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ARTICLE

EXPANDING COMMAND RESPONSIBILITY BEYOND WAR: THE APPLICATION OF THE DOCTRINE OF COMMAND RESPONSIBILITY TO HUMAN RIGHTS LAW

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ABSTRACT

The doctrine of Command Responsibility has been an effective and enduring tool in the International Humanitarian Law effort to punish war crimes. In a reversal of the traditional direction of International Human Rights and Humanitarian Law convergence, the doctrine of Command Responsibility has grown well beyond its role only in humanitarian law to reach areas outside of armed conflicts and outside of traditional armed forces.

Command Responsibility first expanded from its traditional role during international armed conflicts to a seemingly natural role in non-international armed conflicts. Later, courts began to apply the doctrine of Command Responsibility to hold civilians responsible for war crimes of subordinates if they have a superior-subordinate relationship similar to senior military commanders. Recently, courts have expanded Command Responsibility to hold senior military and civilian leaders accountable not for war crimes, but for serious human rights violations. Commanders have been held responsible for human rights violations occurring outside traditional armed conflict situations.

This article will explore the development and expansion of the war crimes notion of Command Responsibility to address human rights violations during and even outside of armed conflict. Specifically, the article will discuss how the doctrine is currently being used in various U.S. forums including civil, criminal, and administrative proceedings to hold leaders accountable for human rights violations during armed conflicts. This transition, for being a war crimes tool to a human rights tool, is the next significant advancement of the doctrine of Command Responsibility.

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I. INTRODUCTION

The United States has moved toward recognizing . . . command responsibility for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of noncombatants in wartime—to protect civilian populations and prisoners . . . from brutality, is similar to the goal of international human-rights law.[1]

The doctrine of Command Responsibility has been an effective and enduring tool in the International Humanitarian Law effort to punish the most senior war criminals for the most significant war crimes.[2] The doctrine was formulated, based on numerous historical examples and state practice, out of necessity to ensure that the most senior military leaders were held accountable for their most egregious violations of the laws of war.[3] Although somewhat controversial during its development, the doctrine of Command Responsibility is now firmly entrenched in International Humanitarian Law and has been labeled part of customary international law.[4] But Command Responsibility has grown well beyond its wartime roots.

The doctrine of Command Responsibility has slowly but determinedly expanded beyond International Humanitarian Law and is now emerging as a principle of international human rights law. First, Command Responsibility expanded from its traditional role during international armed conflicts to a seemingly natural role in non-international armed conflicts.[5] Second, courts began to apply the doctrine of Command Responsibility to hold senior civilians responsible for war crimes of subordinates if they have a superior-subordinate relationship similar to senior military commanders.[6] Third, courts have expanded Command

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1. Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996).

2. *See* Ford *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002).

3. *See In re* Yamashita, 327 U.S. 1 (1946).

4. Prosecutor v. Delalic, Case No. IT-96-21-T, Appeals Chamber, ¶¶ 189-98, 225-26, 238, 256, 263 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) [hereinafter Čelebići Appeal Judgment].

5. Statute for the International Criminal Tribunal of the Former Yugoslavia, 32 I.L.M. 1192 (1993) (applying in both international and non-international armed conflicts contexts); *see also* Čelebići Appeal Judgment, Appeals Chamber, ¶¶ 189-98, 225-26, 238, 256, 263.

6. Statute for the International Criminal Tribunal of the Former Yugoslavia, art. 7(3), 32 I.L.M. 1192 (1993) (same); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8,

Responsibility to hold senior military and civilian leaders for serious human rights violations when committed during armed conflicts. Most recently, the doctrine of Command Responsibility has begun a fourth expansion to hold leaders accountable for human rights violations occurring outside of traditional armed conflicts.

Convergence between International Humanitarian Law and International Human Rights Law is not new, but rarely does a principle of the laws of war expand to cover peace time. Even rarer is when human rights advocates are at the forefront of using International Humanitarian Law principles to expand human rights protections.

The expansion of the principle of Command Responsibility is timely. The rise of terrorist organizations like ISIS and Boko Haram that control and "govern" territory where there are massive human rights violations and there may or may not be active areas of hostilities creates the need for international courts to use Command Responsibility to reach senior leaders who oversee massive human rights and/or humanitarian law atrocities. Command Responsibility will be one more principle to hold these leaders accountable for their crimes.

This paper will explore the development and expansion of the war crimes notion of Command Responsibility to address human rights violations during and even outside of armed conflict. Part II of the article details the history of the Command Responsibility concept and its application in the various military tribunals and courts after World War II. Part III will discuss how the doctrine of Command Responsibility became codified into international law through the enactment of treaty provisions and the statutes of international tribunals, and how these tribunals began to expand its use from international armed conflicts to non-international armed conflicts. Part IV will discuss how the doctrine has developed in the United States, and how the United States is at the forefront of the effort to expand the doctrine beyond its current application. Specifically, the article will discuss how the doctrine is currently being used in various U.S. forums, including civil, criminal, and administrative proceedings, to hold leaders accountable for human rights violations during armed conflicts. This transition, from being a war crimes tool to a human rights tool, is the next significant advancement of the doctrine of Command Responsibility.

1977, 1125 U.N.T.S. 3, 16 I.L.M. at 62 (using the term "superior" instead of military term "commander").

II. THE HISTORY OF COMMAND RESPONSIBILITY

The modern doctrine of Command Responsibility was born out of necessity in the military tribunals following World War II, but its roots began hundreds of years before.[7] The seeds of the doctrine were planted by some of the earliest military theorists and philosophers.[8] The concept slowly grew by practice in medieval Europe before it was exported to colonial America.[9] From there it developed as an American concept during the American Civil War before it was accepted by the world as an idea in World War I and as a principle of International Humanitarian Law in the tribunals following World War II.[10]

A. Command Responsibility from Ancient China to Medieval Europe

One of the oldest military strategists in recorded history, Sun Tzu, discussed the notion that commanders must be held responsible for the misdeeds of their troops.[11] Twenty-five centuries before World War II, Sun Tzu advised that "[w]hen troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general."[12] His teachings further explained that the commanders of soldiers must be responsible for the failures of the soldiers or the army.[13] While Sun Tzu focused on the commander's responsibility for his army's military failures, the principle was later expanded to include disorder and discipline problems.

Another military scholar, Hugo Grotius, expanded on the principle of a commander's responsibility for the actions of his troops.[14] Grotius declared 300 years before the outbreak of World War II that "rulers . . . may be held responsible for the crime of a subject if they know of it and do not prevent it

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7. *See* SUN TZU, THE ART OF WAR 125 (Samuel Griffith trans., 1963) (circa 500 B.C.E.); *see also* HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (C.E.I.P. ed., Kelsey, trans. 1925) (17th century).

8. *See* GROTIUS, *supra* note 7, at 523 (discussing it in more detail in the seventeenth century); TZU, *supra* note 7, at 125 (opining on the responsibility of command in 500 B.C.E.).

9. *See* TZU, *supra* note 7, at 125; *see also* GROTIUS, *supra* note 7, at 523.

10. Major James D. Levine II, *The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?*, 193 MIL. L. REV. 52, 57-64 (2007).

11. TZU, *supra* note 7, at 125.

12. *Id.*; *see* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 3 (1973).

13. Parks, *supra* note 12, at 4 (citation omitted).

14. GROTIUS, *supra* note 7, at 523.

when they could and should prevent it."[15] Grotius focused in his statement on civilian rulers, but since the kings of his time were also the leaders of their armies, his statement applies with equal force to military commanders.[16] In fact, there was precedent for his suggestion that commanders were criminally liable for the action of their soldiers that predates Grotius by one hundred years.[17]

Peter von Hagenbach was a knight and military commander sent to suppress a rebellion in the town of Breisach, now located in the upper Rhine Valley of Germany.[18] After the occupation ended, he was accused and tried before a tribunal composed of judges from many nations for the atrocities committed by him and his men.[19] Von Hagenbach was convicted of murder, rape, and other crimes, which he as a knight was deemed to have a duty to prevent.[20] Perhaps foreshadowing its future evolution, von Hagenbach committed these crimes during a time when there was no declared war, although the rebellion may have been a conflict that had risen to the level of the modern concept of non-international armed conflict.[21] For the next several hundred years, this idea that a commander must be responsible for the conduct of his soldiers, and especially responsible if he fails to punish his soldiers for their misconduct during war, became part of the European military culture. This custom can best be seen when the European military expands to the "New World."

B. Command Responsibility in the New World

As the thirteen colonies began their efforts to seek independence from Great Britain, they also began to develop and improve their organized militias. These state militias brought with them into the revolutionary war a developing principle of Command Responsibility.[22] The colony of Massachusetts—which was the first to have an organized militia—also was

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15. *Id.*

16. *See* Parks, *supra* note 12, at 4.

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

18. Parks, *supra* note 12, at 5.

19. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 81-82 (1970); *see* Parks, *supra* note 12, at 5.

20. *See* Parks, *supra* note 12, at 5.

21. TAYLOR, *supra* note 19, at 81-82; *see* Jordan J. Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99, 112 (1972).

22. Parks, *supra* note 12, at 5 (citing Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775).

the first colony to document the developing notion that a unit commander bears personal responsibility for maintaining the good order and discipline of his troops.[23]

The eleventh article of the 1775 Massachusetts Articles of War requires each commander of the militia to "keep good order, and . . . redress all . . . abuses or disorders which may be committed by any Officer or Soldier under his command."[24] A commander who fails in his responsibility to punish the misconduct of his soldiers shall "be punished . . . as if he himself had committed the crimes or disorders . . ."[25] This principle—that commanders must punish the crimes of his soldiers during war—was not isolated to the Massachusetts militia.[26] As the thirteen colonies began to unite into one American Army, they incorporated this doctrine of Command Responsibility into the doctrine of the American Army.[27]

The American Articles of War adopted the Massachusetts Militia's view on the obligation of a commander to maintain the order and discipline of his troops.[28] This same principle of Command Responsibility was re-enacted in 1776 and expanded upon in 1806.[29] In the Articles of War in 1806, commanders who failed to cooperate with civil authorities in bringing their soldiers to face the civil justice system could lose their military commission.[30] At least twice during the War of 1812, Army Commanders were punished for the misdeeds of their troops.[31]

The doctrine of Command Responsibility continued to develop in the first half of the nineteenth century. A young Abraham Lincoln, then a captain in the militia, was court-martialed for the actions of his inebriated troops during the Black Hawk War of 1832.[32] Fortunately for the United States, Captain Lincoln received a relatively modest punishment. He was required to carry a wooden sword for two days.[33] But the doctrine also began to expand to hold commanders responsible for more than just failing

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23. *Id.*

24. *Id.*

25. *Id.*

26. Journals of the Continental Congress, 1774-1789, II at 114 (1775).

27. *Id.*; Parks, *supra* note 12, at 5.

28. Parks, *supra* note 12, at 5.

29. *Id.* at 5-6.

30. Articles of War, Article 33 (1806).

31. Elbridge Colby, *War Crimes*, 23 MICH. L. REV. 482, 501-03 (1925).

32. CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 30 (1961).

33. *Id.*

to control their troops or to punish a commander for failing to punish his soldiers' crimes committed during war.

In 1851, the United States Supreme Court upheld a civil judgment for over $90,000 against Colonel David Mitchell, who illegally ordered his soldiers to seize goods during a campaign into Mexico in 1846.[34] Colonel Mitchell received an illegal order from his general to seize goods that were not required by military necessity.[35] He passed on this illegal order and even personally assisted in carrying it out.[36] The Supreme Court found that he was personally liable to the plaintiff for the cost of the goods that were stolen by his men.[37]

The *Mitchell* case was a sign of the expansion of the doctrine of Command Responsibility. Although *Mitchell* dealt with civil liability, it strengthened the legal principle that a commander is directly responsibility for the wrongs committed by soldiers under his command. This civil liability idea was expanded to become a criminal responsibility as well, during the American Civil War.[38]

C. Command Responsibility During the American Civil War

The American Civil War set the stage for significant developments in the Law of War and the doctrine of Command Responsibility. In 1863, President Abraham Lincoln issued General Orders No. 100, Instructions for the Government of Armies of the United States, in the Field, commonly referred to as the Lieber Code.[39] The Lieber Code codified 157 articles that instructed the Union Army on their humanitarian obligations. It also specifically prohibited certain conduct during armed conflict and provided that violations of these prohibitions would result in criminal punishment (court martial).[40]

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34. Michell v. Harmony, 54 U.S. (13 How.) 115 (1851).

35. *Id.*

36. *Id.*

37. *Id.*

38. Parks, *supra* note 12, at 7.

39. General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (the Lieber Code), *reprinted in* THE LAWS OF ARMED CONFLICTS (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988). The Lieber Code can be found in 3 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. 3, at 148-64 (Wash., Gov't Printing Off. 1899) [hereinafter WAR OF THE REBELLION].

40. WAR OF THE REBELLION, *supra* note 39, at 148-64.

Article 71 provided criminal punishment for a type of Command Responsibility.[41] A commander who orders a soldier to kill or wound an already "wholly disabled" enemy could be tried before a court martial and sentenced to death.[42] Like the *Mitchell* case, this provided direct liability for commanders who order subordinates to commit a criminal act. But the Lieber Code expands that responsibility to armed conflict and to hold commanders criminally liable for their actions.[43]

This criminal Command Responsibility doctrine was used in 1865 when a military commission found Captain Henry Wirz guilty for his actions and the actions of those under his command at a Confederate Prisoner of War Camp located near Andersonville, Georgia.[44] Captain Wirz was hanged as punishment for his violation of the Lieber Code.[45] Although Captain Wirz did personally commit some acts that we now label war crimes, he was also held responsible as the commander of a prison that committed terrible atrocities against its prisoners.

The idea that commanders must be responsible for the actions of their troops continued to develop in the nineteenth century and began to expand beyond its domestic law roots to become incorporated in international law. The Fourth Hague Convention Respecting the Laws and Customs of War on Land implicitly recognized this principle of Command Responsibility.[46] The right to engage in belligerent acts and to receive combatant immunity for those acts was limited only to armed forces that are "commanded by a person responsible for his subordinates."[47] This convention also required commanders of an occupying force to maintain public order and safety.[48] This treaty confirmed the belief that a commander bears some responsibility for the conduct of his troops.

The Fourth Hague Convention established in international law the notion that a commander is responsible for the actions of his troops. But the scope of that responsibility was not well developed in the first half of the twentieth century. The Fourth Hague Convention was not clear whether a commander could be held criminally responsible for the actions of his

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41. *Id.*

42. *Id.*

43. Parks, *supra* note 12, at 7.

44. *Id.*

45. *Id.*

46. Levine, *supra* note 10, at 56.

47. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 2295-96, at 643-44.

48. *Id.* at 631, 651; *see also* Levine, *supra* note 10, at 56.

troops. Nor did the Convention address whether a commander could be responsible when his troops commit war crimes without his approval. These developments of the doctrine of Command Responsibility were addressed in the war crimes tribunals following World War II.

D. Command Responsibility and the Lessons of World War II

The military tribunals following World War II firmly established the principle that commanders can be criminally responsible for the war crimes of their soldiers.[49] Military tribunals from both the Pacific Theater and from the European Theater of war were responsible for this development.[50] Understanding the development and scope of the war crimes Command Responsibility doctrine is fundamental to learning how the doctrine is being expanded today.

1. The War Crimes Trial of General Tomoyuki Yamashita

General Tomoyuki Yamashita assumed command of the Japanese 14th Area Army in October 1944, eleven days before the United States and Great Britain invaded.[51] A year later, after being defeated by the Allied forces, General Yamashita was charged by a military commission for the rampant war crimes committed by his troops while he was in command.[52] During the time of his command, over 32,000 civilians and prisoners of war were mistreated or murdered.[53] The Japanese committed mass rape and torture and killed priests in their churches and medical personnel in hospitals.[54] There was overwhelming evidence that the Japanese Army committed these atrocities, but the primary question was whether General Yamashita

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49. Timothy Wu & Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law,* 38 HARV. INT'L L.J. 272, 290 (1997); *see In re* Yamashita, 327 U.S. 1 (1946); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995).

50. *See In re* Yamashita, 327 U.S. 1 (1946).

51. *Id.*; *see* RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 6-7 (1982).

52. UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 84 (1948); LAEL, *supra* note 51, at 80-84.

53. LAEL, *supra* note 51, at 80-84; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 52, at 84.

54. LAEL, *supra* note 51, at 80-84.

ordered the atrocities, knew of them, or was unaware of the war crimes being committed by his soldiers.[55]

General Yamashita was tried under a theory that as the commander of the Japanese Army in the Philippines, he was directly responsible for the war crimes committed by his troops.[56] The defense argued that there was no evidence that General Yamashita ordered his soldiers to commit war crimes and no evidence that he even knew war crimes were being committed.[57] Without evidence of actual knowledge of the commission of war crimes, the defense argued that General Yamashita must be found not guilty.[58]

The prosecution argued that there was substantial circumstantial evidence to demonstrate that General Yamashita had actual knowledge of, and even acquiescence of the commission of, the war crimes.[59] The prosecution argued in the alternative, that because the war crimes were so extensive and pervasive throughout his command, that if General Yamashita did not have actual knowledge, he should have known and thus should be held liable because he failed in his responsibility of command to know what his troops were doing.[60] The military commission—comprised of a panel of military officers who were not attorneys—found him guilty and sentenced him to death.[61] General Yamashita filed a writ of habeas corpus, and his fate was ultimately reviewed by the United States Supreme Court.[62]

The Supreme Court, in a divided opinion, affirmed the conviction and sentence.[63] The Court found that commanders can be held criminally responsible for failing to prevent their soldiers from committing war

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55. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 52, at 87, 23-29; Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L 1, 72 (1996).

56. *In re* Yamashita, 327 U.S. 1, 16 (1946).

57. Lippman, *supra* note 55, at 72; Parks, *supra* note 12, at 24.

58. Lippman, *supra* note 51, at 72; Parks, *supra* note 12, at 24.

59. Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 297 (1995); Parks, *supra* note 12, at 27.

60. *In re* Yamashita, 327 U.S. 1, 16 (1946); Landrum, *supra* note 59, at 297; Parks, *supra* note 12, at 27.

61. LEON FRIEDMAN, 2 THE LAW OF WAR, A DOCUMENTARY HISTORY 1598-99 (1972); *United States of American v. Tomoyuki Yamashita*, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945.

62. *In re* Yamashita, 327 U.S. 1, 16 (1946).

63. *Id.*

crimes.[64] *Yamashita* also established the mens rea for this doctrine of Command Responsibility.[65] A commander can be found guilty if he has actual knowledge of the war crimes being committed and fails to take action to stop his troops from committing war crimes.[66] Alternatively, knowledge can be imputed to the commander if a commander who exercised the reasonable obligations of command would have discovered the war crimes committed by his soldiers.[67] The idea of a commander's responsibility for the war crimes of his subordinates if he "knew or should have known" his soldiers were committing war crimes was established in the *Yamashita* case. The legitimacy of this doctrine expanded in the war crimes trials taking place in Europe.[68]

2. Nuremberg Tribunal and Command Responsibility

The developing doctrine of Command Responsibility played a prominent role in the European-based war crimes that followed World War II. Although many cases applied the concept that military commanders can be criminally responsible for the war crimes of their soldiers, two cases are most prominent: *United States v. Wilhelm von Leeb* (referred to as the High Command Case) and *United States v. Wilhelm List* (the Hostage Case).[69] Both cases explained the scope and nature of a commander's responsibility for the war crimes committed by his subordinates.[70]

The High Command Case involved the prosecution of thirteen senior German officials charged with crimes against peace, crimes against humanity, individual war crimes, and conspiracy.[71] The court specifically addressed the concept of when a commander can be held responsible for his

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64. *Id.* at 14-16; Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 181 (2000).

65. *In re* Yamashita, 327 U.S. at 14-16; Smidt, *supra* note 64, at 181.

66. Landrum, *supra* note 51, at 296-98; Smidt, *supra* note 64, at 181.

67. Wu & Kang, *supra* note 49, at 290; *see In re* Yamashita, 327 U.S. 1 (1946).

68. *See* UNITED NATIONS WAR CRIMES COMMISSION, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (1949) [hereinafter German High Command Case]; UNITED NATIONS WAR CRIMES COMMISSION, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 34, 76 (1949); 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, 757 (1950) [hereinafter Hostage Case].

69. German High Command Case, *supra* note 68, at 76; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 68, at 1, 34, 76; Hostage Case, *supra* note 68, at 757.

70. *See* Smidt, *supra* note 64, at 181-84.

71. W. J. Fenrick, *Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 113 n.31 (1995); Parks, *supra* note 12, at 38-39.

failure to know that his troops are committing war crimes (the "should have known" prong of the *Yamashita* standard).[72] The court found that a commander must be derelict in his duty and that "his failure to properly supervise his subordinates constitutes criminal negligence on his part."[73] The court stressed that normal negligence is not enough: "it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."[74] The High Command Case makes clear that this "should have known" standard is not a strict liability, but a failure of a commander's fundamental obligation to be aware of the actions of his soldiers during armed conflict. A commander is criminally liable for the unknown war crimes of his subordinates only when he is significantly derelict in his duty to supervise his soldiers who were committing war crimes.

A second Nuremberg trial also affirmed the doctrine of Command Responsibility.[75] In the Hostage Case, high-ranking German officials were charged with the murder and mass deportation of individuals from Greece, Yugoslavia, Norway, and Albania.[76] The prosecution put forth documents into evidence showing that reports of these war crimes were generated and delivered to the headquarters of the defendants, including the defendant General List.[77] General List claimed he had no actual knowledge of the war crimes because he was not at the headquarters and never received the documents.[78] The court presumed the General had knowledge of the atrocities because reports detailing the war crimes were prepared and delivered to his headquarters.[79] Since he was presumed to have knowledge of the war crimes and failed to prevent, investigate, or punish them, he was found guilty under the principle of Command Responsibility.

Yamashita, the High Command Case, and the Hostage Case cemented into international jurisprudence the idea that commanders can be held

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72. German High Command Case, *supra* note 68, at 73-74.

73. *Id.* at 76.

74. *Id.*

75. *See* UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 68, at 1, 34, 76; Hostage Case, *supra* note 68, at 1259-60.

76. Smidt, *supra* note 64, at 183-84.

77. *See* UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 68, at 1, 34, 76; Hostage Case, *supra* note 68, at 1259-60; Smidt, *supra* note 64, at 183-84 n.121.

78. Smidt, *supra* note 64, at 183-84.

79. *See* Hostage Case, *supra* note 68, at 1259-60 ("It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime."); *see also* Smidt, *supra* note 64, at 183-84 n.121.

criminally responsible for the war crimes committed by their subordinates if (1) the commander orders his subordinates to commit war crimes, (2) the commander knows his subordinates are committing war crimes and fails to stop them or punish them, or (3) the commander is derelict in his duties to supervise his subordinates and should have known of their commission of war crimes.[80] These judicial opinions and developing customary law further developed in the second half of the twentieth century when they become incorporated into doctrine, treaties, and the statutes of international criminal courts.

III. COMMAND RESPONSIBILITY AFTER WORLD WAR II: FROM JUDICIAL OPINIONS TO DOCTRINE AND TREATIES

The international military tribunals following World War II cemented the principle of Command Responsibility into international jurisprudence, but there were still questions about the exact limits and scope of the doctrine as well as some academic disagreement concerning the exact definition or test for Command Responsibility. There were calls to further define the doctrine of Command Responsibility and ensure that it would become an enduring principle of international law.[81] During the second half of the twentieth century, the doctrine did become clear as it was incorporated into military doctrine and treaties and codified in the statutes of the international criminal tribunals established at the end of the century.

These codifications clearly defined Command Responsibility, but they also created the opportunity for expansion of its use. Command Responsibility was a principle of war crimes prosecutions, and war crimes were primarily a concept developed during international armed conflicts. But many of the conflicts at the end of the twentieth century were non-international armed conflicts. Even as the doctrine of Command Responsibility was being codified as a fundamental principle of liability for war crimes during international armed conflicts, courts began to expand the doctrine to cover internal conflicts. Command Responsibility was also a doctrine that applied primarily to military commanders. But these same courts began to recognize that civilians in conflicts can exert authority similar to military commanders and should share the same type of commander's responsibility. The doctrine of Command Responsibility began to expand again to encompass civilian leaders. These two concepts,

80. Smidt, *supra* note 64, at 183-84.

81. *See* U.S. DEP'T OF ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501, at 178 (July 1956) (recognizing the uncertainty by stating Commanders *may* be responsible for the conduct of their troops *in some cases*).

the codification of Command Responsibility and the expansion of it to cover all armed conflicts and to cover any person in "command," will be explored next.

A. Codifying Command Responsibility into Military Doctrine

The next step in the development of the doctrine of Command Responsibility came in 1956 when the United States Army published *Field Manual 27-10: The Law of Land Warfare.*[82] The manual, which was intended to explain International Humanitarian Law to soldiers in the U.S. Army, specifically addressed the developing concept of Command Responsibility.[83] The manual stated that "[i]n some cases, military commanders may be responsible for war crimes committed by subordinate[s] . . . or other persons subject to their control."[84] The doctrine went further to clearly outline the different ways a commander has criminal responsibility. A commander is directly responsible for the war crimes he orders committed.[85] A commander is also responsible if he has "actual knowledge, or should have knowledge" that those subject to his control "are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps . . . to punish" the perpetrators.[86]

Field Manual 27-10 outlines the Command Responsibility doctrine approved by the Supreme Court in *Yamashita.*[87] The United States military thus approved of the doctrine as an accurate statement of International Humanitarian Law and applicable to its own officers.[88] As other nations publicly concurred in the view that Command Responsibility is a principle of international law, the international community included this principle as one of the necessary issues to take up when they met to update the 1949 Geneva Conventions.

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82. U.S. DEP'T OF ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 16 (2007); Smidt, *supra* note 64, at 185-86.

88. Smidt, *supra* note 64, at 186, 201. FM 27-10 is not a penal code, and the U.S. criminal statutes do not contain the same *Yamashita* standard. Therefore, there is disconnect between the international law that the United States recognizes as applicable to its troops and its ability to enforce that law against its own soldiers. *Id.* at 186-87.

B. Incorporating Command Responsibility into Treaty Law

During the mid-1970s, the international community convened once again in Geneva, Switzerland, to update the four Geneva Conventions of 1949.[89] The delegates decided on three additional protocols to the 1949 conventions.[90] Additional Protocol I, related to international armed conflicts and codified the doctrine of Command Responsibility.[91] Protocol I codified a standard of Command Responsibility very similar to the *Yamashita* standard.[92]

Article 86 of Protocol I states that commanders can face criminal liability for the war crimes of their subordinates.[93] Commanders are liable if they "knew, or had information which should have enabled them to conclude" that their subordinates committed or were going to commit a war crime and they failed to "take all feasible measures" to prevent the war crime.[94] Article 87 goes further and requires commanders to take disciplinary or criminal action against subordinates who commit war crimes.[95]

Perhaps the most significant shift in the law is that Protocol I does not use the word "commander" and instead states that "superiors" are liable.[96] The commentary makes clear that this is no accident of translation; the drafters specifically intended to expand the doctrine to cover any superior with control over his subordinates, even if the superior was not in the

89. *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 1, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Both of these treaties allude to the idea that a commander must be responsible for his troops.

90. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 43, Dec. 12, 1977, art. 43, 1125 U.N.T.S. 3 [hereinafter Protocol I]; COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 34 (Jean S. Pictet et al. eds., 1958).

91. Protocol I, *supra* note 90, arts. 86-87.

92. *Id.*

93. *Id.* art. 86(2); Smidt, *supra* note 64, at 202.

94. Protocol I, *supra* note 90, art. 86(2); Smidt, *supra* note 64, at 202.

95. Protocol I, *supra* note 90, art. 87.

96. *Id.* arts. 86-87.

military.[97] Thus, many academics began to rename the *Yamashita* standard to "superior responsibility."[98]

A significant majority of nations have acceded to Protocol I, and the vast majority of those that have not ratified the treaty have conceded publicly that Articles 86 and 87 reflect customary international law on the doctrine of Command Responsibility.[99] But as seen with the United States, there are occasions when a nation's acknowledgement of a principle of International Humanitarian Law differs from its ability to enforce that principle. The international community took care to make sure that the doctrine of Command Responsibility was available and useful for the international community in the war crimes tribunals set up at the end of the twentieth century.

Protocol I has one significant limitation: it is applicable only to international armed conflicts.[100] Protocol II, also drafted at the same time, focused on non-international (commonly referred to as Common Article 3) armed conflicts.[101] But Protocol II did not include the principle of commander's responsibility.[102] The absence of Command Responsibility could be an acknowledgement that the doctrine does not apply during internal conflicts or to indicate that a sovereign state should use domestic law to decide the culpability of superiors. However, since Protocol II said nothing regarding Command Responsibility, it is not clear what the international community believed was the state of the doctrine of Command Responsibility in 1977. Therefore, it was up to the international criminal tribunals to determine if the doctrine of command/superior responsibility applies in non-international armed conflicts.

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97. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1011 ¶¶ 3540-48 (Yves Sandoz et al. eds., 1987) [hereinafter Commentary to the Additional Protocols].

98. *See* Brian Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 9-10 (2012); *see generally* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999).

99. *See, e.g.*, Comments of Mr. Michael Matheson, U.S. Dep't Of State Deputy Legal Advisor, presented to the Sixth Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, reported in 2 AM. U. J. INT'L L. & POL. 419 (1987).

100. Protocol I, *supra* note 90, art. 1.

101. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609, art. 1 [hereinafter Protocol II].

102. Smidt, *supra* note 64, at 205.

C. Command Responsibility Statutes in International Tribunals

The Command Responsibility standard enumerated in Protocol I was put to the test in the international criminal tribunals created at the end of the twentieth century. The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC) all apply the doctrine of Command Responsibility. These courts have provided convincing judicial opinions holding that the current version of the *Yamashita* standard is an enduring principle of customary international law.[103] But the courts also expanded the doctrine by extending its reach beyond international armed conflicts to hold leaders responsible for war crimes committed during non-international armed conflicts and to help define the liability of superiors outside of the traditional military armies for war crimes committed by their subordinates.[104] Understanding this stage of the development of Command Responsibility will explain how the doctrine is being further expanded today.

1. Command Responsibility for the Yugoslavia and Rwanda Tribunals

In partial response to the pervasive atrocities being committed by many groups in the former Yugoslavia, the United Nations Security Council used its Chapter VII authority to create an international criminal tribunal to prosecute the war criminals.[105] The tribunal was the first criminal tribunal created by the U.N. Security Council, and efforts were taken to ensure the conduct of the tribunal reflected the current state of customary international law.[106] The Security Council ultimately adopted a statute that gave the ICTY criminal jurisdiction over persons committing war crimes in the former Yugoslavia.[107]

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103. Čelebići Appeal Judgment, Case No. IT-96-21-T, Judgment, ¶¶ 366-67, 373, 385, 389 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (citing United States v. Wilhelm von Leeb et al., vol. XI, TWC, 462, 513-14 [The High Command Case]); United States v. Wilhelm List, vol. XI, TWC, 1230, 1286, 1288 [The Hostage Case]); United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5012.

104. Čelebići Appeal Judgment, Case No. IT-96-21-T, Judgment, ¶ 378 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (citing ILC Draft Code Report of the International Law Commission on the work of its Draft Code of Crimes against Peace and Security of Mankind, 49th Sess. 6 May-26 July 1996, GAOR, 51st Sess. Supp. No. 10 UN Doc. A/51/10).

105. S.C. Res. 808 (Feb. 22, 1993); S.C. Res. 827 (May 25, 1993).

106. S.C. Res. 827 (May 25, 1993); Statute for the International Criminal Tribunal of the Former Yugoslavia, 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute].

107. S.C. Res. 827 (May 25, 1993); ICTY Statute, *supra* note 106.

The ICTY statute adopted the Protocol I Article 86 definition of Command Responsibility almost verbatim.[108] Article 7(3) of the ICTY statute explains that a superior is criminally responsible for the war crimes of his subordinate if the superior "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."[109] This statute provided a clear standard of superior liability for the court to apply to hold senior leaders accountable for the war crimes of their subordinates.

The next year, the U.N. Security Council again established an international criminal tribunal to address the genocide and massive human rights violations in Rwanda.[110] Establishing an international criminal tribunal in Rwanda was a significant development in the prosecution of war crimes. Unlike its ICTY relative, the conflict in Rwanda was most accurately identified as a non-international or internal armed conflict.[111] The enactment of a war crimes tribunal for an internal conflict raised the question of whether the doctrine of Command Responsibility also applied in non-international armed conflicts. The ICTR statute answered that question, at least for the Rwandan conflict.

The ICTR statute enacted the doctrine of Command Responsibility, taking its language almost verbatim from the ICTY statute.[112] Article 6(3) of the ICTR statute determined that even in a non-international armed conflict, a superior is criminally responsible for the war crimes of his subordinate if the superior "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."[113] By the stroke of the Security Council's pen, the expansion of the doctrine of Command Responsibility to cover war crimes in non-international armed conflicts began. This statutory expansion of the doctrine continued with the Rome Statute, a treaty

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108. *Compare* Protocol I, *supra* note 90, art. 86(2), *with* ICTY Statute, *supra* note 106, art. 7(3).

109. ICTY Statute, *supra* note 106, art. 7(3).

110. *See* S.C. Res. 955 (1994).

111. *See id.* As reflected in its name, the scope of the tribunal's jurisdiction was an internal conflict that mostly occurred within Rwanda.

112. *Compare* S.C. Res. 955, *supra* note 110, art. 6(3), *with* ICTY Statute, *supra* note 106, art. 7(3).

113. S.C. Res. 955, *supra* note 110, art. 6(3).

enacting a permanent international criminal court to punish war crimes committed in both international and non-international armed conflicts.[114]

2. The Rome Statute and Command Responsibility

The treaty creating the International Criminal Court affirmed the ICTR statute and confirmed the view that the doctrine of Command Responsibility is fully applicable during non-international armed conflicts.[115] After the tribunals in Yugoslavia and Rwanda demonstrated that international tribunals were a legitimate and effective way to address armed conflicts, the international community renewed its call for a permanent court to replace the growing system of ad hoc and hybrid tribunals created after the fact for a particular conflict or country.[116] State parties convened at Rome, Italy, to develop and enact what is now commonly referred to as the Rome Statute, a treaty created outside of the United Nations to establish a permanent international criminal war crime tribunal.[117]

The Rome Statute clearly established that its jurisdiction extended to non-international armed conflicts.[118] It also codified Command Responsibility as a theory of liability during non-international armed conflicts.[119]

Article 28 of the ICC Statute clarified both the doctrine of military Command Responsibility and explained how those outside of traditional military organizations can also have criminal responsibility for the war crimes of their subordinates.[120] For military commanders and those who are "effectively acting as a military commander," criminal liability for war crimes is possible for any person who the commander has "control" over

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114. Rome Statute of the International Criminal Court, as corrected by the proc'esverbaux of 10 November 1998 and 12 July 1999, UN DOC. A/CONF. 183/2/Add.1 (1998) [hereinafter ICC Statute].

115. ICC Statute, *supra* note 114.

116. For a short summary see *The Fight for Global Justice*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://cicc.haasontwerp.web-001.webtrack.prvw.eu/fight-global-justice (last visited Mar. 14, 2017).

117. ICC Statute, *supra* note 114. As of May 3, 2015, there are 124 countries that are state parties to the Rome Statute. *See The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/statesparties/pages/thestatespartiestotheromestatute.aspx (last visited Mar. 14, 2017).

118. *See* ICC Statute, *supra* note 114, arts. 1, 8. Although the statute states that it only has jurisdiction over the "most serious crimes of international concern" article 8 specifically includes war crimes committed during non-international armed conflicts. *Id.*

119. ICC Statute, *supra* note 114, art. 28.

120. *Id.*

and where the commander "knew or . . . should have known that the forces were committing or about to commit" war crimes and the commander "failed to take all necessary and reasonable measures" to prevent, investigate and punish the offenders.[121] The ICC statute details Command Responsibility as stated in *Yamashita*, and the statutes of ICTY and ICTR, but explains that those who act in a manner similar to a military commander share the same criminal liability as military commanders.

The Rome Statute expanded the coverage of Command Responsibility by clearly stating that civilians can be held responsible for war crimes of others in certain circumstances.[122] The Rome Statute then explained that criminal responsibility for war crimes can exist even outside of a military-type command environment.[123] Article 28(b) states that criminal responsibility extends to superiors that do not meet the Article 28(a) test:

> [A] superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[124]

Here, the Rome Statute clearly extends criminal liability for war crimes to civilians who have "effective responsibility and control" over others.[125]

The ICC applied this article in the prosecution and conviction of Jean-Pierre Bemba, a former politician and military commander from the

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121. ICC Statute, *supra* note 114, art. 28(a).

122. ICC Statute, *supra* note 114, art. 28.

123. ICC Statute, *supra* note 114, art. 28(b).

124. *Id.*

125. *Id.*

Democratic Republic of the Congo.[126] The ICC found Bemba guilty in partial reliance on Article 28(b), noting that Bemba was effectively acting as the military commander of a militia in Congo and liable for the militia's war crimes.[127] The ICC decision was the first, but clearly not the last, decision where Command Responsibility was used to hold leaders accountable for the war crimes of their subordinates during a non-international armed conflict.

The Rome Statute and the ICC Trial Chambers have cemented a further expansion of the doctrine of Command Responsibility. With 123 state parties to the Rome Statute and with the history of the ICTY and ICTR, it is clear that the doctrine of Command Responsibility applies during non-international armed conflicts.[128] The ICC is slowly building on the jurisprudence of the ICTY and ICTR to establish the liability of civilian leaders for the war crimes of those they have effective control over.

Absent some strong future objections, customary international law will apply the principle of Command Responsibility to civilians and during non-international armed conflicts. But Command Responsibility has not stopped with this development. In the twenty-first century, the doctrine of Command Responsibility is being extended even further. Human rights advocates are actively working to expand the doctrine to hold superiors responsible not just for war crimes, but also for human rights violations committed during armed conflicts. They are also seeking to expand the doctrine to hold superiors responsible for acts that occur outside of armed conflicts.

IV. CONTEMPORARY COMMAND RESPONSIBILITY IN THE UNITED STATES: FROM WAR CRIMES TO HUMAN RIGHTS VIOLATIONS

The twenty-first century has seen a new expansion of the doctrine of Command Responsibility, now being used to hold leaders responsible not for war crimes, but for human rights violations committed both during and even outside of armed conflicts. The expansion of Command Responsibility to combat human rights violations is occurring in U.S. federal courts and administrative proceedings, but like the *Yamashita* standard it may expand to other forums and to other nations. The further expansion of the doctrine

126. Press Release, International Criminal Court, ICC Trial Chamber III Declares Jean-Pierre Bemba Gombo Guilty of War Crimes and Crimes Against Humanity (Mar. 21 2016), https://www.icc-cpi.int/Pages/item.aspx?name=pr1200.

127. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Judgment, ¶¶ 170-213 (Mar. 21, 2016).

128. ICC Statute, *supra* note 114, art. 28(b).

of Command Responsibility can best be observed in an examination of civil proceedings under the Torture Victim's Protection Act and administrative proceeding concerning the deportation of those that have committed human rights violations around the world. These statutes and court proceedings will be examined next.

A. Command Responsibility and Civil Proceedings

The federal district courts have been the preferred venue for the criminal prosecution of defendants for war crimes.[129] The last two decades have witnessed a shift where civil prosecutions have been used to hold senior leaders accountable for the human rights violations (that look strikingly similar to war crimes) of their subordinates.[130] Command Responsibility has been used to ensure that the leaders who command others to commit human rights violations are held civilly responsible for their torts. A clear example of a statute that has proved useful for this effort is the Torture Victim Protection Act (TVPA).[131] The TVPA, and the cases that interpreted it, will be analyzed next.

The Torture Victim Protection Act was enacted in 1992 and was added to the United States Code as an addition to the Alien Tort Statute.[132] The TVPA provides an avenue to hold leaders civilly responsible for extrajudicial killings and torture.[133] The TVPA states that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to "torture" or "extrajudicial killing," "shall . . . be liable for damages" in a civil action in a U.S. federal court.[134] Although the statute does not specifically address Command Responsibility, the legislative history and subsequent case law makes it clear that the doctrine of Command Responsibility can be applied to remedy TVPA violations.[135]

The Senate Committee Report related to the TVPA discussed the importance of applying Command Responsibility to civil actions under the

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129. War Crimes Act, 18 U.S.C. § 2441 (2006).

130. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

131. *Id.*

132. *Id.*; *see* Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L LAW. 640, 641 (2010).

133. *See* 28 U.S.C. § 1350; *see* Apostolova, *supra* note 132, at 641.

134. *See* 28 U.S.C. § 1350; *see* Apostolova, *supra* note 132, at 641.

135. *See* S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991) (footnote omitted); Xuncax v. Grammajo, 886 F. Supp. 162 (D. Mass. 1995).

TVPA.[136] The Senate believed that liability would attach to superiors under the Act.[137] Citing to *Yamashita*, the Senate Committee Report stated that

> a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.[138]

The Senate gave no indication that Command Responsibility would attach only in an armed conflict or only if the killing or torture was a war crime. Under this statute, Command Responsibility is a permissible mode of liability for any tort committed within the scope of the TVPA regardless of whether it occurred in an armed conflict.

Courts reviewing this issue have followed the Senate's intent and applied Command Responsibility to TVPA violations.[139] In *Hilao v. Estate of Marcos*, the United States Court of Appeals for the Ninth Circuit specifically addressed the issue of whether the concept of Command Responsibility applies to human rights violations that occur outside of an armed conflict[140] The court found that Command Responsibility applies regardless of whether there is an armed conflict, stating that

> [t]he United States has moved toward recognizing . . . "command responsibility" for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of noncombatants in wartime—"to protect civilian populations and prisoners . . . from brutality," . . . is similar to the goal of international human-rights law.[141]

The court found Command Responsibility applies in peace time to an action for damages in a civil suit for human rights violations.[142]

In *Doe v. Qi*, the district court took a similar view of Command Responsibility for human rights violations.[143] The court found that two

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136. S. Rep. No. 249, 102d Cong., 1st Sess. at 9 (1991) (footnote omitted).

137. *Id.*

138. *Id.*

139. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 776-78 (9th Cir. 1996); *Xuncax*, 886 F. Supp. at 171-72; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

140. *Hilao*, 103 F.3d at 776-78.

141. *Id.* at 777 (citing *In re* Yamashita, 327 U.S. 1, 15 (1946) (internal citations omitted)).

142. *Id.*

Chinese municipal officials (a mayor and a deputy mayor who also ran the local police force) could be held civilly liable for violations of their human rights.[144] Both civil authorities met the standard for commander responsibility and knew or should have known of the human rights violations committed by the police.[145] The court found, once again, that Command Responsibility applied to human rights violations and without regard to any armed conflict.[146]

Similarly, the United States Court of Appeals for the Eleventh Circuit endorsed the Command Responsibility doctrine in a suit against the Director of the Salvadoran National Guard and El Salvador's Minister of Defense for the torture and murder of women who lived and worked at a local church.[147] Although the court stated that an essential element of the doctrine was that subordinates committed acts that were "violative of the law of war," the court affirmed that the defendants could be civilly responsible for human rights violations.[148]

These cases either directly hold or strongly suggest that the United States has expanded Command Responsibility beyond its International Humanitarian Law bounds to apply outside of armed conflicts and to human rights violations. It also now is a civil liability concept in addition to a mode of liability for a criminal offense. But the United States has gone further to expand Command Responsibility as a tool in administrative courts to enforce immigration and deportation rules.

B. Command Responsibility for Human Rights Violations in U.S. Administrative Proceedings

United States administrative courts have also made a significant shift in the application of the doctrine of Command Responsibility to human rights violations.[149] Perhaps the most significant application of Command Responsibility in the twenty-first century is the development of U.S. immigration law to deport former leaders in foreign countries for human rights violations committed by their subordinates.[150] Similar to the

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143. Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

144. *Id.* at 1329.

145. *Id.*

146. *Id.*

147. Ford v. Garcia, 289 F.3d 1283, 1288–89 (11th Cir. 2002).

148. *Id.* at 1288 (affirming the theory of liability, but recognizing the jury in the lower court determined these specific defendants were not liable).

149. Matter of Carlos Eugenio Vides Casanova, 26 I. & N. Dec. 494 (BIA 2015).

150. *See id.* at 494-95, 515.

reasoning in *Yamashita* and other cases, administrative courts felt the need to incorporate the doctrine of Command Responsibility to make the current law an effective tool to respond to major human rights violations.[151]

The Intelligence Reform and Terrorism Prevention Act provides for the deportation (officially called the "removal") from the United States of any "alien" who has "committed, ordered, incited, assisted, or otherwise participated in the commission of" an "act of torture" or an "extrajudicial killing."[152] Originally enacted specifically to prevent members of the German Nazi Party from living inside the United States, the law was expanded to prohibit anyone who engaged in torture or extrajudicial killings to be admitted or remain inside the United States.[153] The Intelligence Reform and Terrorism Prevention Act did not specifically incorporate Command Responsibility as a mode of liability, but the administrative courts quickly identified the necessity and applicability of the war crimes doctrine to this area of human rights law.[154]

In *Matter of D-R-*, the Board of Immigration Appeals found that the doctrine of Command Responsibility applied to this section of the Act.[155] Citing the legislative history, the court determined that this section of the immigration act requiring deportation of those responsible for human rights violations was "intended to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility."[156] Further, when the court outlined the test to apply the doctrine of Command Responsibility, the court modified the doctrine to be directly applicable to human rights violations.[157] The court eliminated any reference to "war crimes" or "armed conflict."[158] The court made Command Responsibility applicable to "unlawful acts," which include human rights violations such as torture and extrajudicial killings.[159]

The Board of Immigration Appeals recently affirmed and expanded this ruling in a decision deporting a former general and minister of Defense of

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151. *Id.*; *see also In re* Yamashita, 327 U.S. 1 (1946).

152. 8 U.S.C. §§ 1182(a)(3)(E), 1227(a)(4)(D) (2004). The Act was passed in 2004, but Congress specifically made it retroactive.

153. 8 U.S.C. §§ 1227(a)(4)(D), 1182(a)(3)(E).

154. *See* Matter of Carlos Eugenio Vides Casanova, 26 I. & N. Dec. 494, 500-01 (BIA 2015).

155. Matter of D-R-, 25 I. & N. Dec. 445, 452-53 (BIA 2011).

156. *Id.* at 452.

157. *Id.* at 452-53.

158. *Id.*

159. *Id.*

El Salvador.[160] The Board determined that the general must be deported because he had knowledge that his subordinates under his control committed human rights violations, and he "failed to take action to investigate those acts *afterwards* in a genuine effort to punish the perpetrators."[161] The Board affirmed the lower proceedings ordering the general removed from the United States to El Salvador. These opinions are binding precedent on all subsequent immigration proceedings; thus, Command Responsibility is now firmly entrenched as a tool to deport leaders responsible for human rights violations.

In 2011, President Barack Obama issued a presidential proclamation that clearly demonstrated that Command Responsibility applies equally to humanitarian law and human rights law.[162] Titled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses," the proclamation prohibits entry into the United States of "[a]ny alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, *including through command responsibility*, war crimes, crimes against humanity or other serious violations of human rights . . . ."[163] Command Responsibility is a mode of liability for both war crimes and human rights violations, both during and outside of armed conflicts.

The U.S. courts and administrative proceedings have expanded the doctrine of Command Responsibility. Under U.S. civil and administrative law, Command Responsibility is applicable during and outside of armed conflicts. It also applies to those who exercise Command Responsibility over subordinates who commit human rights violations. This is a clear and determined expansion of the doctrine of Command Responsibility beyond its customary international law roots of war crimes committed during armed conflicts.

IV. CONCLUSION

The doctrine of Command Responsibility has been an effective and enduring tool in the International Humanitarian Law effort to punish the most senior war criminals for the most significant war crimes. The doctrine—first brought clearly upon the international legal arena in the military tribunals following World War II and pronounced in the U.S.

160. Matter of Carlos Eugenio Vides Casanova, 26 I. & N. Dec. 494 (BIA 2015) (emphasis in original).

161. *Id.* at 502.

162. Presidential Proclamation 8697 (August 2011).

163. *Id.* (emphasis added).

Supreme Court's *Yamashita* decision—is a well-settled principle of customary international law. But it has grown and it will continue to grow beyond its wartime roots.

The United States has again taken the lead in the application and expansion of Command Responsibility. Human rights advocates in the United States have expanded its application to apply outside of traditional armed conflicts. Advocates in U.S. courts have also clearly made it applicable, in civil and administrative proceedings, to hold leaders responsible for serious human rights violations of those within their control.

It is time to cement these new gains and apply Command Responsibility to the leaders of terrorist groups like ISIS and Boko Haram. These terrorist organizations have blurred the lines between peace time violence and war and are committing human rights violations in conjunction with violations of the law of war. Command Responsibility must be used to hold leaders responsible for large-scale human rights violations and violations of International Humanitarian Law. These leaders, if brought to criminal tribunals, can face judgment for the whole of their violations of international law, both in and out of armed conflicts. International Humanitarian Law professionals and human rights law advocates can and should work together to establish the doctrine of Command Responsibility as a method to hold leaders responsible for significant human rights violations around the globe. The principle of Command Responsibility will continue to expand to combat human rights violations internationally and to punish those responsible for committing them.