses which might have occurred had been committed by Haitian soldiers who were not under American operational or territorial command.[424] At any rate, there was no indication that the JTF 190 Commander had ordered or even possessed actual or constructive knowledge of the alleged abuses,[425] or that such abuses, in fact, had occurred.[426] In addition, The Court Martial pointed out that Rockwood was a staff officer who was not charged with an international obligation to act under the doctrine of command responsibility.[427] He was convicted despite the fact that a United States Department of State report

417. *Id.* at 352.

418. *Id.* at 360. For a discussion of command responsibility in Vietnam, *see* William V. O'Brien, *The Law of War, Command Responsibility and Vietnam,* 60 GEO. L.J. 605 (1972).

419. Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood,* 149 MIL. L. REV. 275-76 n.4 (1995).

420. *Id.*

421. *Id.* at 275.

422. *Id.* at 275-76.

423. *Id.* at 276 n.5.

424. *Id.* at 278, 288.

425. O'Brien, *supra* note 419, at 278-79 n.10, 299.

426. *Id.* at 278-79, 288-89.

427. *Id.* at 290-91.

in his possession detailed the unhealthy conditions, inadequate diet and poor health care in Haitian prisons.[428]

In sum, American court martials appear to have been influenced by political considerations[429] in their reluctance to impose command culpability.[430] The instructions in *Medina* adopted an actual knowledge standard. which deviated from both the *Yamashita* test established by the United States Supreme Court and the stricter actual or constructive knowledge or gross negligence test articulated at *Tokyo*.[431] In *Goldman*, the Court Martial determined that Goldman was an exemplary officer and sentenced him to an insignificant sentence in light of the gravity of his crimes.[432] The *Rockwood* court circumvented the issue of command responsibility by determining that Rockwood had not occupied an authoritative position and that the Haitian forces were not within the American chain of command.[433]

V. THE SABRA AND SHATILLA INCIDENTS

In reaction to the assassination of Lebanese President-elect and Christian Phalangist leader Bashir Jemayel, in September 1982, Israeli defense forces (I.D.F.) entered West Beirut in order to prevent an escalating cycle of violence between Christian and Muslim militias.[434] The Israelis then directed their Phalangist allies to enter the Sabra and Shatilla refugee camp,[435] which was considered a center of Palestinian guerilla activity.[436] This task was deemed too dangerous for the I.D.F and was intended to signal to Israeli public opinion that the Phalangists were contributing to the armed struggle against Palestinian partisans.[437] The Phalangist experience in Lebanon also was thought to have provided the Christian

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428. *Id.* at 275-76 n.4, 290 n.72.

429. *See supra* notes 416-18 and accompanying texts.

430. *See supra* notes 384-88 and accompanying texts.

431. *See supra* notes 374-85 and accompanying texts.

432. *See supra* notes 414-15 and accompanying texts.

433. *See supra* notes 424-28 and accompanying texts.

434. Israel: Final Report of the Commission of Inquiry Into the Events at the Refugee Camps in Beruit, Final Report, 22 I.L.M. 473, 478 (1983) [hereinafter Kahan Commission]. *See* Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71 (1985).

435. Kahan Commission, *supra* note 434, at 498.

436. *See id.* at 481.

437. *See id.* at 498.

militia with a unique capacity to detect and to detain Palestinian guerillas.[438] Once inside the camp, the Phalangist passion erupted, resulting in the slaughter of between seven and eight hundred civilians.[439]

There was no suggestion of a conspiracy between the I.D.F. and Phalangists or that Israeli troops had participated in the killings or that the slaughter had been visible or audible from the Israeli observation post.[440] The evidence, in fact, indicated that Israeli military officials had been well -aware of the Phalangist's disregard for legalities and desire for revenge and had cautioned their Lebanese allies to respect the civilian inhabitants.[441]

The Israeli Cabinet appointed a commission of inquiry, headed by Yitzhak Kahan, President of the Supreme Court, which found that the Phalangists were directly responsible for the atrocities.[442] Kahan, however, further determined that those officials who had approved, knew or implemented the Phalangist entry into the camps should have anticipated the likelihood of slaughter.[443] Yet, these individuals failed to deter or to diminish the danger.[444] The report concluded that civilian and military officials possessed "indirect responsibility" regardless whether they harbored a criminal intent or merely avoided addressing the anticipated atrocities.[445] Indirect responsibility also was extended to individuals who, after receiving an account of the killings, failed to do "everything within their power to stop them."[446]

The Kahan Report conceded that the formal legal responsibility of Israeli officials for the occupants of Sabra and Shatilla was problematic in light of the uncertainty as to whether the Jewish State could be considered an occupying power under customary international law.[447] The report, however, adopted the unprecedented position that even if these transnational norms were inapplicable that a duty arose from the "obligations applying to every civilized nation and the ethical rules accepted by civilized

438. *Id.*
439. *Id.* at 491.
440. *Id.* at 495.
441. Kahan Commission, *supra* note 434, at 481.
442. *Id.* at 496.
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. Kahan Commission, *supra* note 434, at 496.

people."[448] This reflected the view that the cultivation of universal moral norms required that responsibility should be placed on the perpetrators as well as those "who could and should have prevented" the commission of the Phalangist's criminal conduct.[449] Kahan recognized that there were persuasive rationales for directing the Phalangists to enter Sabra and Shatilla.[450] The report nevertheless admonished that this decision should have been accompanied by precautions and protections against the type of terror which officials "were obligated to foresee as probable."[451] In addition, Israeli military officials were found to have failed to take "energetic and immediate actions" to restrain the Phalangists in response to the first reports of repression.[452]

A "certain degree of responsibility" was imposed on Prime Minister Menachem Begin who had been informed at a cabinet meeting of the Phalangist incursion into the camp thirty-six hours following the decision.[453] There was no indication that he was subsequently told that civilians had been killed.[454] Begin did not react to the warning expressed by Deputy Prime Minister David Levy at the cabinet meeting that the Phalangists could be expected to exact retribution.[455] The commission concluded that Begin had demonstrated little interest or alarm over the next two days and had not questioned the failure of his subordinates to keep him informed.[456] His indifference was considered indefensible in light of the fact that it was "foreseeable and possible" that the Phalangists would "commit acts of revenge."[457] The Kahan Report concluded that an expression of concern by Begin might have alerted the Defense Minister and Chief of Staff to adopt protective measures.[458] This "lack of involvement" merited the imposition of a "certain degree of responsibility."[459]

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448. *Id.* The Kahan Report supported this broad imposition of responsibility by citing biblical injunctions as well the plight of Jews victimized by pogroms. *Id.*

449. *Id.* at 496-97.

450. *Id.* at 498.

451. *Id.* at 499.

452. *Id.* at 497-98.

453. Kahan Commission, *supra* note 434, at 501.

454. *Id.*

455. *Id.* at 484.

456. *Id.* at 501.

457. *Id.*

458. *Id.*

459. Kahan Commission, *supra* note 434, at 501.

Foreign Minister Yitzhak Shamir conceded that a fellow cabinet member had complained to him of Phalangist "'unruliness.'"[460] The official, on the other hand, insisted that he had alerted Shamir of the "'slaughter'" which was being perpetrated by the Phalangists.[461] The Foreign Minister conceded that he had discounted the report based on his fellow minister's well-known opposition to the incursion into Lebanon.[462] The commission concluded that Shamir, in light of Minister Levy's admonition, should have responded to the cabinet member's warning with "sensitivity and alertness" and, at a minimum, should have contacted Defense Minister Sharon.[463] Shamir was determined to have "erred in not taking any measures after the conversation ... about the Phalangist actions in the camps."[464]

Kahan thus adopted a broad view of command responsibility, holding Menachim Begin partially responsible for his indifferent and disinterested posture after being informed that revenge killings in the camps were "foreseeable and possible."[465] Foreign Minister Yitzak Shamir also was adjudged to have "erred" in failing to have responded with sufficient concern to the statement of a fellow minister concerning the killings which were being perpetrated in Sabra and Shatilla.[466] In both cases, the Commission appears to have required officials to conduct inquiries and to monitor events after being notified of potential criminal conduct.[467] This liberal "notice" standard may have reflected the special obligation of high-ranking civilian decision-makers such as Begin and Shamir.[468] Absent a reliable report regarding the killings, Begin and Shamir arguably cannot be characterized as having acted in a wanton or grossly negligent standard.[469]

The Kahan Report recommended the dismissal of Defense Minister Ariel Sharon.[470] Sharon, along with Chief of Staff Rafael Etan, authorized the Phalangist entry into the camps.[471] He was well-acquainted with the

460. *Id.* at 504.
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*
465. *See supra* notes 453-59 and accompanying texts.
466. *See supra* notes 460-64 and accompanying texts.
467. *See supra* notes 456 & 463 and accompanying texts.
468. *See supra* notes 458-59 & 463-64 and accompanying texts.
469. *See supra* note 276 and accompanying text.
470. Kahan Commission, *supra* note 434, at 519.
471. *Id.* at 480-81.

practices and procedures of the Christian militia and the commission noted that he need not have possessed prophetic powers in order to have anticipated the danger of depredations.[472] Yet, Kahan observed that Sharon focused exclusively on the advantages while disregarding the potential perils of the Phalangist incursion.[473] The report stressed that Sharon, as a politician responsible for Israel's security affairs and as a significant strategist in the war in Lebanon, possessed the duty to consider the costs and consequences of intervention, including the possible humanitarian and political price.[474] Once having instructed the Phalangists to intervene, Sharon was further obligated to provide supervision and safeguards against slaughter; the routine warnings which were issued to the Phalangists clearly were inadequate.[475] Absent effective controls, the Kahan Report concluded that Sharon was obligated to cancel the campaign.[476]

The Kahan Report also criticized the disinterest displayed by Lieutenant General Rafael Eitan, Chief of Staff in the Defense Ministry.[477] Eitan was found to have disregarded his duty when, together with the Minister of Defense, he approved the Phalangist's entry into the camps without insuring the safety of the residents or providing for an adequate flow of information.[478] Upon receiving reports that the Phalangists had "'gone too far,'"[479] Eitan flew to Beirut and immediately met with the Phalangist commanders.[480] He later explained that he had concluded that the allegations of atrocity were erroneous since the Phalangists failed to mention the killings.[481] As a result, instead of confirming the order canceling the operation issued by a lower-ranking Israeli officer, Eitan permitted additional Phalangists to enter the camp and equipped them with tractors to bulldoze terrorist concentrations.[482] The Kahan Report concluded that Eitan was obligated to inquire into whether atrocities were occurring and, in the event that he was not "satisfied that excesses had not

472. *Id.* at 502.
473. *Id.*
474. *Id.*
475. *Id.* at 503.
476. Kahan Commission, *supra* note 434, at 503.
477. *Id.* at 505.
478. *Id.* at 505-06.
479. *Id.* at 485-86.
480. *Id.* at 488.
481. *Id.* at 506-07.
482. Kahan Commission, *supra* note 434, at 507.

been committed," he was required to take measures to prevent the continuation of the abuses.[483] Instead, the Phalangist's may have reasonably concluded from Eitan's silence and support that the I.D.F. condoned or encouraged the killings.[484]

Major General Yehoshua Saguy, Director of Israeli Military Intelligence, issued assessments of the risks of I.D.F. intervention into West Beirut which were deemed to have failed to adequately warn civilian and military officials of the distinct danger that the Phalangists would seek retribution.[485] He was present during discussions concerning the role of the Phalangists, but claimed to have been unaware of the precise parameters of their role and responsibility.[486] Even after receiving reports of the Phalangist entry into the camp and the possible killing of three hundred, Saguy failed to investigate or to contact the Chief-of-Staff or the Defense Minister.[487] He explained that he was a well-known opponent of cooperation with the Phalangists and that his warnings likely would have been dismissed.[488] The Kahan Report, however, admonished that this had not relieved him of the obligation to issue an explicit and express assessment of the risks of retribution and to clarify and to calculate the costs and consequences.[489] Saguy's "inaction" constituted a breach of the duty incumbent on the director of Military Intelligence.[490]

Major General Amir Drori, Head of the Northern Command, anticipated that the Phalangists might act in an uncontrolled fashion in the refugee camp.[491] This was reinforced by verbal reports from Israeli officers indicating that civilians likely were at risk.[492] Drori promptly ordered a cessation of Phalangist operations, telephoned the Chief-of-Staff that the Phalangists "'had overdone it,'" and attempted to persuaded the Lebanese Army to restore order in the camp.[493] The Kahan commission concluded that there was no evidence that Drori had been informed of the killings

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483. *Id.*

484. *Id.* at 505-07.

485. *Id.* at 509.

486. *Id.* at 508-09.

487. *Id.* at 486.

488. Kahan Commission, *supra* note 434, at 509.

489. *Id.*

490. *Id.* The Kahan Report recommended his dismissal. *Id.* at 519. For an assessment of the responsibility of the unidentified Head of the Mossad, *see id.* at 509-10.

491. *Id.* at 511.

492. *Id.* at 485.

493. *Id.* at 511.

and that he had acted "properly, wisely, and responsibly, with sufficient alertness."[494] Drori, however, was criticized for neglecting to fully pursue the reported abuses with Phalangist leaders and with superior officers and for failing to urge Lieutenant General Eitan to discuss the issue with the Phalangists in Beirut.[495] The commission concluded that Drori's "disengagement" constituted a breach of duty.[496]

Brigadier General Amos Yaron was present at the forward command post and received three reports of killings, including intelligence from a Phalangist liaison officer recording the death of three hundred.[497] Yaron promptly admonished the Phalanguist liaison officer and a unit commander, but failed to convey this information to the Chief of Staff and Head of the Northern Command.[498] Yaron later explained that he had been more concerned with insuring that the I.D.F. was not involved in operations in the camps than with preventing a massacre.[499] This constituted a "mistaken judgment" and "grave error" and comprised a breach of his duty.[500]

In summary, in 1982, the Israeli cabinet formed the Kahan Commission to inquire into the killings in the Sabra and Shatilla refugee camps.[501] The commission was not limited by prevailing international legal doctrine and relied on universal moral and ethical norms to extend command responsibility to Israeli civilian and military officials.[502] Kahan did not question the decision to cleanse the camps of Palestinian guerillas.[503] Instead, the commission held officials accountable for failing to consider and to calculate the costs and consequences of this decision and for neglecting to provide the necessary precautions and protections.[504]

The Kahan Report contributed to the jurisprudence of command responsibility by supplementing the intentional or gross disregard test with a mere "notice" standard for high-ranking civilian and military decision-

494. Kahan Commission, *supra* note 434, at 511.

495. *Id.* at 511-12.

496. *Id.*

497. *Id.* at 512.

498. *Id. See also id.* at 482-83.

499. *Id.* at 513.

500. Kahan Commission, *supra* note 434, at 513-14.

501. *Id.* at 434-42.

502. *See supra* notes 447-52 and accompanying texts.

503. *See supra* note 450 and accompanying text.

504. *See supra* notes 473-74 and accompanying texts.

makers.[505] These officials, along with those apprised of possible criminal conduct, were required to affirmatively inquire into alleged misconduct.[506] Commanders also possessed the obligation to convey relevant facts to higher level decision-makers.[507] Following the decision to send the Phalangists into the camp, officials were charged with the customary obligation to monitor the operation and to safeguard civilians.[508] Reports of misconduct were to be met with vigorous action, such as canceling the operation and taking steps to restore order.[509] The notion that Israeli decision-makers were responsible for the actions of the Phalangists was an important application of the concept of command responsibility to encompass troops outside of the chain of command over whom decision-makers exercised effective informal control.[510]

VI. THE 1977 PROTOCOL TO THE GENEVA CONVENTION

Three issues concerning command responsibility required clarification: the intent or knowledge requirement, the scope of command responsibility and the standard for remedial action. A review of the historical record reveals four closely-related approaches to the intent standard. The stringency of the *Yamashita* strict liability test[511] was softened by the actual and constructive knowledge and gross negligence standard adopted by the tribunals in the *Tokyo*[512] and *High Command* decisions.[513] The Kahan Report adopted a mere negligence test for high-level civilian officials which required officials to investigate facts which suggested that war crimes might be committed.[514] This constituted a significant expansion of the actual knowledge test articulated in *Medina*.[515] The central controversies revolved around the evidentiary standard required to presume or to circumstantially establish constructive knowledge and whether an official was obligated to investigate facts from which a reasonable person might conclude that war crimes may have

505. *See supra* notes 455-58, 463-64 and accompanying texts.
506. *See supra* notes 483-84 and accompanying texts.
507. *See supra* notes 489-90 and accompanying texts.
508. *See supra* note 475 and accompanying text.
509. *See supra* notes 493-496 and accompanying texts.
510. *See supra* notes 471, 478 and accompanying texts.
511. *See supra* notes 104-07 and accompanying texts.
512. *See supra* notes 172-77 and accompanying texts.
513. *See supra* note 276 and accompanying text.
514. *See supra* notes 453-59 and accompanying texts.
515. *See supra* notes 274-76 and accompanying texts.

occurred or whether a duty only arose in clear and compelling cases.[516] The issue also remained whether the scope of a commander's responsibility should be limited to the chain of command or also should include territorial authority as well as units over whom an official exercised influence or informal control.[517] The extent of required remedial action and whether officials were required to take steps which transcended their formal authority also required clarification.[518]

The requirements of international law pertaining to command responsibility were clarified in the 1977 Protocol to the Geneva Convention[519] which codified the requirements of customary international law.[520] Article 86(2) provides that the fact that a breach of the Convention was committed by a subordinate does not relieve his superiors from responsibility in those instances in which the superiors "knew, or had information which should have enabled them to conclude in the circumstances at the time" that the subordinate was "committing or was going to commit such a breach."[521] Superiors under these circumstances were required to "take all feasible measures within their power to prevent or repress the breach."[522] This may entail either criminal or disciplinary punishment, which ever is appropriate under the circumstances.[523]

The central commentary on the Protocol notes that Article 86(2) is sufficiently elastic to incorporate both a specific intent and a gross negligence standard.[524] A good faith, but deficient judgment, or inadver-

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516. *See supra* notes 453-59 and accompanying texts.

517. *See supra* notes 233-35 and accompanying texts.

518. *See supra* notes 210-17 and accompanying texts.

519. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 86(2), 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

520. *See* George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I,* 26 VA. J. INT'L L. 693, 719 (1986).

521. Protocol I, *supra* note 519, art. 86(2).

522. *Id.*

523. *Id.* Article 86(1) imposes a duty on the High Contracting Parties and the Parties to a conflict to "repress grave breaches" and to "take measures necessary to suppress all other breaches" of the Convention which "result from a failure to act when under a duty to do so." This unprecedented provision provides for State responsibility for war crimes which result from a failure by relevant officials to repress war crimes. *Id.* art. 86(1). Grave breaches are accorded the status of war crimes. *See id.* art. 85(5).

524. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1012 (Yves Sandoz et al. eds. 1987) [hereinafter Commentary].

tence, generally are not subject to sanction; the negligence must be sufficiently serious to support a charge of malicious intent.[525]

The concept of a superior connotes officials who exercise direct authority over the subordinates who perpetrated the criminal acts as well as officials who possess control over combatants.[526] The latter encompasses territorial commanders who exercise indirect control over troops within the ambit of their authority.[527] This broad view of command authority is clarified in Article 87(1) which specifies that military officials are to suppress and to report breaches of the Convention committed by "armed forces under their command" and "other persons under their control."[528] The liability of commanders extends from the commander-in-chief down to the lowest level officials in the chain of command.[529]

The "should have enabled them to conclude" standard was included to counter the difficulty of establishing actual knowledge.[530] The commentary noted that the case law established that a superior may not claim to be unaware of reports addressed to him.[531] In addition, he is deemed to be aware of widespread, numerous, notorious and chronologically continuous breaches.[532] A superior also was charged with awareness of contextual considerations such as the level of training in the law of war and the treatment of prisoners, the means and mode of attack, the density of the targeted population and the availability of medical services.[533] The commentary noted that in several "flagrant cases" stemming from World War II that tribunals drew on the above factors in imputing knowledge to officials who attempted to evade responsibility by claiming ignorance of criminal conduct.[534]

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525. *Id.* Article 86(2) extends to both grave and ordinary breaches of the Protocol. Grave breaches are accorded the status of war crimes. *See* Protocol I, *supra* note 519, art. 85(5). They are subject to a "prosecute or extradite" requirement. *See* Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

526. Commentary, *supra* note 524, at 1013.

527. *Id.* at 1020, 1023.

528. Protocol I, *supra* note 519, art. 87(1).

529. Commentary, *supra* note 524, at 1019.

530. Ilias Bantekas, *The Contemporary Law of Superior Responsibility,* 93 AM. J. INT'L L. 573, 589 (1999).

531. Commentary, *supra* note 524, at 1014.

532. *Id.* at 1016.

533. *Id.* at 1014.

534. *Id.*

Article 86(2) requires a commander to take measures to both prevent and to punish breaches of the Geneva Convention.[535] This is reinforced by Article 87(3) which requires a military official who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Convention to initiate steps to prevent violations and, where appropriate, to "initiate disciplinary or penal action."[536] Article 86(2) restricts a commander's obligation to measures which are "feasible" and "within their [the commander's] powers."[537] Military officials thus are not required to undertake acts which are outside the scope of their authority or to exhaust every possible and imaginable avenue of redress. [538] The commentary nevertheless stresses that military officials at every level are obligated to act to prevent violations of the Convention.[539] This requires a range of ambitious and aggressive acts to control and curb war crimes.[540]

The is reinforced by Article 87(1) which establishes a general duty on military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and to suppress and to report breaches of the Convention.[541] As part of this general obligation, Article 87(2) provides that commanders are to ensure

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535. *Id* at 1015.

536. Protocol I, *supra* 519, art. 87(1).

537. Commentary, *supra* note 524, at 1015.

538. *See id.* The commentary notes that Article 87 requires a commander who is in command of a sector to do everything within his power to address breaches against individuals for whom he is responsible, even when committed by units that are not within his chain of command. The commentary also makes the unprecedented assertion that this duty attaches to a commander who lacks authority over the territory. *Id.* at 1020.

539. *Id.* at 1022. The commentary cites the duty of non-commissioned officers to intervene to prevent a combatant from a wounded adversary or civilian. A lieutenant must mark a protected place, such as a hospital, that he encounters during an advance. A company commander is obligated to shelter prisoners from attack. A battalion commander must halt an attack that he discovers is being directed at a locale which he determines no longer possesses military significance. A regimental commander is required to select sites to avoid indiscriminate attacks. *Id.* The commentary cites the duty of non-commissioned officers to intervene to prevent a combatant from killing a wounded adversary or civilian. A lieutenant must mark a protected place, such as a hospital, which he encounters during an advance. A company commander is obligated to shelter prisoners from attack. A battalion commander must halt an attack which he discovers is being directed at a locale which he determines no longer possesses military significance. A regimental commander is required to select sites to avoid indiscriminate attacks. *Id.*

540. *See id.*

541. Protocol I, *supra* note 519, art. 87(1).

that members of the armed forces under their command are aware of their obligations under the Geneva Convention.[542] These provisions recognize that military officers are positioned to encourage support for the law of war, impose discipline, limit the deployment of unnecessary force and to insure a flow of accurate information and reports.[543]

In summary, the Geneva Protocol constituted a compromise. Military officials are held responsible for transgressions in those instances in which they possessed actual or constructive knowledge or disregarded information indicating that war crimes had been or were about to be committed.[544] The "should have enabled them to conclude" standard while less harsh than strict liability also insures that officials cannot adopt a disengaged and disinterested demeanor.[545]At the same time that officials may not adopt a passive posture, there is no requirement that they actively and affirmatively monitor and investigate events and circumstances.[546] Their liability extends to the acts of subordinates as well as to troops under their control.[547] Officials are obligated to undertake "feasible measures" which are "within their power;" they are not required to undertake all possible or extraordinary efforts.[548]

The Protocol provision was incorporated, with slight modification, into the Draft Code of Crimes Against the Peace and Security of Mankind.[549] The article on command responsibility provides for command responsibility in those instances in which superiors "knew or had information enabling them to conclude" that a subordinate was committing or was going to commit a crime.[550] A superior had a duty to undertake "all feasible measures within their power" to prevent or repress the crime.[551]

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542. *Id.* art. 87(2).

543. Commentary, *supra* note 524, at 1022.

544. *See supra* note 521 and accompanying text.

545. *See supra* notes 530-36 and accompanying texts.

546. *See supra* notes 533-34 and accompanying texts.

547. *See supra* notes 526-29 and accompanying texts.

548. *See supra* notes 536-40 and accompanying texts.

549. Report of the International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, at 242, art. 12, U.N. Doc. A/46/10 (1991).

550. *Id.*

551. *Id.* The International Law Commission stressed there was no intention for the interpretation of this provision to vary from the terms of the Additional Protocol I (II), Y.B. INT'L L. COMM'N 71-72 (discussing article 10) (1988).

Several decisions of the International Criminal Tribunals for Yugoslavia and Rwanda contain comprehensive commentaries on the contemporary standard for command responsibility.

VII. COMMAND RESPONSIBILITY AND THE INTERNATIONAL TRIBUNAL FOR YUGOSLAVIA

A. Delalic

The United Nations Commission Of Experts formed to investigate war crimes and crimes against humanity in the former Yugoslavia recommended that any international court which may be formed should be vested with jurisdiction over alleged contraventions of the doctrine of command responsibility.[552] The text formulated by the Experts was incorporated with slight modification into the Statute of the International Criminal Tribunal for Yugoslavia (ICTY).[553] This provided that the fact that a crime punishable under the Statute was committed by a subordinate "does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[554] The Secretary-General observed that this was consistent with court decisions stemming from World War II which imposed criminal responsibility on heads of State, government officials and persons acting in an official capacity.[555] The Secretary-General further noted that "imputed responsibility" or "criminal negligence" arose in those instances in which a superior knew or had reason to know of potential or past criminal conduct and failed to take "necessary and reasonable steps" to prevent, repress or

552. *See* Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, ¶¶ 55-60 (1992), U.N. Doc. S/1994/674 (1994).

553. *See* United Nations Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 I.L.M. 1159, 1174, art. 7(3) (1993).

554. *Id.* at ¶ 55 (commentary).

555. *Id.*

punish the criminal conduct.[556] A similar provision was incorporated into the Statute of the International Criminal Tribunal for Rwanda (ICTR).[557]

In *Delalic,* defendant Esaid Landzo was alleged to have served as a guard in the Celebici prison camp and was charged with killing, torture and cruel treatment and willfully causing great suffering or serious injury to Serb internees.[558] Two other defendants, Hazim Delic, assistant commander of the camp[559] and Zdravko Mucic, commander of the Celebici prison camp,[560] were charged with direct involvement as well as command responsibility.[561] The fourth defendant, Zejnic Delalic, also was accused of command responsibility for the acts alleged in the indictment as a result of his coordination of Muslim and Bosnian Croat forces in the Konjic region and command of the First Tactical Group of the Bosnian Army.[562]

The decision noted that the touchstone of command responsibility was a superior-subordinate relationship characterized by the capacity to effectively control the actions of subordinates.[563] This may be based on either the formal legal authority or informal practical power to prevent or to punish the crimes of subordinates.[564] This broad and flexible standard was particularly required in situations such as the former Yugoslavia in which the military command had broken down and had been replaced by fluid and ill-defined structures.[565] In these decentralized and diffuse military organizations, formal designation as a commander was not a prerequisite for command responsibility.[566] Conversely, the Court

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556. *Id.* at 117.

557. *See* United Nations Security Counsel Resolution 955, 33 I.L.M. 1598, 1604-05, art. 6(3) (1994).

558. Prosecutor v. Delalic, Case No. 96-21-T, ¶¶ 4-10 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty. The Celebici detention facility was located in the village of Celebici which was located in the Konjic municipality in central Bosnia. *Id.* ¶ 3.

559. *Id.* ¶¶ 4, 11-18.

560. *Id.* ¶¶ 4, 21-28.

561. *Id.* ¶¶ 4, 21-28.

562. *Id.* ¶¶ 4, 21-27.

563. *Id.* ¶ 354. Criminal liability for command responsibility "may arise either out of the positive acts of a superior, referred to as direct command responsibility, or from culpable omissions, indirect command responsibility." *Id.*¶ 333. The latter arises in those instances in which there is a duty to prevent or to repress the unlawful conduct of subordinates. *Id.* ¶ 334.

564. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 354 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

565. *Id.*

566. *Id.* ¶ 370. The Tribunal abandoned the traditional view that staff officers could not be held liable under the doctrine of command responsibility. *See id.* ¶¶ 365-69. The Court

cautioned that command liability should not be imposed upon individuals with formal authority who lacked effective control.[567] The duty of an individual endowed with the formal or informal authority to curb criminal conduct extended to his subordinates, as well as to those considered to be under his control, such as military units operating within the superior's territorial command, the residents of occupied territories and prisoners of war.[568]

The Court also ruled that the employment of the term "superior" in Article 7(3), in juxtaposition with Article 7(2)'s affirmation of the criminal responsibility of a "'Head of State,'" "'Government official'" or "'responsible Government official,'" indicated that criminal liability extended beyond military commanders to encompass political leader and other civilians in positions of authority.[569] The Tribunal noted that civilians were liable in those instances in which they exercised a measure of control over their subordinates analogous to that of military commanders.[570] The Trial Chamber interpreted the requirements of Article 7(3) in light of customary international law and ruled that a superior possessed the requisite *mens rea* to incur criminal responsibility in those instances in which: he possessed actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes;[571] or he possessed information which, at a minimum, provided notice of the need for an additional investigation in order to determine whether such crimes had been committed or were about to be committed by subordinates.[572] The Court stressed that the doctrine of command responsibility did not provide for strict liability.[573]

The Trial Chamber made a subtle innovation in the law of command responsibility by ruling that in the absence of direct knowledge that a superior officer's constructive knowledge of the offenses could not be presumed as a matter of law.[574] Instead, actual awareness must be

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explained that a chief of staff lacking formal powers of command might be deemed to possess "powers of control over the actions of subordinates." *Id.* ¶ 370.

567. *Id.* ¶ 370.

568. *Id.* ¶¶ 371-72, 378. Control was defined as the "material ability to prevent and to punish the commission of offenses." *Id.* ¶ 378.

569. *Id.* ¶ 356.

570. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 378 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

571. *Id.* ¶ 383.

572. *Id.*

573. *Id.*

574. *Id.* ¶¶ 384-86.

established by the totality of circumstantial evidence.[575] The Trial Chamber enumerated various indicia listed by the Commission of Experts which may be considered. These included the number, character, scope, duration and time of the illegal acts; the number and type of troops involved; the logistics and tactical tempo of the operation; the *modus operandi* of other illegal acts; the officers and staff involved; and the location of the commander at the time of the crimes.[576]

The "reason to know" standard was interpreted in accordance with what the Trial Chamber considered to be the ordinary meaning of the term.[577] The Court elaborated that a superior only may be held criminally responsible in those instances in which specific facts were available which would provide notice of offenses.[578] This information need not definitively establish the commission of the delicts; it was sufficient that a superior was placed on notice that an additional investigation was required to determine whether offenses were being committed or were about to be committed by subordinates.[579] The Trial Chamber stressed that this was the position of customary international law at the time of the commission of the crimes before the Court.[580]

The Trial Chamber explained that this notice standard was based on the policy that the law should not condone a superior remaining willfully unaware of the acts of his or her subordinates.[581] A superior who disregarded information within his or her actual possession which compelled the conclusion that a criminal offense may be, or was about to be committed, was guilty of a dereliction of duty.[582] What of a situation in which a commander lacked information by virtue of a failure to supervise subordinates? The Trial Chamber noted that the jurisprudence immediately following the Second World War affirmed the duty of commanders to remain informed of the activities of their subordinates.[583] However, in the view of the Trial Chamber, the Geneva Protocol, which was deemed to

575. *Id.* ¶ 386.

576. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 386 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

577. *Id.* ¶ 393.

578. *Id.*

579. *Id.*

580. *Id.* The Trial Chamber made no finding as to the present content of customary international law. *Id.*

581. *Id.* ¶ 387.

582. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 387 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

583. *Id.* ¶ 388.

reflect customary international law at the time of the offenses at issue in *Delalic,* failed to provide for the imposition of liability in such cases.[584]

The legal duty resting upon superior authorities required that they take all necessary and reasonable measures to prevent the commission of offenses.[585] In the event that such crimes already had been committed, there was a duty to punish the perpetrators.[586] The Trial Chamber held that the remedial actions required of superiors were so inextricably related to the facts of each situation that it was unrealistic to attempt to provide a specific legal standard.[587] The Court, however, stressed that a superior was obliged to take those measures which were within his powers.[588] At the same time that a commander was not required to undertake the impossible, the Tribunal took the innovative step of ruling without explanation that the lack of formal legal competence to prevent or to repress a crime did not constitute a complete defense.[589]

The Trial Chamber held that proof of causation was not an independent requirement for the imposition of command culpability.[590] As a conceptual matter, the Tribunal noted that there was an inherent causal connection between a commander's failure to fulfill his duty to intervene and the commission of war crimes by subordinates.[591] There also may be a causal connection between the failure of an official to have punished past crimes and future criminal conduct.[592] However, the Chamber observed that there was no causal connection "between an offense committed by a subordinate and the subsequent failure of a superior to punish the offense."[593] This, according to the Trial Chamber, demonstrated the

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584. *Id.* ¶¶ 391-92.

585. *Id.* ¶ 394.

586. *Id.*

587. *Id.* ¶ 394.

588. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 395 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

589. *Id.* The superior was required take measures that are within his "material possibility." *Id.* "The lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior." *Id.*

590. *Id.* ¶ 398.

591. *Id.* ¶ 399.

592. *Id.* ¶ 400.

593. *Id.*

absence of a causality requirement as an independent element of the doctrine of superior responsibility.[594]

The Tribunal concluded that Zejnil Delalic lacked authority over the Celebici prison, camp commander or personnel and could not be convicted under the doctrine of command responsibility.[595] Delalic had returned from overseas and had devoted his considerable wealth to the Bosnian Muslim cause.[596] He gradually gained authority and influence and, in May 1992, the local civilian War Presidency appointed him to coordinate relations with the Konjic Municipality Defense Forces.[597] Delalic's primary responsibility was the provision of logistical support for various units of the armed forces;[598] there was no evidence that he was in a command position or exercised informal authority over the Celebici prison camp.[599]

In July 1992, Delalic was appointed Commander of Tactical Group I with authority over the military formations of Bosnia-Herzegovina in the Konjic region.[600] The Tribunal stressed that this was a temporary combat formation which was comprised of roughly 1,200 troops and that Delalic did not exercise territorial command in the region.[601] The Court clarified that no non-combat units were attached to the Tactical Group and that Delalic was not authorized to issue orders to the commander of the Celebici prison camp.[602] The prosecution pointed out that Delic, in fact, had issued two orders to the commander of the Celebici prison camp directing that a three member commission should be established to interrogate prisoners.[603] However, the Trial Chamber ruled that Delalic had been functioning as an intermediary for higher authorities and that conveying these commands had not expanded the scope of his authority.[604]

In sum, the prosecution failed to establish beyond a reasonable doubt that Delalic exercised formal or informal authority over the Celebici prison camp administration and guards and possessed the duty to prevent

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594. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 400 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

595. *Id.* ¶ 657.

596. *Id.* ¶ 651.

597. *Id.* ¶ 659.

598. *Id.* ¶ 664.

599. *Id.* ¶ 669.

600. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 687 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

601. *Id.* ¶¶ 688-90.

602. *Id.* ¶ 693.

603. *Id.* ¶ 692.

604. *Id.* ¶¶ 696-700.

or punish criminal acts.[605] Delalic likely possessed knowledge of events in the camp;[606] command culpability nevertheless could not be premised on mere influence or persuasive power.[607]

The Trial Chamber imposed command responsibility on Zdravko Mucic.[608] The Tribunal noted that while it was uncertain whether Mucic was a military commander or a civilian administrator, that his status was not controlling since the term superior in the ICTY statute encompassed civilian as well as military authorities.[609] Formal appointment was an important indicator of command authority, but the actual exercise of authority and control over subordinates, in the absence of formal appointment, was sufficient for the imposition of criminal culpability.[610]

The defense stressed that there were no written or formal documents recognizing that Mucic, was commander of the camp.[611] The Tribunal, however, determined that Mucic was the acknowledged *de facto* head of the camp.[612] This was based on Mucic's statements and admissions,[613] the observations of detainees,[614] and journalists,[615] his relations with other officials,[616] and, most importantly, Mucic's assertion of disciplinary control over the guards.[617] He also exercised his discretion to determine which Serbian prisoners would be released, transferred,[618] or receive visitors.[619] In short, Mucic enjoyed the recognition, powers and functions of command.[620]

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605. *Id.* ¶ 703-04.

606. *See* Prosecutor v. Delalic, Case No. 96-21-T, ¶ 678 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

607. *Id.* ¶ 648.

608. *Id.* ¶ 775.

609. *Id.* ¶ 735.

610. *Id.* ¶ 736.

611. *Id.* ¶ 739.

612. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 737 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

613. *Id.* ¶¶ 737-38.

614. *Id.* ¶ 750.

615. *Id.* ¶ 749.

616. *Id.* ¶ 748.

617. *Id.* ¶ 765.

618. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 764 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

619. *Id.* ¶ 765.

620. *Id.* ¶ 750.

Mucic conceded that he had been aware and had personally observed that the guards under his command were committing crimes.[621] Witnesses corroborated that he was present during the interrogation and abuse of detainees.[622] The Trial Chamber also observed that the crimes committed in the Celebici prison camp had been so frequent and notorious that it would have been impossible for Mucic not to have been aware or to have heard about them.[623] He nevertheless failed to take necessary and appropriate measures to prevent or to punish crimes committed within the Celebici camp.[624] Mucic neglected to issue instructions to the guards concerning the treatment of detainees, [625] failed to establish a system to monitor or to punish violations of the international humanitarian law of war,[626] and neither investigated nor punished the mistreatment of detainees.[627] The effectiveness of any protective orders which he may have issued were limited by the fact that Mucic typically was absent from the camp during the evening; the period in which detainees typically were abused.[628]

Mucic was determined to have participated in the maintenance of inhumane conditions and to have failed to prevent the violent acts of his subordinates, thereby subjecting the detainees of the Celebici prison camp to an atmosphere of terror.[629] As a result, he was convicted of willfully causing great suffering or serious injury to the body or health of detainees.[630]

The Trial Chamber acquitted Hazim Delic of command responsibility.[631] The Tribunal noted that the detainees viewed Delic as a formidable figure who exercised substantial influence over the other guards in the camp.[632] There was evidence that during Mucic's absence that Delic had

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621. *Id.* ¶ 769.

622. *Id.*

623. *Id.* ¶ 770.

624. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 770 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

625. *Id.* ¶ 773.

626. *Id.* ¶¶ 770, 772.

627. *Id.* ¶ 772.

628. *Id.* ¶ 773.

629. *Id.* ¶ 1237.

630. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 1237 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

631. *Id.* ¶ 810.

632. *Id.* ¶ 800.

assumed control of the camp[633] and that he had issued orders to kill, torture and beat inmates and had organized their interrogation.[634] The Trial Chamber concluded that the prosecution failed to establish beyond a reasonable doubt that Delic had been within the chain of command at the Celebici prison camp with the power to issue orders to subordinates or to prevent or to punish the criminal acts of subordinates.[635] The Court attributed his influence over the other guards to their fear of resisting the demands of such an intimidating and morally malevolent individual.[636]

In mitigation of Mucic's punishment, the Trial Chamber observed that Celebici was established to detain Serbs whose loyalty to the newly-established Bosnian State was in doubt.[637] The Konjic municipality was strongly anti-Serbian and Mucic, a Croat, was understandably apprehensive that the majority Muslim population might view him as sympathetic to the Serbian cause.[638] The Court recognized that considerations of self-preservation likely prevented Mucic from taking stronger measures to prevent the mistreatment of detainees.[639] There also was no evidence that Mucic directly participated in torture and murder, despite the fact that he was positioned to exercise unlimited and unrestrained power and authority.[640] In fact, there was an indication that he had saved some detainees and had prevented the rape of a thirteen year old girl to whom he subsequently had given money and had assisted to escape.[641] He also implored the Bosnian government to provide food to feed detainees.[642] The Trial Chamber observed that in light of Mucic's restraint that his transgressions might be viewed as a manifestation of human frailty rather than venality; a failure and fear of exercising his authority to assist the detainees of the Celebici prison camp.[643]

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633. *Id.* ¶ 801.

634. *Id.* ¶¶ 804-05.

635. *Id.* ¶ 810.

636. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 806 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty. Essad Landzo was convicted of willful murder, willfully causing great suffering or serious injury and of the brutal treatment of detainees. *Id.* ¶ 1272.

637. *Id.* ¶ 1241.

638. *Id.* ¶ 1245.

639. *Id.*

640. *Id.* ¶¶ 1240, 1248.

641. *Id.* ¶ 1247.

642. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 1247 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

643. *Id.* ¶ 1248.

The defense compared Mucic to Field Marshall von Leeb who had been sentenced to three years in prison for having implemented the Barbarossa Jurisdiction Order.[644] This authorized the summary execution of civilians suspected of having attacked German troops as well as the infliction of collective penalties on villages which were thought to have harbored terrorists.[645] Von Leeb conveyed this directive through the chain of command and set the slaughter in motion; he had no further involvement in the killings.[646]

The Trial Chamber distinguished Mucic's degree of complicity, noting that he had been closely involved in atrocities and abuse.[647] According to the Trial Chamber, Mucic had intentionally neglected to supervise his subordinates thereby condoning and facilitating the abuse of detainees.[648] He absented himself from the camp in the evening hours in order to position himself to later plead that he had been unaware of criminal conduct.[649] The Trial Chamber proclaimed that it would constitute "a travesty of justice" as well as "an abuse of the concept of command authority" to permit Mucic to rely on this calculated neglect of his duties in mitigation of punishment.[650] In fact, Mucic's conscious creation of an alibi constituted a dereliction of an essential duty and comprised an aggravating factor.[651] On the basis of these facts, the Trial Chamber observed that the three-year sentence meted out to von Leeb would be inadequate.[652] The Court also observed that in imposing a sentence that the gravity of Mucic's offense must be considered, but that retribution should not constitute the

644. *Id.* ¶ 1249. *See generally supra* notes 302-15.

645. *See* Prosecutor v. Delalic, Case No. 96-21-T, ¶ 1249 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

646. *Id.*

647. *Id.* ¶ 1250.

648. *Id.*

649. *Id.*

650. *Id.*

651. Prosecutor v. Delalic, Case No. 96-21-T, ¶ 1250 (Int'l Crim. Trib. for the Former Yugoslavia 1998), http://www.un.org/icty.

652. *Id.* The Trial Chamber noted that, at trial, that Mucic had demonstrated a casual and perfunctory attitude towards his duties in the Celebici prison camp. He also intimidated witnesses and attempted to influence their testimony. The Tribunal observed that Mucic's attitude during the proceedings mirrored the "casual and perfunctory attitude which he displayed towards his duties in the Celebici prison-camp." *Id.* ¶ 1251.

sole determining factor.[653] He was convicted on seven counts and sentenced to a concurrent term of seven years in prison.[654]

In summary, *Delalic* both clarified and further confused the jurisprudence of command responsibility. The decision established that responsibility may be imposed on civilians or members of the military exercising *de facto* was well as *de jure* responsibility.[655] As indicated by the discussions of Mucic and Delic, *de facto* authority was measured by various indicia of authority based on the totality of the circumstances.[656] The touchstone was whether an individual exercised effective control over subordinates rather than a formal title or designation.[657] Mere influence or persuasive ability was not sufficient.[658]

The Trial Chamber also ruled that the knowledge standard was satisfied by either actual or constructive knowledge or specific information which provided notice that additional inquires were required.[659] This was a relaxation of the gross negligent standard in Protocol I.[660] Constructive knowledge was not presumed; instead it was to be determined by circumstantial evidence.[661] The Trial Chamber refused to recognize that superiors possessed an affirmative duty to inform themselves of criminal conduct.[662] Proof of causation was not an independent element of command responsibility.[663] The decision further diverged from the prevailing standard by articulating that a commander's obligation to take reasonable and necessary remedial measures, while dependent on the facts of each situation,[664] was not circumscribed by the scope of an individual's

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653. *Id.* ¶ 1252.

654. *Id.* ¶ 1285 (Judgment). *Id.* ¶ 1252. A commander's abuse of his or her position may be considered an aggravating factor. At the same time, it might be mitigating factors that a superior acted to alleviate harm, was distant from the scene of the crime and that his awareness was based on constructive knowledge. *Id.* ¶ 1220. A defendant would not be sentenced for both command responsibility and for participating in an offense. *See id.* ¶¶ 1221-23.

655. *See supra* notes 563-68 and accompanying texts.

656. *See supra* notes 613-20 and accompanying texts.

657. *See supra* notes 566-67 and accompanying texts.

658. *See supra* notes 635-36 and accompanying texts.

659. *See supra* notes 577-80 and accompanying texts.

660. *See supra* notes 524-25, 571-84 and accompanying texts.

661. *See supra* notes 574-76 and accompanying texts.

662. *See supra* notes 583-84 and accompanying texts.

663. *See supra* notes 590-594 and accompanying texts.

664. *See supra* notes 585-87 and accompanying texts.

formal power and authority.[665] At a minimum, a commander was required to issue cautionary orders, to establish a system to monitor violations and to investigate and to punish war crimes.[666]

B. Blaskic, Aleksovski and Kordic

In *Blaskic,* General Tihomir Baskic, former commander of the Croatian armed forces headquarters in central Bosnia,[667] was convicted of various offenses, including command responsibility for the death, destruction, cruel and inhuman treatment and forced departure of the Muslim population of the Lasva Valley and adjacent municipalities as well as the pillage and plunder of dwellings, personal property and religious monuments.[668]

The decision elaborated on the jurisprudence of command responsibility, reiterating that commanders may incur legal liability for crimes committed by individuals who were not their direct subordinates over whom they exercised "effective control."[669] The Court affirmed that the essential factor was the "material ability" to control combatants through the issuance of orders or disciplinary action or through the submission of reports to commanders authorized to undertake the "proper measures."[670]

The knowledge of superiors, as noted in *Delalic*, may not be presumed. Instead such awareness must be established through either direct or circumstantial evidence.[671] The Trial Chamber, however, diverged from their brethren in *Delalic* and ruled that a commander was required to exercise due diligence in the exercise of his duties.[672] Ignorance was not a defense in those instances in which the absence of knowledge resulted from a failure to take affirmative steps to remain informed of the actions of subordinates.[673] In such circumstances, a commander "had reason to know within the meaning of the Statute."[674]

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665. *See supra* notes 588-89 and accompanying texts.

666. *See supra* notes 631-34 and accompanying texts.

667. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶¶ 9, 112 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

668. *Id.* ¶ 754.

669. *Id.* ¶ 301.

670. *See id.* ¶ 302.

671. *Id.* ¶ 307.

672. *Id.* ¶ 332. *See supra* notes 583-84 and accompanying texts.

673. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 332 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

674. *Id.*

The Trial Chamber also clarified that the reasonableness of a commander's remedial measures to prevent and to punish criminal conduct was based on the extent of his effective control.[675] For instance, a commander with limited authority may discharge this obligation by reporting the matter to competent authorities.[676] In addition, an accused may not compensate for his failure to prevent criminal conduct by later punishing his subordinates; these are complementary rather than alternative obligations.[677] A failure to punish, where causally related to the commission of subsequent crimes, may constitute the offense of instigation.[678] However, as noted in *Celebici*, this causal connection need not be established in order to constitute liability for command responsibility.[679]

In analyzing the facts, the Trial Chamber observed that, in 1992, that the Croatian military initiated a campaign of discrimination and harassment against the Muslim residents of the Lasva Valley in order to insure demographic dominance in central Bosnia.[680] This escalated, on April 16, 1993, when General Blaskic issued an order instructing troops under his command to enter and to occupy Ahmici and three other villages in anticipation of an alleged attack by Muslim forces.[681] The Court, however, stressed the lack of evidence of an ongoing or imminent Muslim military initiative.[682] The Croatian commandos encountered no resistance in the villages:[683] civilians were collected and shot at point blank range,[684] dwellings and stables were set ablaze,[685] and religious schools and Mosques were destroyed.[686]

Blaskic was determined to have exercised authority over the special and police units and conventional combatants involved in these operations

675. *Id.* ¶ 335.

676. *Id.*

677. *Id.* ¶ 336.

678. *Id.* ¶ 339.

679. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 339 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

680. *See id.* ¶¶ 366-67, 370, 380-83.

681. *Id.* ¶¶ 435 437.

682. *Id.* ¶¶ 407-09.

683. *Id.* ¶ 409.

684. *Id.* ¶ 414.

685. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶¶ 412, 418 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

686. *Id.* ¶¶ 419-23.

based on the territorial nature of his authority[687] and the assimilation of these combatants into his command.[688] The Trial Chamber also pointed to the coordinated character of these systematic attacks against Muslim civilians[689] which indicated that they had been undertaken in accordance with orders issued by the accused.[690]

The regular Croatian forces (HVO) were indisputably within Blaskic's chain of command.[691] The Military Police Fourth Battalion was attached to Blaskic for specific combat missions.[692] The evidence indicated that this unit complied with Blaskic's orders, even when directed to cooperate with international observers.[693] Although Blaskic concededly lacked the power to directly punish members of the Fourth Police Battalion, he was obligated to contact the relevant unit officers as well as the higher authorities in the Defense Department in the event of transgressions.[694] Blaskic also was determined to have command of the Vitezovi special military unit.[695] The unit was formally subordinated to the Defense Minister who, along with the commander of the Vitezovi, recognized Blaskic's authority.[696] He issued orders to the unit on matters ranging from organization to the conduct and management of troops.[697] The Trial Chamber also observed that the Vitezovi command could not have planned, organized or obtained the explosives and artillery utilized in their combat actions absent Blaskic's assistance.[698]

The Court noted that Blaskic need not have possessed a clear criminal intent to expel and to exterminate Muslim civilians in order to be found criminally culpable.[699] The accused was well-aware from past reports that

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687. *Id.* ¶ 451. Blaskic possessed the technological capacity to communicate with forces in the field. *Id.* ¶ 448.

688. *Id.* ¶¶ 449-65. *See generally* ¶¶ 519-28.

689. *Id.* ¶ 467

690. *Id.* ¶¶ 469-72.

691. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 517 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

692. *Id.* ¶¶ 459-60.

693. *Id.* ¶ 463.

694. *Id.* ¶ 464. The obligation on the accused to report any abuse committed to the competent authorities "sufficed . . . to establish command responsibility." *Id.*

695. *Id.* ¶ 518.

696. *Id.* ¶¶ 527-28.

697. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 522 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

698. *Id.* ¶¶ 529-30.

699. *Id.* ¶ 474.

various units included troops with a history of committing war crimes and, in fact, issued orders requiring the removal of these soldiers from combat.[700] However, Blaskic failed to insure the implementation of these commands and wantonly and recklessly permitted the troops to participate in operations against Muslim villages.[701]

Blaskic was informed of the atrocities within two to four days of their occurrence.[702] Yet, he failed to take reasonable and appropriate remedial measures.[703] Blaskic made no effort to contact the commander of the Military Police, although he suspected that this unit had been involved in the crimes.[704] In addition, he neglected to seal off the area in order to preserve evidence, request autopsies or to interview the victims.[705] Blaskic also refused to cooperate with international investigative efforts and, instead, ordered an internal inquiry which, by his own admission, was inadequate and incomplete.[706] A second investigation was initiated over a year later which was never presented in court.[707] Blaskic's sole prophylactic measure was to issue various protective orders following the attack.[708] The Trial Chamber, however, noted that the directive prohibiting the burning of homes, like the others, had been issued too late to assist the Muslim victims.[709] In the end, not a single member of Blaskic's command was punished by Croatian military authorities for the crimes committed in the Ahemici, Pirici, Santici and Nadioci villages.[710]

In sum, Blaskic ordered attacks that resulted in massacre.[711] He nevertheless failed to take measures to prevent or to punish the crimes which he reasonably knew were about to be, or had been, committed.[712] The military assault directed by Blaskic next targeted civilians in other areas of the

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700. *Id.*

701. *Id.; but see id.* ¶ 476.

702. *Id.*¶¶ 479-81.

703. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 477 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

704. *Id.* ¶ 488.

705. *Id.*

706. *Id.* ¶ 492.

707. *Id.* ¶ 493.

708. *Id.* ¶ 486.

709. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶¶ 486-87 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

710. *Id.* ¶ 494.

711. *Id.* ¶ 495.

712. *Id.* ¶ 477.

Lasva Valley and surrounding villages.[713] In discussing the attacks on the villages of Loncari and Ocehnici, the Trial Chamber noted that these assaults, like those launched against the villages in the municipalities of Vitez and Kiseljak, involved "unlawful confinement of the men of fighting age, rounding up then deportation of the elderly, women and children, intimidation of civilians by murder and beating, and systematic torching and pillage of homes and farms."[714] The Trial Chamber stressed that in these actions that Blaskic deployed forces which "he knew, according to his own testimony, were, at least in part, difficult to control, and at the very time when they were being called into question for the perpetration of earlier crimes."[715]

Blaskic also was aware that Muslims were being detained by troops under his control within the area of his territorial command.[716] The detainees allegedly were deployed as human shields, compelled to dig trenches and subjected to physical and mental violence and inhuman treatment, including the deprivation of food and water.[717] The Trial Chamber held that Blaskic had reason to know of this abuse since two of the facilities staffed and commanded by his troops were located adjacent or near his headquarters and his subordinates must have discussed the conditions in these complexes.[718] Blaskic also conceded that he was aware that women and children were being detained at a primary school where the Vitezovi unit was billeted.[719] Yet, the Trial Chamber observed that Blaskic seemed indifferent to the fate of the detainees and failed to meet his obligation of reasonable diligence in pursuit of information on their conditions of detention.[720]

The Trial Chamber noted that it might be considered in mitigation that a commander only possessed constructive knowledge.[721] Yet, in this case, Blaskic held "more than a constructive knowledge of the crimes" which he may have ordered, but certainly condoned.[722] In addition, in cases

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713. *See id.* ¶ 579. *See also id.* ¶¶ 499, 559-60, 588-92, 623, 661.

714. *Id.* ¶ 573.

715. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 561 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

716. *Id.* ¶¶ 722, 723.

717. *See id.* ¶¶ 680-82.

718. *Id.* ¶¶ 730-31.

719. *See id.* ¶ 732.

720. *Id.* ¶ 733.

721. Prosecutor v. Blaskic, Judgment, Case No. IT-95-14, ¶ 788 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.unorg.icty.

722. *Id.*

like *Blaskic*, in which a commander failed to prevent a crime or to punish the perpetrators, the Trial Chamber determined that the accused merited a heavier sentence than the subordinates who carried out the crime.[723] The commander's actions in these cases conveyed a measure of tolerance or even approval which created the risk of contributing to the continuance of such offenses.[724] Blaskic was sentenced to forty-five years in prison.[725]

In summary, *Blaskic* imposed liability on commanders who exercised both formal authority and effective control over combatants.[726] The latter was measured by a range of factors, the most important of which was the capacity to impose some form of discipline.[727] *Blaskic* also held that the knowledge component required either actual or constructive awareness or a failure to monitor the maneuvers of subordinates.[728] The obligation to undertake reasonable remedial measures varied in accordance with the nature and scope of a superior's authority over a subordinate.[729]

In a related prosecution, Zlato Aleksovski was convicted of command responsibility for the mistreatment of Muslim internees at the Kaonik detention facility in the Lasva Valley.[730] The case arose out of the Croatian Defense Council's detention and confinement of nearly four hundred Muslim men at the Kaonik compound for roughly two weeks in January 1993.[731]

In discussing command culpability, the Court observed that the doctrine of superior responsibility was not based on the imposition of liability for the acts of others, but was premised on the failure of an official to fulfill his obligation to prevent or to punish criminal conduct.[732] This extended to military as well as to civilian authorities who exercised a degree of command and control which was similar to that of their military brethren.[733]

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723. *Id.* ¶ 789.

724. *Id.*

725. *Id.* ¶ 790 (Disposition).

726. *See supra* note 669 and accompanying text.

727. *See supra* note 670 accompanying text.

728. *See supra* notes 671-74 and accompanying texts.

729. *See supra* notes 675-76 and accompanying texts.

730. *See* Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶¶ 1, 230 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty.

731. *Id.* ¶ 23.

732. *Id.* ¶ 72.

733. *Id.* ¶¶ 73, 75.

The Tribunal observed that hierarchical power was the touchstone of command responsibility.[734] A civilian may be characterized as a superior in those instances in which he possessed the *de jure* or *de facto* capacity to issue orders to prevent an offense and to punish the perpetrators.[735] A civilian authority, however, need not possess the authority to sanction analogous to a military official; this would unduly limit the scope of the doctrine of command culpability so as to exclude most civilians.[736] As a result, it was sufficient that a civilian official possessed the ability to transmit reports to the appropriate authorities who were likely to investigate and, where justified, to initiate disciplinary or even criminal sanctions.[737]

The Trial Chamber followed *Delalic* and *Blaskic* and was reluctant to presume knowledge.[738] The Chamber, however, stressed that an individual's superior position was a "significant indicium" that he was aware of the crimes committed by his subordinates.[739] The weight to be accorded this "indicium" depended, in part, on geographical and temporal circumstances.[740] Thus, the commission of a crime in the immediate proximity of a superior would "establish a significant indicium that he had knowledge of the crime," particularly in the event that it was repeatedly committed.[741]

The Trial Chamber concluded that Aleksovski , whatever his formal title, was accorded the status of prison warden.[742] Despite the fact that there was no written designation, the evidence demonstrated that Aleksovski had been officially appointed by the Ministry of Justice and that he had identified himself as warden to various witnesses.[743] The

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734. *Id.* ¶ 78.

735. *Id.*

736. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty. *But see supra* note 570 and accompanying text.

737. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty. "Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy; it does not apply to the civilian authorities." *Id.* ¶ 78.

738. *Id.* ¶ 79.

739. *Id.* ¶ 80.

740. *Id.*

741. *Id.*

742. *Id.* ¶ 93.

743. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 93 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty.

Travnik military tribunal, which possessed jurisdiction over Kaonik, also recognized Aleksovski's formal position in various communications.[744]

There was no clear consensus as to whether Aleksovski was a civilian or a member of the military.[745] The Trial Chamber, however, was clear that Aleksovski had acted as *de facto* head of the prison: he established the institutional rules, received representatives of international and European monitoring groups and signed receipts for materials supplied by humanitarian organizations.[746] Aleksovski also issued orders for the transfer of prisoners and assumed responsibility for prison conditions, hygiene and the health and welfare of detainees.[747]

Was Aleksovski liable for mistreatment within the compound? The Trial Chamber determined that Aleksovski had exercised effective control over the prison guards, who were members of the military police.[748] The guards complied with Aleksovski's orders.[749] He also was authorized to initiate disciplinary or criminal proceedings against guards by filing complaints with the military police commander and president of the Travnik military tribunal.[750] The Trial Chamber importantly held that the fact that the guards were concurrently subjected to another authority did not detract from the fact that the accused was their superior within the confines of the Kaonik prison.[751] On the other hand, there was no evidence that the accused was positioned to issue orders to the HVO soldiers who entered the compound to remove detainees.[752] Aleksovski, however, could initiate disciplinary or criminal proceedings by contacting their superiors.[753] The Trial Chamber, in reviewing the evidence, concluded that the defendant was not liable for failing to prevent or to punish the acts

744. *Id.*

745. *Id.* ¶ 100.

746. *Id.* ¶ 101.

747. *Id.*

748. *Id.* ¶ 103.

749. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 104 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty.

750. *Id.* ¶ 105.

751. *Id.* ¶ 106.

752. *Id.* ¶¶ 108-09.

753. *Id.* ¶ 110.

perpetrated by the HVO,[754] including the utilization of Muslim detainees to dig trenches or to serve as human shields outside of the camp.[755]

The accused had been resident inside the prison for some weeks and, in the view of the Trial Chamber, must have been aware of the continual ill-treatment of detainees.[756] He conceded in a conversation that some guards whose relatives had been killed during combat tended to exact revenge on the detainees.[757] The Trial Chamber concluded that Aleksovski had been aware of the rules of the international humanitarian law and had been apprised of the physical and psychological abuse in the Kaonik compound.[758] Yet, he took no measures to prevent or punish these crimes: he failed to submit reports documenting assaults to the military police commander or to the president of the Travnik military tribunal.[759] In fact, rather than curbing crime, the accused, at times, was present during the abuse of internees,[760] abuse which the Trial Chamber characterized as an "outrage upon personal dignity" and "degrading or humiliating treatment."[761]

As for the harsh conditions of confinement, Aleksovski was determined to have neither harbored an intent to create or to condone this deprived and dilapidated atmosphere.[762] On the contrary, Aleksovski was found to have taken all available steps to ameliorate these conditions, including the distribution of blankets and the provision of hygienic conditions of confinement.[763] The Trial Chamber also concluded that the overpopulation and inadequate resources resulted from circumstances beyond Aleksovski's control.[764]

The Appellate Chamber increased Aleksovski's sentence from two and a half[765] to seven years in prison.[766] The Court stressed that while

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754. *Id.* ¶ 119.

755. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty. Aleksovski's authorization was not required to remove the detainees. He could, however, object on health grounds. *Id.* ¶ 135.

756. *Id.* ¶ 114.

757. *Id.*

758. *Id.*

759. *Id.* ¶ 117.

760. *Id. See also id.* ¶ 224.

761. Prosecutor v. Aleksovski, Case No. It-95-14/1-T, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia 1999), http://www.un.org/icty.

762. *Id.* ¶ 219.

763. *Id.*

764. *Id.*

765. *Id.* ¶ 244.

Aleksovski occupied a secondary position in the command structure, that he was nonetheless the commander of the prison compound and could have prevented and punished the illicit conduct.[767] Aleksovski did not merely tolerate these delicts; his direct participation in the selection of detainees to be used in digging trenches and as human shields encouraged the continued commission of these crimes.[768]

Aleksovski clarified that command responsibility was applicable to both military and civilian officials[769] exercising *de facto* as well as *de jure* authority.[770] The Trial Chamber also affirmed that *de facto* authority was to be measured by various factors, the most important of which was the capacity to prevent and to punish an offense or to report disciplinary violations to competent authorities.[771] However, the Trial Chamber suggested that the latter was not controlling in those instances in which an official lacked the capacity to issue binding orders and other indicia of authority.[772] The Court was reluctant to impute knowledge, but ruled that command position was an important factor to consider in adjudging constructive knowledge.[773] In addition, *Aleksovski* held that multiple individuals at varying levels of the administrative hierarchy may be held concurrently liable under the doctrine of command culpability.[774]

The effective control standard for *de jure* and *de facto* authority was affirmed in *Kordic*.[775] Dario Kordic was Vice-President of the separatist Croatian Republic of Herceg Bosna and President of the Croatian Democratic Union of Bosnia and Herzegovina, the principal Bosnian Croat political party.[776] Kordic was charged with responsibility as a superior for the acts of the Croatian Defense Council in the ethnic cleansing of Central Bosnia.[777] Kordic regularly appeared in a military uniform, was referred to as "Colonel" and was surrounded by military

766. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, ¶ 191 (Int'l Crim. Trib. for the Former Yugoslavia 2000), http://www.un.org/icty.

767. *Id.* ¶ 184.

768. *Id.* ¶ 183.

769. *See supra* note 733 and accompanying text.

770. *See supra* note 735 and accompanying text.

771. *See supra* notes 746-47 and accompanying texts.

772. *See supra* notes 752-55 and accompanying texts.

773. *See supra* notes 738-41 and accompanying texts.

774. *See supra* note 751 and accompanying text.

775. Prosecutor v. Kordic, Case No. IT-95-14/2-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.or/icty.

776. *Id.* ¶ 5(d).

777. *Id.* ¶¶ 5(f), 520.

guards.[778] He issued orders for military equipment, supplies and the appointment of personnel,[779] represented the Croatian forces in negotiations with United Nations forces,[780] and exercised control over roads and roadblocks[781] and prisoners.[782] Most importantly, Kordic participated in planning military operations,[783] was present during attacks,[784] and provided political authorization for the ethnic cleansing of the Lasva Valley.[785] The Trial Chamber concluded that despite Kordic's "tremendous influence and power" in Central Bosnia[786] and issuance of orders and exercise of authority over military forces, that he was a civilian who was not part of the formal military command structure.[787] He also lacked the central requisite of command, the effective control to prevent or to punish offenses.[788] The Trial Chamber, in acquitting Kordic of command responsibility, stressed "that great care must be taken in assessing the evidence to determine command responsibility in respect to civilians, lest an injustice is done."[789]

C. *The ICTY Jurisprudence of Command Responsibility*

The Appellate Chamber in *Delalic* summarized and clarified the jurisprudence of command responsibility under the ICTY Statute.[790] The Chamber affirmed that command responsibility under Article 7(3) encompassed both *de jure* and *de facto* authority[791] exercised by civilian as

778. *Id.* ¶¶ 546, 556.

779. *Id.* ¶¶ 553-54.

780. *Id.* ¶ 539.

781. Prosecutor v. Kordic, Case No. IT-95-14/2-T, ¶ 588 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.or/icty.

782. *Id.* ¶ 589.

783. *Id.* ¶¶ 577-86, 656, 761.

784. *Id.* ¶ 726.

785. *Id.* ¶¶ 631, 642.

786. *Id.* ¶ 838.

787. Prosecutor v. Kordic, Case No. IT-95-14/2-T, ¶ 839 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.or/icty.

788. *Id.* ¶ 841.

789. *Id.* ¶ 840.

790. Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 192 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty.

791. *Id.*

well as military authorities.[792] Central in determining command responsibility was the effective control to prevent or to punish criminal conduct[793] rather than formal position.[794] A Court, however, was free to presume, pending proof to the contrary, that an individual with official authority wielded effective control.[795] The *de facto* superior is required to exercise "substantially similar powers of control over subordinates" as *de jure* authorities[796]

The concept of command responsibility was based on the notion of direct or indirect hierarchical control.[797] The perpetrator was not required to be part of a subordinate unit within a direct and formal chain of command.[798] The Appellate Chamber stressed that the issue was not whether the accused was the direct or formal subordinate of the accused, but whether the accused was "senior" in "some sort of formal or informal hierarchy to the perpetrator."[799] The exercise of effective control to prevent or to punish crimes was the "minimum requirement for the recognition of the superior-subordinate relationship" which typically entailed a subordinate relationship.[800] The Appellate Chamber recognized that there well might be a scenario in which an individual exercised effective control over a combatant of equal rank. However, the Chamber noted that the doctrine of command responsibility extended legal liability

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792. *Id.* ¶ 195. The term command normally means powers that attach to a military superior while the term control may encompass powers exercised by civilian leaders. The latter has been accepted as part of the jurisprudence of the Tribunal. *Id.* ¶ 196.

793. *Id.* ¶¶ 197-98.

794. *Id.* ¶ 197.

795. *Id.* The actual exercise of authority in the absence of formal appointment is sufficient for the purpose of incurring criminal responsibility provided that the *de facto* superior exercises actual power of control. *Id.* ¶ 206. The Appellate Chamber approvingly pointed to the *Delalic* Court's determination that Mucic exercised *de facto* authority as commander or warden of the Celebici camp. The Court relied on a range of factors including Mucic's own admissions, his intervention to protect detainees, statements by co-defendants, evidence that Mucic arranged for the transfer and classification and possessed the power to release detainees. *Id.* ¶ 206.

796. Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 197 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty.

797. *Id.* ¶ 251.

798. *Id.* ¶¶ 251, 254.

799. *Id.* ¶ 303.

800. *Id.* Title or position is not dispositive; the issue is the actual authority or control exercised by the accused. *Id.* ¶ 306.

to those in authoritative positions and was not applicable to situations of equal authority.[801]

"Substantial influence" which does not amount to effective control, meaning the material ability to prevent or to punish subordinate offenders, was not sufficient to establish command culpability.[802] The Appellate Chamber also clarified that territorial commanders possessed a unique obligation under the international humanitarian law of war towards individuals who were not their subordinates and over whom they may exercise mere influence.[803]

The mental element of command responsibility entailed either actual knowledge or reason to know.[804] The Appellate Chamber stated that the latter required that a superior possess "some general information" which would "put him on notice of possible unlawful acts by his subordinates."[805] This might be written or oral and was not required to assume the form of a specific report.[806] The Appellate Chamber broadly interpreted the requisite standard to encompass an awareness of facts such as that subordinate soldiers were poorly trained, possessed violent or unstable characters, or had been drinking.[807] The relevant information only was required to have been provided or available to the superior; it was not necessary that a commander actually possessed the material or had "actually acquainted himself with the information."[808] This mental element must be established in each case and may not be imputed to the accused; the Chamber noted that the latter would involve the imposition of strict liability.[809]

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801. *Id.* ¶ 303. The Trial Chamber concluded that, despite Delalic's position of deputy commander of the camp, that he had not exercised actual authority in the sense of having powers to prevent or to punish and, therefore, was not a superior or commander for purposes of Article 7(3) of the ICTY. *Id.* ¶ 299. Delic's influence was attributable to the guards' fear of an intimidating and morally delinquent individual. *Id.* ¶ 308.

802. Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 257 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty.

803. *Id.* ¶ 258.

804. *Id.* ¶ 234.

805. *Id.* ¶ 238.

806. *Id.*

807. *Id.*

808. Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 238 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty.

809. *Id.* ¶ 239. The Appeals Chamber "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability." *Id.*

The Appellate Court did not fully address the obligation to take necessary and reasonable measures.[810] The Trial Chambers generally adopted the position that the duty to prevent and to punish criminal conduct varied with the facts and circumstances of each case.[811] The scope of this obligation was dependent on the formal authority and informal capacity of the accused.; a lack of formal legal competence to take the necessary measures did not necessarily constitute a defense.[812] As a result, it was deemed unrealistic to establish set standards.[813] The fact that a perpetrator was subject to concurrent authority did not exonerate a lower-level official from command culpability[814] and there was no requirement that causation should be independently established.[815]

The Appellate Chamber, determined that the trial court in *Delalic* did not give sufficient weight to the gravity of the offenses committed by Mucic and that, as a result, that Mucic's seven year concurrent sentence did not adequately punish the totality of his conduct.[816] The Chamber made several observations which likely will guide future sentencing in cases of command culpability. The Court clarified that there was no presumption that the criminal conduct of a superior was "inherently less grave" than the responsibility of a subordinate perpetrator.[817] The primary

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810. *See supra* note 585 and accompanying text.

811. *See supra* note 587 and accompanying text.

812. *See supra* notes 589, 675-76 and accompanying texts. The trial chamber in *Kordic*, in reviewing prevailing authorities ruled that a commander is obligated to take measures that "practically within his powers and do not hang on his formal legal ability to take them." Prosecutor v. Kordic, Case No. IT-95-14/2-T, ¶ 441 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.or/icty. The trial chamber noted that in assessing "whether a superior failed to act, the Trial Chamber will look beyond formal competence to his actual capacity to take measures." *Id.* ¶ 443. A superior will be deemed to have discharged his duty to prevent or to punish "if he uses every means in his powers to do so." *Id.* ¶ 445.

813. *See supra* note 587 and accompanying text. There was language suggesting that a lack of formal legal competence was not a complete defense. *See supra* note 589 and accompanying text.

814. *See supra* note 751 and accompanying text.

815. *See supra* notes 590-94 and accompanying texts.

816. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 755 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty. The standard governing sentencing is that the penalty must accurately recognize the gravity of the offense and must reflect the totality of the accused's criminal conduct. *Id.* ¶ 769.

817. *Id.* ¶ 735 (emphasis omitted). The Appellate Chamber was critical of the trial court's failure to consider the impact of Mucic's ongoing failure to exercise his duties of supervision on the atmosphere of lawlessness in the camp. *Id.* ¶ 740. The uniform sentence of seven years also indicated that the Trial Chamber neglected to consider the gravity of the various underlying offenses. *Id.* ¶¶ 741-42.

consideration in adjudging the appropriate penalty for command culpability was the seriousness of the offense.[818] This was comprised of two factors: the seriousness of the delict which the superior failed to prevent or to punish;[819] and the character of the commander's misconduct.[820] The Court clarified that although active and concrete involvement in criminal conduct may aggravate a commander's culpability,[821] that the lack of direct engagement does not reduce liability for failing to prevent or to punish criminal offenses.[822] An ongoing failure to prevent or to punish delicts implicitly encouraged subordinates to believe that they could commit additional crimes with impunity and was considered of "significantly greater gravity than isolated incidents of such failure."[823]

The Appellate Chamber also ruled that in those instances in which the same conduct resulted in conviction for both command responsibility and direct involvement in a crime that this aggravated a commander's criminal culpability.[824] However, a defendant only was to be punished once for the same act.[825] Unspecified acts which were named in the indictment, but were not established beyond a reasonable doubt at trial may not be considered at sentencing.[826] The Appellate Court clarified that the Trial Chamber possessed the discretion to impose concurrent or consecutive sentencing and the only limitation was that the sentence "reflect the totality of the accused's criminal conduct."[827] A defendant convicted of various crimes thus ordinarily should receive a lengthier sentence than an individual convicted of only one of these delicts.[828] The Trial Chamber also was free

818. *Id.* ¶ 731.

819. *Id.* ¶ 732.

820. *Id.* ¶ 741.

821. *Id.* ¶ 736.

822. Prosecutor v. Delalic, Case No. IT-96-21-A, ¶ 737 (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.org/icty.

823. *Id.* ¶ 739. Mucic's consistent failure to act in relation to the conditions and unlawful conduct within the camp must have had such an encouraging effect. *Id.*

824. *Id.* ¶¶ 745-46. The Appellate Chamber noted that Mucic's sentence of seven years did not reflect his direct responsibility for the inhuman conditions prevailing in the camp as well as his superior responsibility for the atmosphere of terror created by the guards over whom he exercised authority. *Id.* ¶ 746. The Appellate Chamber also pointed to the disparity between the seven year sentence imposed on Aleksovski and the punishment meted out to Mucic for much more serious conduct. *Id.* ¶ 759.

825. *Id.* ¶ 769.

826. *Id.* ¶¶ 762, 765.

827. *Id.* ¶ 769.

828. *Id.* ¶ 771.

to determine that Mucic's altruistic acts did not significantly mitigate his sentence in light of the fact that as commander that he had been in a position to control and to prevent acts of violence in the camp and, instead, had absented himself during the evening hours.[829]

In summary, the ICTY decisions importantly contributed to expanding the doctrine of command culpability to civilians and to military officials exercising *de facto* as well as *de jure* authority.[830] A range of factors might be considered in establishing *de facto* authority.[831] However, the capacity to directly or indirectly prevent and to punish criminal conduct was central to the imposition of command responsibility.[832] There must be at least a loose superior and subordinate relationship, but this does not require a rigid organizational chain of command.[833] Mere influence was not sufficient to establish command liability.[834]

The Appellate Chamber in *Delalic* ruled that the standard for criminal intent was knowledge or a generalized notice of possible criminal conduct,[835] thus rejecting the *Blaskic* requirement of a duty to exercise due diligence in investigating the conduct of combatants.[836] Knowledge must be established in each case and was not to be imputed to the accused.[837] The scope of remedial action remained uncertain and was to be adjudged on a case-by-case basis in accordance with the scope of a commander's forma and informal power.[838] As for sentencing, the Appellate Chamber clarified that a conviction and sentence for command responsibility should reflect both the gravity of the commander's conduct and of the underlying offense.[839] A continuing failure to intervene to control or to punish criminal conduct encouraged such illegalities and constituted an aggravating factor.[840] In addition, a conviction for both command culpability and

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829. *Id.* ¶ 776. The Appellate Chamber suggested that deterrence and retribution were the most important factors to be considered in sentencing; and that rehabilitation should not be accorded undue weight. *Id.* ¶ 806.

830. *See supra* notes 790-91 and accompanying texts.

831. *See supra* notes 745-47 and accompanying texts.

832. *See supra* notes 791-94 and accompanying texts.

833. *See supra* notes 797-800 and accompanying texts.

834. *See supra* note 802 and accompanying text.

835. *See supra* notes 804-09 and accompanying texts.

836. *See supra* notes 672-74 and accompanying texts.

837. *See supra* note 809 and accompanying text.

838. *See supra* notes 795-800 and accompanying texts.

839. *See supra* notes 803-05 and accompanying texts.

840. *See supra* note 823 and accompanying text.

direct participation in criminal conduct may aggravate a defendant's criminal punishment.[841]

D. Kambanda and Akayesu

The International Criminal Tribunal for Rwanda recognized the principle of command responsibility in a guilty plea agreement with Jean Kambanda, the former Prime Minister of the interim government of Rwanda.[842] Kambanda served as head of the twenty member Hutu Council of Ministers and exercised legal authority and effective control over government officials, senior civil servants and military officers.[843] During Kambanda's tenure, the government launched a sustained and systematic attack against the minority Tutsi population, exterminating hundreds of thousands of civilians.[844] Kambanda acknowledged that he participated in meetings of the Council of Ministers and other high-level gatherings at which the massacres were discussed and monitored.[845] He also conceded that, in May 1994, he had disregarded a plea to intervene to protect children at a hospital who had survived a massacre; the children were subsequently killed.[846] In the plea agreement, Kambanda acknowledged that he failed to fulfill "his duty to ensure the safety of the children and the population of Rwanda."[847]

Kambanda conceded that he knew or should have known that persons for whom he was responsible were engaged in massacring the Tutsi and that he had failed to prevent these acts or to punish the perpetrators.[848] He admitted that he had witnessed the massacres of Tutsi and had been apprised of these killings from the reports of local leaders and cabinet discussions.[849] The Trial Chamber ruled that Kambanda's abuse of his authority and of the trust of the civilian population constituted an aggravating factor[850] and sentenced him to life imprisonment.[851]

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841. *See supra* note 824 and accompanying text.

842. Prosecutor v. Kambanda, No. ICTR 97-23-8, ¶39 (Int'l Crim. Trib. Rwanda 1998), http://www.un.org/ictr.

843. *Id.* ¶ 39(ii).

844. *Id.* ¶ 39 (i).

845. *Id.* ¶ 39 (iii).

846. *Id.* ¶ 39 (ix).

847. *Id.*

848. Prosecutor v. Kambanda, No. ICTR97-23-8, ¶39(xii) (Int'l Crim. Trib. Rwanda 1998), http://www.un.org/ictr.

849. *Id.*

850. *Id.* ¶ 44.

851. *Id.* (Verdict).

In *Akayesu*, the Trial Chamber convicted Jean Paul Akayesu, the bourgmestre or head of the Taba Commune, of genocide and crimes against humanity.[852] The bourgmestre was vested with power over every aspect of life, including the economy, medical care, safety and security and the utilization of land and other resources.[853] Akayesu also possessed wide-ranging *de facto* authority; the bourgmestre was described by the Trial Chamber as a parental figure who was consulted on personal problems and concerns.[854]

In a brief discussion of command responsibility, the Trial Chamber rejected a strict liability standard, explaining that criminal intent was the moral foundation of the criminal law.[855] The Chamber accordingly reasoned that it was entirely proper to impose liability on officials manifesting a malicious intent or a degree of negligence amounting to acquiescence or even malicious intent.[856] This standard would appear to preclude simple negligence or the imposition of an affirmative duty to monitor the activities of combatants or an obligation to inquire into the activities of units in the field.[857]

The Trial Chamber also observed that the imposition of command responsibility on civilians for the conduct of armies in the field remained contentious and controversial.[858] According to the Chamber, this should be assessed on a case-by-case basis in order to determine whether the accused possessed the actual power to take all "necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof."[859]

The Trial Chamber determined that Akayesu was responsible for maintaining law and order in the Taba Commune.[860] He initially opposed

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852. Prosecutor v. Akayesu, No. ICTR 96-4-T, 139 (Int'l Crim. Trib. Rwanda 1998), http://www.un.org/ictr. Rwanda was divided into 11 prefectures, each of which was governed by a prefect. The prefectures were further subdivided into communes which were under the authority of bourgmestres. The bourgmestre of each commune was appointed by the President of the Republic, upon the recommendation of the Minster of the Interior. *Id.* at 4.

853. *Id.* at 19.

854. *Id.* at 20.

855. *Id.* at 95-96.

856. *Id.* at 96.

857. *See supra* notes 811-12 and accompanying texts.

858. *See* Prosecutor v. Akayesu, No. ICTR 96-4-T, 96 (Int'l Crim. Trib. Rwanda 1998), http://www.un.org/ictr.

859. *Id.*

860. *Id.* at 132.

the activities of the Hutu armed militia in the Taba Commune.[861] Akayesu later changed course and cooperated with these combatants and had reason to know, and in fact knew, that murder, mutilation and sexual violence were occurring on or near the premises of his offices in the bureau communal.[862] Yet, once having aligned himself with the militia, Akayesu took no measures to prevent these atrocities or to punish the perpetrators.[863]

The Trial Chamber determined that although the accused possessed a superior and subordinate relationship with members of the armed local militia who were resident at his headquarters, that he did not exercise this control in relation to those armed units who were the principle perpetrators of murder and sexual violence in the commune.[864] The Trial Chamber thus chose not to rely on command culpability. The judges instead pointed to the fact that Akeyasu had encouraged criminal conduct through "his presence, his attitude and his utterances" and held him liable for aiding and abetting in the preparation or execution of killings and the infliction of serious bodily harm.[865]

In sum, the ICTR recognized, but failed to fully develop or to apply the notion of command culpability.[866] Despite reluctance to impose criminal culpability on civilian officials,[867] the Trial Chamber held Kambanda liable for the acts of military units.[868] Defendant Akayesu exercised control over the units based at his headquarters, but was deemed to have lacked hierarchical control over the armed militia distant from his base of operations.[869] The Court avoided an analysis of command culpability and convicted Akayesu of the less complex and controversial crime of aiding and abetting sexual violence and killing.[870]

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861. *Id.*

862. *Id.* at 129.

863. *Id.* at 132.

864. Prosecutor v. Akayesu, No. ICTR 96-4-T, 96 (Int'l Crim. Trib. Rwanda 1998), http://www.un.org/ictr.

865. *Id.* at 132-33.

866. *See supra* note 842 and accompanying text.

867. *See supra* notes 858-59 and accompanying texts. This position may appear to be a retrograde step. However, it recognizes that high ranking civilian officials rarely possess effective control over military units. *Id. See* Prosecutor v. Kordic, No. IT-95-14/2-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), http://www.un.or/icty.

868. *See supra* notes 848-51 and accompanying texts.

869. *See supra* note 864 and accompanying text.

870. *See supra* note 865 and accompanying text.

VIII. THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court (ICC), of July 17, 1998, provides for command liability[871] for genocide,[872] crimes against humanity[873] and enumerated war crimes.[874] This provision was inspired by the prosecutions in *Celebici* and *Blaskic* and, in turn, has encouraged additional indictments for command culpability before the ICTY.[875]

Article Twenty-eight states that a military commander, or individual effectively acting as a military commander, shall be criminally responsible for crimes committed by forces under his effective command and control or effective authority and control.[876] The latter provision provides for responsibility by military leaders exercising *de facto* as well as *de jure* control.[877] The qualification that that these officials must "effectively" exercise "effective command" or "effective authority" appear to limit liability in both instances to military commanders who possess the material capacity to control troops.[878] A commander shall be considered criminally culpable who "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes."[879] This language is directly drawn from the Geneva Protocol [880] and recognizes that command culpability is based on the failure to fulfill an official duty and is not an imputation of liability for the acts of subordinates.[881] Most problematic is the required intent standard. The imposition of liability on a commander who knew of an offense appears to provide for culpability based on knowledge.[882] The "should have known standard" likely encompasses constructive knowledge based upon

871. Rome Statute, *supra* note 27, art. 28.

872. *Id.* art. 6.

873. *Id.* art. 7.

874. *Id.* art. 8.

875. *See* Bantekas, *supra* note 530, at 575.

876. Rome Statute, *supra* note 27, art. 28.

877. *See id.*

878. *See id.*

879. *Id.* art. 28(1)(a).

880. Protocol I, *supra* note 519.

881. *See* Report of the Preparatory Committee on the Establishment of an International Criminal Court, art. 25, n.12 A/Conf. 183/Add.1 (1998) *reprinted in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 142 (M. Cherif Bassiouni ed. 1998) [hereinafter Bassiouni].

882. *See supra* note 879 and accompanying text.

circumstantial evidence.[883] The language "owing to the circumstances of the time" was selected in preference to the narrower "owing to the widespread commission of the offenses," indicating that the determination of constructive knowledge was to be premised on a broad range of factors.[884] The commentary to the Geneva Protocol, for instance, stipulates that superiors are responsible for the content of reports and that absence from headquarters does not absolve a commander from responsibility.[885] The commentary further provides that a commander cannot claim to be unaware of the level of training in the law of war of officers or troops, their character traits, the tactical situation, the means of attack being deployed against a densely populated area, and the adequacy of instructions relating to the treatment of prisoners or a lack of medical services.[886] The text notes that this information may enable an official to conclude that a crime has been or is about to be committed.[887]

The *Delalic* decision stressed that the information available to an official need not provide definitive proof and only must alert an official that an additional investigation is required.[888] The commentary to the Geneva Protocol also notes that while a commander may be uninformed of developments, that a superior cannot absolve himself from liability by deliberately avoiding knowledge of events and of the general context of combat.[889] The issue remains whether the information available to a commander must merely suggest or is required to compel the conclusion that a crime is, or may be committed.[890] At the same, time, *Delalic* failed to find a duty on commanders to affirmatively investigate a situation in the absence of incriminating information.[891] The latter standard was rejected by the Trial Chamber in *Blaskic* and would appear to be a future point of contention under the ICC.[892]

The military commander is culpable in the event that he fails to take all necessary and reasonable measures within his power to prevent or

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883. *See id.*

884. Bassiouni, *supra* note 881, art. 25(a).

885. *See* Commentary, *supra* note 524, at 1014.

886. *Id.*

887. *Id.*

888. *See supra* notes 578-80, 790 and accompanying texts.

889. *See* Commentary, *supra* note 524, at 1014.

890. *See supra* notes 524-25, 578-79 and accompanying texts. *See infra* notes 905-09 and accompanying texts.

891. *See supra* notes 581-84, 835-36 and accompanying texts.

892. *See supra* notes 672-74 and accompanying texts.

repress the commission of crimes or "to submit the matter to the competent authorities for investigation and prosecution."[893] The duty to take preventive or repressive action appears to be confined to those acts which are within the commander's power.[894] This is distinguished from duty to take all reasonable measures regardless of whether they fall within a commander's formal scope of authority.[895] The ICC's necessary and reasonable measures standard should be interpreted in light of the facts and circumstances and an official's scope of authority and, while a commander cannot be expected to undertake the impossible, a severe situation may demand particularly strenuous efforts.[896] The provision that the matter might be submitted to competent authorities recognizes that individuals exercising "effective command and control" may not be authorized to directly discipline combatants.[897]

The ICC also imposed responsibility on civilian "superiors" for the acts of their subordinates over whom they exercised "effective authority and control."[898] The limitation of liability to civilians who possess "effective authority and control" appears to relieve civilian officials of the obligation to exert informal influence and persuasion to affect individuals outside of the scope of their formal authority.[899] This liability attached in those instances in which superiors failed "to exercise control properly" over their subordinates[900] whose actions fell within the superior's "effective responsibility and control."[901] Civilian culpability arose in those instances in which the superior either knew or "consciously disregarded information which clearly indicated" that the subordinates were committing or about to commit crimes.[902] The superior was obligated to take the traditional "necessary and reasonable measures within his or her power" to prevent and to punish the crimes or to submit the matter to competent authori-

893. Rome Statute, *supra* note 27, art. 28(2)(c).
894. *Id.* art. 28(2).
895. *See supra* notes 588-89 and accompanying texts.
896. *See supra* notes 679-80 and accompanying texts.
897. *See supra* notes 694, 750 and accompanying texts.
898. Rome Statute, *supra* note 27, art. 28(2).
899. *See id.*
900. *Id.*
901. *Id.* art. 28(2)(b).
902. *Id.* art. 28(2)(a).

ties.[903] The latter presumably might be necessary in the case of military matters.[904]

Military commanders and civilian superiors under the ICC Statute were responsible in those instances in which they possessed knowledge of delicts.[905] Military officials also are liable for what they reasonably should have known while civilians culpability is limited to the conscious disregard of information which clearly connotes the commission of war crimes.[906] This appears to limit the liability of civilian officials to instances of gross and wanton recklessness entailing a failure to act in response to clear and compelling evidence of criminal conduct.[907] Mere inattentiveness, lack of due care or a failure to monitor or to investigate would not appear to be sufficient to satisfy this standard.[908] The result is that a much lighter burden of care and concern appears to be imposed upon civilian than military officials.[909]

The Rome Statute was created to complement rather than to replace the jurisdiction of national courts. The international court may not assume jurisdiction over a case which is being investigated or prosecuted by a State with recognized grounds to assert jurisdiction over the offense.[910] This pertains even in those instances in which the State subsequently decides not to prosecute the person concerned, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."[911] An individual also may not be prosecuted before the ICC with respect to conduct which formed the basis of a prior domestic prosecution in which the defendant was convicted or acquitted.[912] There is an exception in those instances in which the proceedings were intended to shield the defendant "from criminal responsibility for crimes within the jurisdiction of the Court;"[913] or in which the proceedings "were not conducted independently or impartially in accordance with the norms of due process recognized by

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903. *Id.* art. 28(2)(c).

904. *See supra* notes 694, 750 and accompanying texts.

905. Rome Statute, *supra* note 27, arts. 28(1)(a), 28(2)(a).

906. *Id.*

907. *See id.*

908. *See* Bruce Broohmhall, *The International Criminal Court: Overview and Cooperation with States, in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 45, 62-63 (M. Cherif Bassiouni ed. 1999).

909. *See supra* notes 905-07 and accompanying texts.

910. Rome Statute *supra* note 27, art. 17(1)(a).

911. *Id.* art. 17(1)(b).

912. *Id.* art. 20(3).

913. *Id.* art. 20(3)(a).

international law and were conducted in a manner which... was inconsistent with an intent to bring the person concerned to justice."[914]

Professor Jordon Paust has noted that domestic courts have narrowly interpreted the scope of command liability in order to insulate domestic officials from criminal culpability.[915] The issue arises whether a national court's decision to impose an actual knowledge standard which results in a defendant's acquittal would constitute the impermissible shielding of a defendant from liability.[916]

IX. CONCLUDING COMMENTS

The doctrine of command responsibility is based on the presumption that military officers and civilian officials possess the knowledge, authority and power to curb the transgressions of their troops. Command culpability is designed to encourage military commanders and civilian superiors to fulfill their legal duty to control the conduct of combatants. This is part of a constellation of rules which are intended to preserve the humanitarian impulse which underlies the modern law of war There also is a procedural purpose, command responsibility provides a convenient mechanism for apportioning responsibility for international crimes. It likely would be inordinately time-consuming, complicated, impractical and potentially unpopular to prosecute the combatants who directly engaged in war crimes or crimes against humanity. There is an equitable impulse which is satisfied by imposing primary, if not exclusive, responsibility on high-ranking officials. A full rendition of a country's conspiratorial design also may not be clearly and coherently communicated in a prolixity of individual prosecutions. The extension of culpability, of course, raises the intractable conflict between the patriotic pursuit of military victory and the preservation of international legal and moral principle. A commander or superior who closely controls his or her troops runs the risk of discouraging battlefield initiative and lowering military morale. On the other hand, the failure to impose legal controls corrodes the integrity of the code of conflict and could contribute to chaotic consequences.[917]

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914. *Id.* art. 20(3)(b).

915. *See* Jordan Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora* 12 N.Y.L. SCH. J. HUM. RTS. 547, 566 (1995).

916. *Id.*

917. *See supra* notes 1-2, 26 and accompanying texts. *See generally* Comment, *supra* note 2; Parks, *supra* note 123.

At the same time, command responsibility is a potentially politically pernicious doctrine which runs the risk of portraying crimes as part of a coordinated campaign rather than as individually inspired incidents. Although it may be psychologically satisfying to cast culpability upon a single soldier or statesperson, the interests in efficiency and utilitarianism may be outweighed by the fundamental unfairness of, in effect, holding a single individual responsible for the collective criminal conduct of lower level combatants, particularly in those instances in which the official neither planned, ordered, caused or explicitly condoned the delicts. In the end, the international law of command culpability is caught in a conflict between expeditiously prosecuting officials through reliance on strict standards of liability and the equitable interest in requiring the establishment of a specific intent or a reckless or wanton disposition.[918]

The notion of command responsibility was articulated by the Commission on Responsibility following World War I.[919] The United States Supreme Court, in 1946, provided the first full statement of this doctrine in *Yamashita.*[920] The stringency of the strict liability standard was ameliorated by the Nuremberg Tribunal's actual knowledge test[921] and by International Military Tribunal at Tokyo, which reverted to an actual or constructive knowledge or negligent disregard standard.[922] The Control Council Law No. 10 decisions demarcated the special responsibility of territorial commanders.[923] The Kahan Commission suggested that a mere notice requirement might be appropriate for high-level decision-makers.[924] The acquittal of Ernst Medina indicated that there was a temptation to tailor the standard for command responsibility to the demands of political self-interest.[925] The Geneva Protocol of 1977 provided some uniformity by setting forth an actual or should have known, gross negligent standard.[926] This standard informed and influenced the diverse interpretations of the International Criminal Courts for Yugoslavia[927] and Rwanda.[928] The

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918. *See id.*
919. *See supra* notes 30-73 and accompanying texts.
920. *See supra* notes 77-120 and accompanying texts.
921. *See supra* notes 124-52 and accompanying texts.
922. *See supra* notes 160-221 and accompanying texts.
923. *See supra* notes 239-316 and accompanying texts.
924. *See supra* notes 434-500 and accompanying texts.
925. *See supra* notes 362-409 and accompanying texts.
926. *See supra* notes 520-43 and accompanying texts.
927. *See supra* notes 790—841 and accompanying texts.
928. *See supra* notes 842-65 and accompanying texts.

differing approaches to the elements of command responsibility likely will be expressed in judicial and scholarly consideration of the broad language of the Rome Statute of the newly-established International Criminal Court.[929]

The ICC provision on command responsibility was the culmination of roughly eighty years of discussion and development. A number of central provisions of the text remain subject to the vagaries of judicial and scholarly interpretation. Will knowledge be imputed to officials or will such awareness be determined on the basis of circumstantial evidence? Is causality an independent element of command culpability? Should officials be required to take remedial action that is beyond the formal scope of their authority? There also is a question whether a reasonable inquiry is required of military commanders and the determination of the threshold evidentiary standard for triggering such affirmative action. What are the parameters of responsibility for territorial commanders? Are there separate standards for military and civilian officials and for officials at different levels of the bureaucratic hierarchy? Can the criteria for the imposition of *de facto* responsibility be clarified? What are the precise obligations of political and military officials with knowledge of illegalities who are not within the chain of command? Can the criteria for civilian officials be more precisely established? At what point are officials required to openly protest or to resign?[930] Another concern is the failure to empirically analyze the impact of the various legal standards in light of self-protective nature of military bureaucracies.[931]

In the end, command responsibility is not merely of academic interest. It provides the primary mechanism through which to bring the high-level perpetrators of international crimes to the bar of justice. The threat of criminal trial promises to provide the best prospect for discouraging dictators from condoning the violation of human rights. At the same time, the obligation of individuals confronted with delicts and depredations remains a central conundrum of our increasingly bureaucratic age.

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929. *See generally supra* notes 871-916 and accompanying texts.

930. *See generally* Eckhardt, *supra* note 1; Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Operations*, 164 MIL. L. REV. 153 (2000).

931. *See generally* TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI: THE HUGH THOMPSON STORY (1999).

Globalization has exacerbated this dilemma by increasing the awareness of the often diverse demands of national and international law.[932]

Missing from the jurisprudence of command responsibility is the moral dimension. The legal niceties divert attention from the question of whether there is an ethical imperative or privilege to intervene to prevent war crimes, whatever the scope of an official's formal command or control. The costs of quiescence are considerable and, yet, individuals who act to uphold the rule of international law often are denigrated and dismissed.[933] It is a cruel irony that these people of conscience have largely been abandoned by transnational law.[934]

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932. *See generally* Anthony D'Amato, *Agora: Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604 (1986); Howard S. Levie, *Some Comments on Professor D'Amato's "Paradox,"* 80 AM. J. INT'L L. 608 (1986).

933. *See generally* Matthew Lippman, *First Strike Nuclear Weapons and the Justifiability of Civil Resistance Under International Law*, 2 TEMP. INT'L & COMP. L.J. 155 (1988); Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17 (1992).

934. *See generally* Matthew Lippman, *The White Rose: Judges and Justice in the Third Reich*, 15 CONN. J. INT'L L. 95 (2000).