THE DOCTRINE OF COMMAND RESPONSIBILITY AND ITS APPLICATION TO SUPERIOR CIVILIAN LEADERSHIP: DOES THE INTERNATIONAL CRIMINAL COURT HAVE THE CORRECT STANDARD?

MAJOR JAMES D. LEVINE II*

I. Introduction

In 1998, the Rome Statute of the International Criminal Court (ICC) codified the doctrine of command, or superior, responsibility in Article 28.[1] Article 28 is unique in the development of the doctrine of superior responsibility in that it specifically provides for different mens rea standards depending upon whether the superior is a military commander or a civilian non-military superior.[2] Providing different standards of knowledge has met with some controversy and concern.[3]

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* Judge Advocate, U.S. Army. Presently assigned as the Brigade Judge Advocate, 2d Brigade Combat Team, 3d Infantry Division, Fort Stewart, Ga., currently deployed in support of Operation Iraqi Freedom. LL.M., 2006, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Va.; J.D., 1997, Quinnipiac University School of Law; B.A., 1990, University of California at Santa Barbara. Previous assignments include Defense Counsel, Darmstadt, Germany, 2003–2005; Trial Counsel, I Corps and Fort Lewis, Fort Lewis, Wash., 2001–2003; Administrative Law Attorney, I Corps and Fort Lewis, Fort Lewis, Wash., 2001; Physical Evaluation Board Soldiers' Counsel, I Corps and Fort Lewis, Fort Lewis, Wash., 2000–2001; Legal Assistance Attorney, I Corps and Fort Lewis, Fort Lewis, Wash., 2000; Platoon Leader, 15th Transportation Company, Fort Sill, Ok., 1993–1994; Platoon Leader, 418th Transportation Company, Somalia, 1993; Platoon Leader, 471st Transportation Company, Fort Sill, Ok., 1992–1993. Member of the bars of Connecticut and the U.S. District Court for the District of Connecticut. This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course.

[1] Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90, 106 (1998) [hereinafter Rome Statute].

[2] *Id.* art. 28(1)(a), (2)(a).

[3] *See* Kai Ambos, *Superior Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 863–70 (Antonio Casesse et al. eds., 2002); Norman Dorsen & Jerry Fowler, *The International Criminal Court: An Important Step Toward Effective International Justice*, *in* ACLU INT'L CIVIL LIBERTIES REP. (May 1999), *available at* http://www.aclu-sc.org/attach/i/Intl_CivLib_Report_1999.pdf; Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 165 (Mar. 2000); Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES: NEGOTIATIONS, RESULTS 189, 204 (Roy S. Lee ed., 1999); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 93–94, 120–24 (2000).

The doctrine of superior responsibility holds a superior criminally responsible for the criminal conduct of his subordinates.[4] Command responsibility can be subdivided into two different types of responsibility, direct and indirect.[5] Direct responsibility involves holding a superior criminally responsible for issuing unlawful orders.[6] Indirect or imputed criminal responsibility involves holding a superior criminally responsible for failing to take action in order to prevent criminal activity of subordinates, investigate allegations of criminal activity of subordinates, and report or punish subordinates who are found to have committed criminal acts.[7] This article will focus on the indirect or imputed form of superior responsibility.[8] Criminal responsibility is based on the superior's omissions.[9] The doctrine consists of three general elements: (1) the existence of a superior-subordinate relationship; (2) actual or constructive knowledge of the superior that a criminal act was about to be or had been committed; and (3) failure by the superior to take reasonable and necessary measures to prevent the crimes or punish the wrongdoers. These will be explored further during the course of the article.

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[4] Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 333 (Nov. 16, 1998); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 290 (2003); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 345 (1996).

[5] BASSIOUNI, *supra* note 4, at 290; L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320 (1995); BASSIOUNI & MANIKAS, *supra* note 4, at 345; Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1, 2 (1973).

[6] BASSIOUNI, *supra* note 4, at 290; Green, *supra* note 5, at 320.

[7] BASSIOUNI, *supra* note 4, at 290–91; Green, *supra* note 5, at 320.

[8] This article will refer to the doctrine of imputed command or superior responsibility as superior responsibility. The doctrine is better known as command responsibility and any mention or references to that term are used interchangeably with superior responsibility. This article adopts the use of the term superior responsibility from a suggestion first read in 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, 110 n.21 (1995) [hereinafter Fenrick, *Prosecutions Before the ICTY*], in which Fenrick states: "it is possible that a new term of art such as superior responsibility should be developed," and next uncovered in Ambos, *supra* note 3, at 824 n.1, referring to Fenrick's article and footnote. Because this article is focusing on the civilian superior and how the doctrine is applied to them, use of the term superior is chosen over the word command to encompass a broader category of individuals. *See also* Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 750 (2001).

[9] BASSIOUNI, *supra* note 4, at 293–94; Ambos, *supra* note 3, at 824.

This article will address the creation of a different mens rea standard for civilian superiors in Article 28 and discuss whether in fact this change really increases the difficulty of a successful prosecution. Part II will provide an overview of the historical development of the doctrine of superior responsibility. The modern application of the doctrine will be discussed in Part III. Part IV will examine the elements of the superior responsibility doctrine as identified in Article 28 of the Rome Statute. Finally, in Part V, three scenarios will be presented involving civilian superiors and subordinate criminal conduct, and then Article 28 will be applied and a potential result discussed.

II. Historical Development of the Doctrine of Superior Responsibility

A. Pre-World War II

The idea of holding a commander criminally liable for the actions of his subordinates emerges from the concept of command responsibility, that is, the notion that a commander is generally responsible for his command.[10] The doctrine of command responsibility can be traced back in time to the writings of Sun Tzu.[11] An early recording of the concept of superior responsibility for the actions of others was made by Grotius, who stated that "[a] community, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it."[12] The doctrine continued to develop in Europe by identifying individuals in command as potentially criminally liable for their orders to subordinates and their subordinates' criminal behavior.[13] For instance, in 1439, King Charles VII of France issued the following ordinance:

> The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he

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[10] *See* William J. Fenrick, *Article 28*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 515, 516 (Otto Triffterer ed., 1999) [hereinafter Fenrick, *Article 28*]; Parks, *supra* note 5, at 2.

[11] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 351; Parks, *supra* note 5, at 3–4.

[12] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (James Brown Scott ed., Francis W. Kelsey trans., 1925) (1625). Grotius also stated: "With respect to toleration we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime." *Id.*

[13] *See* Parks, *supra* note 5, at 4–5 (providing an overview and application of the doctrine).

> receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.[14]

In the United States, an early pronouncement of the doctrine can be found in the eleventh article of the 1775 Massachusetts Articles of War, providing that:

> Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.[15]

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[14] Green, *supra* note 5, at 321 (quoting ORDONNANCES DES ROIS DE FRANCE DE LA TROISIEME RACE (Louis Guillaume de Vilevault & Louis de Brequigny eds., 1782)).

[15] *See* Parks, *supra* note 5, at 5. This language was further adopted by the American Articles of War in 1775 and 1776. *Id.* For further examples of the adoption of the command responsibility doctrine in the United States, and its application from the War of 1812 through the American presence in the Philippines in the 1900s, *see id*. at 6–10.

In 1907, the doctrine received implicit recognition in the Fourth Hague Convention respecting the laws and customs of war on land.[16] Article 1 of the Annex to the Convention provides that in order for an armed force to receive the rights of a lawful belligerent, it must be "commanded by a person responsible for his subordinates."[17] In addition to recognizing the importance of a responsible commander, the Convention also imposed upon an occupying commander the responsibility to maintain public order and safety.[18] While not specifically addressing or defining the responsibility of a commander for the actions of his subordinates, Article 3 of the Convention recognized the responsibility of a nation for "all acts committed by persons forming part of its armed forces."[19]

After the end of hostilities at the conclusion of World War I, the first international attempt was made to hold commanders accountable for the crimes of their subordinates.[20] The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report recommending the creation of an international tribunal to prosecute violators of the laws and customs of war arising out of World War I.[21] One conclusion of the report was that "[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[22] Due to objection and disagreement of some commission members, no international tribunal was ever

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[16] Fenrick, *Article 28*, *supra* note 10, at 516; Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797, 817 (2002).

[17] Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 1, Oct. 18, 1907, 36 Stat. 2277, 2295–96, 1 Bevans 631, 643–44 [hereinafter Hague IV].

[18] *Id.* Annex (Regs.), art. 43, 36 Stat. at 2306, 1 Bevans at 651.

[19] Hague IV art. 3, 36 Stat. at 2290, 1 Bevans at 640.

[20] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶¶ 335–36 (Nov. 16, 1998); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3530 (Yves Sandoz et al. eds. 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS].

[21] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *reprinted in*, 14 AM. J. INT'L. L. 95 (1920) [hereinafter Authors of the War Report]; *see also* Parks, *supra* note 5, at 11.

[22] Authors of the War Report, *supra* note 21, at 117.

formed,[23] but a small number of individuals were tried by the German Supreme Court at Leipzig, Germany.[24]

B. Post-World War II

The first international application of the doctrine of superior responsibility occurred after the conclusion of World War II, at the Nuremburg and Tokyo tribunals.[25] The post-World War II cases are important because they form the foundation and precedent for future development and application of the doctrine. Neither the Nuremberg nor Tokyo charters specifically addressed the concept of holding a superior accountable for the actions of his subordinates,[26] although both addressed the issue of "direct command responsibility."[27] These cases had a

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[23] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 354; Parks, *supra* note 5, at 12–13. The United States objected to the proposed trial by international tribunal, preferring military tribunals instead. *See* Authors of the War Report, *supra* note 21, at 139–47. Japan objected to prosecution in the case where "the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war." *Id.* at 152.

[24] *See* Parks, *supra* note 5, at 13–14. Twelve of the forty-five people identified by the allies were tried by the German Supreme Court and six were convicted of various Law of War violations. *Id.*; *see also* Ambos, *supra* note 3, at 828 (pointing out that the Leipzig Trial did not apply the doctrine of superior authority). "The German Reichsgericht did not even know this doctrine and only judged the defendants on the basis of the ordinary rules of participation as laid down in the Strafgesetzbuch." *Id.* Parks concludes that prior to entering into World War II, there existed "a custom of command responsibility, codified in large part by the Hague Conventions of 1907 and the 1929 Red Cross Convention, and with somewhat of a warning based on the essentially unfilled demands of the Versailles Treaty that concepts of command responsibility would be implemented at the conclusion of any future conflict." Parks, *supra* note 5, at 14.

[25] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573, 573 (1999); Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 388 (2000); Shany & Michaeli, *supra* note 16, at 818; 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, 274 (1997).

[26] Mitchell, *supra* note 25, at 388; Shany & Michaeli, *supra* note 16, at 818; Vetter, *supra* note 3, at 105.

[27] Vetter, *supra* note 3, at 105. Both charters contained the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." *Id.* (quoting Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 11).

significant impact in establishing international recognition for and development of the doctrine of command responsibility, specifically holding superior commanders and civilians responsible for the actions of their subordinates.

1. Yamashita

The case which generated the most controversy is that of General Tomoyuki Yamashita.[28] General Yamashita was the commander of the Fourteenth Army Group of the Japanese Imperial Army responsible for the Philippine Islands from 9 October 1944, until he surrendered on 3 September 1945.[29] During this time period, General Yamashita was both the military commander of all Japanese forces in the Philippines and the military governor of the Philippines.[30] On 2 October 1945, General Yamashita was charged with failing to discharge his duties as a commander to control the soldiers of his command from committing atrocities and other crimes against Americans, American allies and Filipinos in the Philippines.[31] At trial, Yamashita denied knowledge of the atrocities committed and asserted that his command and control were

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[28] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 354–55; Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 297–98 (1995); Parks, *supra* note 5, at 22. For a detailed explanation and analysis of the Yamashita case see RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949); Parks, *supra* note 5, at 22–38.

[29] Transcript of Record at 3519, United States v. Tomoyuki Yamashita, Before the Military Commission Convened by the Commanding General, United States Army Forces, Western Pacific, Oct. 1945-Dec. 1945 [hereinafter Transcript]; *see also* Parks, *supra* note 5, at 22.

[30] *Id.* at 22–23.

[31] Transcript, *supra* note 29, at 31–32. The charge read as follows:

> Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.

Id. at 31.

disrupted by fighting the Americans, distance, time, and the inability to inspect his troops.[32] He was tried by an American military commission of five general officers who convicted him and sentenced him to death by hanging.[33]

Yamashita's defense counsel successfully sought review before the United States Supreme Court.[34] The issues before the Court concerned the lawfulness of the military commission's power to try Yamashita; whether the charge preferred stated an offense in violation of the law of war; and whether Yamashita was provided a fair trial.[35] The Court decided all issues in favor of the United States.[36]

The *Yamashita* trial is of importance in the development of the command responsibility doctrine because it recognized the affirmative duty of a commander to take appropriate measures under the circumstances to ensure his subordinates abide by the law of war; that failing to do so violates the law of war; and that a properly constituted tribunal of another nation has jurisdiction over a former enemy commander.[37]

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[32] *Id.* at 3654–57.

[33] *Id.* at 4063. None of the general officers were attorneys. *See* Parks, *supra* note 5, at 30. In its opinion, the commission stated:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.

Transcript, *supra* note 29, at 4061.

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

[35] *Id.* at 6.

[36] *Id.* at 25.

[37] *See* Parks, *supra* note 5, at 37.

2. Tribunals of German War Criminals

In Germany, the trials of German war criminals were conducted by a number of different courts. The most famous was the International Military Tribunal at Nuremberg which tried twenty-two of the most senior German war criminals.[38] Superior responsibility was only an indirect concern before that tribunal.[39] The trials with the greatest impact on the development of the superior responsibility doctrine were those conducted by military tribunals of the four Allied Powers under Allied Control Council Law No. 10 (CCL 10).[40] A number of these cases directly contributed to the development of the doctrine.

In addressing the issue of superior responsibility, the tribunal's judgment in the *High Command Case*[41] expressly rejected a strict liability standard with respect to a commander's transmittal of an order.[42] The judgment also recognized the limited responsibility of commanders of occupied territories.[43] The tribunal required more than the widespread

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[38] *See* Green, *supra* note 5, at 327–33. The International Military Tribunal was established by the London Charter which provided that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 7, Aug. 8, 1945, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288.

[39] *See* Green, *supra* note 5, at 333.

[40] *See id.* at 333–40; Ambos, *supra* note 3, at 828; Vetter, *supra* note 3, at 106.

[41] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 462 (1951). This case involved the prosecution of fourteen highly ranked German officers for, among other things, war crimes and crimes against humanity. Of particular importance was the responsibility of these individuals for passing illegal orders issued from higher down to their subordinates and for crimes committed by subordinates. *See* Lieutenant Commander 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, 116 (1985). The illegal orders included ordering the summary execution of captured Soviet political officers, *High Command Case*, and provisions permitting the German army to "liquidate ruthlessly" guerrilla fighters, and to make the prosecution of German soldiers discretionary for crimes committed against enemy civilians. *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 517, 521, 522. Many of the accused in this case were commanders of occupied territories. *Id.* at 542–43.

[42] *Id.* at 510; *see also* Burnett, *supra* note 41, at 114; Parks, *supra* note 5, at 40, 63–64.

[43] *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 543. The tribunal stated:

nature of the crimes that the *Yamashita* tribunal relied on to impute knowledge to a superior. In order to be criminally responsible for the crimes of subordinates, their actions needed to be traced back directly to the superior or the superior's failure to properly supervise amounted to criminal negligence on his part.[44]

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone.

Id. at 543.

[44] *Id.* The tribunal stated:

> There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.
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> We are of the opinion . . . that the occupying commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.

Id. at 543–45; *see also* Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 215 (1994). The tribunal found Von Leeb not guilty of implementing one order because "[h]e did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey." *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 557. However, he was found guilty of implementing another order "by passing it into the chain of command," and not opposing the order or attempting to prevent it from being carried out. *Id.* at 560.

In the *Hostage Case*,[45] the tribunal found a commander criminally responsible for actions of his subordinates because of information he should have known.[46] Knowledge was imputed to him because of the reports that were received by his command which should have put him on notice that war crimes were taking place, or at the least that he needed more information to determine what exactly was going on within his area of responsibility.[47]

The French tribunal applied the superior responsibility doctrine to a civilian superior in the *Roechling* case.[48] Hermann Roechling was a German civilian industrialist who before the war owned an important steel works company.[49] During the war, he was ultimately appointed to head the German steel production in Germany and the occupied countries. Roechling utilized the services of prisoners of war and

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[45] United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 759 (1951). This case involved twelve German generals prosecuted for war crimes and crimes against humanity committed by soldiers under their command in Greece, Yugoslavia, and Albania. *Id.* at 765–76. The defendants claimed that orders or reports, some of which involved the killing of prisoners as a means of suppressing resistance and in reprisal for the killing of German soldiers, directed to them did not come to their attention and denied responsibility for some acts charged because they were away from their headquarters at the time committed. *Id.* at 1259, 1265–69.

[46] *See* Crowe, *supra* note 44, at 219–20.

[47] *See id.* at 219; Burnett, *supra* note 41, at 114. With respect to Field Marshal List, the tribunal concluded that as the commanding general of occupied territory he had a duty to maintain peace and order in the area of his command. *Hostage Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 1271. Additionally, in discussing the responsibilities of a commander, the tribunal stated:

> He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprize him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.

Id. The tribunal convicted List based on his broad authority and responsibility as the commander of an occupied territory and his failure to keep himself informed and to read reports sent to him detailing the war crimes being committed in his area of responsibility. *See* Burnett, *supra* note 41, at 112.

[48] France v. Roechling, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, app. B at 1061 (1951).

[49] *Id.* at 1077.

deportees.[50] The tribunal found Roechling guilty as a superior for the conditions that the workers lived and worked under at a number of steel plants, because even though it was his duty and responsibility, he did nothing to improve the "miserable situation."[51] Roechling's son-in-law was also found guilty of inhuman treatment of these workers because he failed to take any action to improve their situation and the tribunal specifically found that his relation to Roechling gave him sufficient authority "to obtain an alleviation in the treatment of these workers."[52]

3. International Military Tribunal for the Far East (Tokyo Tribunal)[53]

The Tokyo Tribunal further developed the application of superior responsibility to civilian superiors.[54] Responsibility to civilian superiors

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[50] *Id.* at 1077–80.

[51] *Id.* at 1088–89. The tribunal stated:

> Whereas Roechling is not accused of having ordered this abominable treatment but of having tolerated it and of not having done anything in order to have it modified;
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> [T]hat it was his duty as the head to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was, moreover, forbidden by the rules of warfare, of which fact he must have been aware; that he cannot escape his responsibility by stating that the question had no interest for him; that his double position as chief of an important industry and as president of the RVE would have given him the necessary authority to bring about changes in the inhuman treatment of these workers; that witnesses have stated that several times he had the opportunity to ascertain what the condition of his personnel was during his visits to the plants; that he himself states that he came in contact with these men from Voelklingen, particularly with the internees from Etzenhofen, who were recognizable by the prison garb, but that he had never considered the condition of their existence, although their miserable situation was apparent to all those who passed them on the street.

Id.

[52] *Id.* at 1092.

[53] The International Military Tribunal for the Far East (IMTFE), known as the Tokyo Tribunal, was established to prosecute the only the major Japanese war crimes suspects charged with crimes against peace. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 19 (2001). Like the Nuremberg Tribunal, it created its own charter. *Id.*

[54] *See* Ambos, *supra* note 3, at 830; Lippman, *supra* note 3, at 145.

was applied with respect to the proper treatment of prisoners of war.[55] The Tokyo Tribunal adopted an actual or constructive knowledge requirement, thereby refining and replacing the *Yamashita* standard.[56] If a government official had knowledge of war crimes, he was required to take positive action to address the criminal activity.[57] Also, senior government officials could not rely on assurances that criminal activity would be stopped and ignore continued reports of continued activity.[58] The Tokyo Tribunal essentially clarified the responsibility of civilian government officials as to their duty to take affirmative action to prevent or punish subordinates who fail to abide by international or domestic law.[59]

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[55] *See* Ambos, *supra* note 3, at 830; Lippman, *supra* note 3, at 145.

[56] Lippman, *supra* note 3, at 146. In the case of Shimada Shigetaro, Navy Minister from 1941 to 1944, he was acquitted based on a lack of knowledge with regards to the murders of prisoners. *Id.*

[57] *Id.* at 146. The application of the tribunal's knowledge standard is not without criticism. *See, e.g.*, Ambos, *supra* note 3, at 831 (discussing the case of Mamoru Shigemitsu, Minister of Foreign Affairs from 1943 to 1945, found guilty because he had knowledge of mistreatment of prisoners of war and as a member of the government he had a special responsibility for their well being); *see also* 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE) 1133–38 (B.V.A. Roling & C.F. Ruter eds., 1977) [hereinafter THE TOKYO JUDGMENT].

[58] Lippman, *supra* note 3, at 146–47. Illustrating this principle is the case of Koki Hirota, Foreign Minister from 1933 to 1936, after learning of the mistreatment of prisoners was assured by the War Ministry that this conduct would stop. *Id.* The tribunal found his reliance on these assurances and inaction amounted to criminal negligence. *Id.* This case is also criticized with the leading critic Judge Roling who authored a dissent in this case. *See* 2 THE TOKYO JUDGMENT, *supra* note 57, at 1121–27.

[59] *See* Fenrick, *Prosecutions Before the ICTY*, *supra* note 8, at 118. Fenrick argues that the Tokyo Tribunal's decision with respect to civilian superior responsibility stands for the following:

> (1) once the veil of statehood is pierced, international law may impose obligations on political and bureaucratic leaders in the same way that it imposes obligations on military leaders; (2) political and bureaucratic leaders may be held responsible for the acts of subordinates when they have ordered the commission of these acts; (3) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a relationship with subordinates similar to those of a military commander and they fail to act to prevent or punish; and (4) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a duty established either directly by international law or indirectly by domestic law or practice to ensure that their subordinates comply with the law and the leaders fail to fulfill that duty.

C. Geneva Conventions—1949

Despite the application and the development of the superior responsibility doctrine in the post-World War II trials, the Geneva Conventions of 1949[60] were silent on the doctrine.[61] It has been argued that this failure, coupled with the widespread nature of the civil wars of the time, led to a decline in the use of the doctrine for the next thirty-plus years.[62]

D. Field Manual 27-10, Section 501

In 1956, the United States Army addressed the doctrine in its Field Manual (FM) on the Law of Land Warfare. Paragraph 501 of that manual states:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a

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Id.

[60] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[61] *See* Bantekas, *supra* note 25, at 574; Mitchell, *supra* note 25, at 394. For an examination of the duties and requirements for military commanders that the Geneva Conventions of 1949 do specify, see Burnett, *supra* note 41, at 135–39.

[62] *See* Bantekas, *supra* note 25, at 574–75; Mitchell, *supra* note 25, at 394–95. Many of the civil wars fought during this time involved rebel armies lacking the formal command structures found in national armies thus prohibiting the application of superior responsibility because of the difficulty in identifying commanders or superiors. Bantekas, *supra* note 25, at 574–75. Bantekas also identifies the political environment of the times and "the political implications of such charges," as contributing factors to the decline in the use of the doctrine and refers to the case of United States Army Captain Medina as an example of national reluctance to convict officers for the crimes of their subordinates. *Id.* at 574, 574 n.14; *see infra* Part II.E for a discussion of the Medina case.

> responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[63]

As paragraph 501 indicates, the Army adopted the mens rea requirement that a commander should have been aware of war crime violations of those under his control through reports received by him or through other means. This standard reflects that adopted by the tribunal in the *Hostage Case*.[64]

E. Vietnam

In 1971, the U.S. Army brought to trial Captain Ernest Medina, a company commander, for responsibility of his subordinates' actions in the My Lai massacre.[65] The controversial aspect of this case related to the doctrine of command responsibility and the military judge's instructions to the panel.[66] The military judge's instructions concerning the responsibility of the commander stated:

> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to

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[63] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (18 July 1956).
[64] *See supra* notes 45–47 and accompanying text.
[65] United States v. Medina, 43 C.M.R. 243 (C.M.A. 1971). For more history of the facts surrounding the My Lai massacre, *see* WILLIAM R. PEERS, THE MY LAI INQUIRY (1979); MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND COURT-MARTIAL OF LIEUTENANT CALLEY (2002).
[66] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 362–63; Bantekas, *supra* note 25, at 574 n.14; Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 7 (1972) (Howard was the military judge in the Medina case.).

> make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.[67]

This instruction makes actual knowledge a requirement for conviction in contrast to the "should have knowledge" language of FM 27-10.[68] Captain Medina was acquitted of all charges.[69]

F. Additional Protocol I, Geneva Conventions (1977)

The first international codification of the doctrine occurred in 1977, in Additional Protocol I to the Geneva Conventions of 12 August 1949.[70] With respect to the doctrine, there were differing views as to the knowledge element and what standard would apply.[71] The conference

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[67] Howard, *supra* note 66, at 10–11.
[68] *See supra* notes 63–64 and accompanying text.
[69] Homer Bogart, *Medina Found Not Guilty of All Charges on Mylai*, N.Y. TIMES, Sept. 23, 1971, at 1.
[70] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 86, 87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
[71] *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3545 n.31; LAEL, *supra* note 28, at 134; Crowe, *supra* note 44, at 224–25.

adopted the *Hostage Case* precedent and rejected two proposals for a should-have-known standard.[72]

1. Article 86

Article 86 of Additional Protocol I is entitled "Failure to Act" and states:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[73]

Article 86 refers to "superiors" and is not limited to military superiors.[74]

2. Article 87

Article 87 provides actual duties for commanders to follow regarding the issue of possible breaches of the Conventions.

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and,

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[72] *See* LAEL, *supra* note 28, at 134; Crowe, *supra* note 44, at 225. The United States proposal stated: "If they knew or should reasonably have known in the circumstances at the time." COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3545 n.31.
[73] Protocol I, *supra* note 70, art. 86.
[74] *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶¶ 3540–48.

> where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[75]

Although an important step in the development of International Humanitarian Law and imposing obligations upon the parties to a conflict, Additional Protocol I is not without its shortcomings. Additional Protocol I failed to provide for international jurisdiction over breaches of its provisions, therefore, the creation of a means to enforce this agreement would require further international consensus.[76] Additionally, the United States has not ratified Additional Protocol I and has objected to certain articles contained therein.[77]

G. Lebanon—Sabra & Shatilla Massacre

Between September 16 and September 18, 1982, at the Sabra and Shatilla refugee camps in Beirut, Lebanon, over 800 Palestinian and

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[75] Protocol I, *supra* note 70, art. 87.
[76] Fenrick, *Prosecutions Before the ICTY*, *supra* note 8, at 104 (quoting the ICRC's preliminary remarks made on the setting up of an International Tribunal for the former Yugoslavia in 1993 and the need to rely on a United Nations' resolution rather than existing international humanitarian law).
[77] Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469 (1993). The United States does not object to either Articles 86 or 87. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419 (1987).

Lebanese civilians were killed.[78] These killings were carried out by the Lebanese Christian Phalangists in response to the assassination of their leader a few days earlier.[79] These events transpired in the course of the Israeli invasion of Lebanon in order to destroy the Palestine Liberation Organization's military infrastructure located there.[80] The Israeli and Phalangist forces worked together to control Beirut.[81] Despite concerns about potential harm to the inhabitants of the camps by the Phalangists, the decision was made by the Israeli military, including the Minister of Defence Ariel Sharon, to allow the Phalangists to enter the refugee camps without Israeli Defence Forces (IDF) accompanying them.[82] After the massacre was discovered, Israel established a Commission of Inquiry (the Kahan Commission), headed by the President of the Supreme Court, to look into the details of what transpired.[83]

The Commission concluded that direct responsibility for the massacre belonged to the actual perpetrators—the Phalangist militia.[84] More importantly for purposes of superior responsibility, the Commission also concluded that "everyone who had anything to do with events in Lebanon should have felt apprehension about a massacre in the camps, if armed Phalangist forces were to be moved into them without the I.D.F. exercising control and effective supervision and scrutiny of them."[85] Clearly finding the doctrine of command responsibility applicable to Israeli military authorities,[86] the Commission also found

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[78] Final report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (1983) (Authorized Translation), *reprinted in* 22 I.L.M. 473, 491 (1983) [hereinafter Kahan Report].
[79] *Id.* at 473–74.
[80] *Id.* at 476–77.
[81] *Id.* at 477–78.
[82] *Id.* at 479–81; *see also* Green, *supra* note 5, at 361–62.
[83] Kahan Report, *supra* note 78, at 473; *see also* Green, *supra* note 5, at 362.
[84] Kahan Report, *supra* note 78, at 493.
[85] *Id.* at 498.
[86] *Id.* at 496. In its report, the Commission responded to objections voiced over finding any indirect responsibility on the part of Israel if no direct responsibility on Israel's part were found by stating:

> [T]hose who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded the anticipated danger. . . . It is also not possible to absolve of such indirect responsibility those persons who, when they received the first reports of what was happening in the camps, did not rush to prevent the continuation of the Phalangists' actions and did not do everything within their power to stop them.

that the Israeli Defence Minister shared responsibility for the decision to allow the Phalangists to enter the camps.[87] The Commission, however, did not find the Defense Minister responsible for failing to do more in response to learning of the atrocities being committed.[88] As a result of the Commission's report, Sharon was forced to resign as the Defense Minister, but remained in Prime Minister Menachem Begin's cabinet as a Minister without portfolio.[89]

III. Modern Application

A. International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

The first application of the command responsibility doctrine by international criminal tribunals to crimes unrelated to World War II has taken place at the ICTY and ICTR.[90] These ad hoc tribunals were created by the United Nations as a result of the international discovery of widespread ethnic violence and atrocities committed in the former Yugoslavia and Rwanda respectively.[91]

Id.

[87] *Id.* at 502–03. Regarding Defense Minister Sharon, the Commission stated:

> It is our view that responsibility is to be imputed to the Minister of Defense for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. These blunders constitute the nonfulfillment of a duty with which the Defense Minister was charged.

Id. at 503.

[88] *Id.* at 503; s*ee* Green, *supra* note 5, at 367 (arguing that the Commission's decision to not hold Sharon responsible for making further inquiries at that time a political decision).

[89] Shany & Michaeli, *supra* note 16, at 797. The Commission recommended that Sharon resign as defense minister and if not that Prime Minister Menachem Begin consider removing him from office. Kahan Report, *supra* note 78, at 519.

[90] Boelaert-Suominen, *supra* note 8, at 784.

[91] *See* BASSIOUNI, *supra* note 4, at 422–34.

Both the ICTY and ICTR have articles in their respective statutes addressing the superior responsibility doctrine.[92] The language of these two statutes is almost identical.[93] Both make a superior criminally responsible for identified crimes of a subordinate if the superior "knew

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[92] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute]. The military regulations of the Socialist Federal Republic of Yugoslavia (SFRY) concerning the application of the international law of war to the armed forces dated 1988 include a paragraph entitled Responsibility for the acts of subordinates which states:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorized to charge them, and he did not report them to the authorized military commander, he would also be personally responsible.
> A military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units and individuals to continue to commit the acts.

Federal Secretariat for National Defence, Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY art. 21 (1988), *reprinted in* BASSIOUNI & MANIKAS, *supra* note 4, at 661.

[93] Article 7(3) of the ICTY Statute states:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

ICTY Statute, *supra* note 92, at 1194. Article 6(3) of the ICTR Statute states:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.

ICTR Statute, *supra* note 92, at 1604–05.

or had reason to know that the subordinate was about to commit such acts or had done so,"[94] and then failed to prevent the acts or "to punish the perpetrators thereof."[95]

B. ICTY & ICTR Jurisprudence

The Trial Chambers of both the ICTY and ICTR have addressed the doctrine of superior responsibility and dealt specifically with its application to civilian and non-military superiors. A review of their decisions provides a view of the modern development of the doctrine and some of the specific areas that have been addressed.

As to the applicability of ICTY Article 7(3) and ICTR Article 6(3) to civilians, the Tribunals have determined that superior responsibility applies to both military commanders and civilian superiors in positions of authority.[96] In determining whether an individual is a superior for purposes of criminal responsibility, it is the actual possession or non-possession of powers of effective control over the actions of the individual's subordinates that is dispositive.[97] As stated previously, one of the elements of the superior responsibility doctrine requires a senior-subordinate relationship between the accused superior and the subordinate perpetrator of the crime. This element is crucial because the doctrine exists to punish the superior for failing to take action against the subordinate perpetrator.

One way to determine whether such a relationship exists, especially in the non-military situation, is to examine the "effective control" that the superior has over the subordinate. The ICTY Trial Chamber has held that "in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons

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[94] ICTY Statute, *supra* note 92, at 1194; ICTR Statute, *supra* note 92, at 1604–05.
[95] ICTY Statute, *supra* note 92, at 1194; ICTR Statute, *supra* note 92, at 1604–05.
[96] Prosecutor v. Musema, ICTR Case No. 96-13-T, Judgement & Sentence, ¶¶ 127–48, 864, 866 (Jan. 27, 2000); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, ¶¶ 213–16 (May 21, 1999); Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-A, Judgement, ¶¶ 195-96, 240 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 75 (June 25, 1999); Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 363 (Nov. 16, 1998);
[97] Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 58 (Nov. 16, 2005); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 301 (Mar. 3, 2000); *Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 76; *Čelebici*, Case No. IT-96-21-A, ¶ 197; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 370.

committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of the offenses."[98] The formal designation as a commander is not controlling, as this authority can be either de jure or de facto.[99] Furthermore, even if the perpetrators were not the direct subordinates of the superior, he could still be criminally responsible for their actions "insofar as he exercises effective control over them."[100] In reaching these conclusions, the ICTY Trial Chamber in *Čelebici* examined the post-World War II precedent and some of the questionable results where individuals with mere powers of influence or persuasion were found guilty under the superior responsibility doctrine.[101] The ICTY approach appears to be a safeguard from stretching the doctrine too far as applied to those non-military commanders.

Knowledge on the part of the superior of offenses committed by his subordinates can be proved by either direct or circumstantial evidence, but can not be presumed.[102] A superior will only be held criminally responsible if the prosecution can prove that there was some specific evidence actually available to him that could have provided notice that his subordinates were planning or committing offenses.[103] It is enough that the information available to the superior indicated that further investigation was required to determine if offenses were being planned or committed.[104]

In terms of how far a superior must go to prevent the commission of offenses by subordinates, the ICTY jurisprudence states that this inquiry must be determined on a case-by-case basis, but that criminal responsibility should attach only when the superior fails "to take such

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[98] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 300-01; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 378.
[99] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 300; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 378; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 300.
[100] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 301.
[101] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶¶ 364-378. The ICTY Trial Chamber specifically discussed the *Roechling* and *Hirota* cases in their examination of precedent. *Id.* ¶ 376. *See also supra* notes 52, 58 and accompanying text.
[102] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 386. In *Čelebici*, the trial chamber identified a list of indicia that it could consider in determining whether a superior possessed the required knowledge. *Id.*; *see also Halilović*, Case No. IT-01-48-T, Judgement, ¶ 66; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 307.
[103] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 393.
[104] *Id.*

measures that are within his material possibility."[105] Those measures possible under the circumstances are required regardless of whether the superior has a recognized legal authority to prevent or punish.[106] Also, the reporting of crimes or suspected activity to appropriate authorities by a civilian superior may satisfy the element requiring the superior to take disciplinary action.[107]

A number of civilian superiors in different positions have been prosecuted in the ICTY and ICTR. Jean Kambanda, the Prime Minister of the Interim Government of Rwanda from 8 April 1994, to 17 July 1994, pled guilty to being responsible for acts of genocide and crimes against humanity.[108] He specifically acknowledged that he participated in numerous meetings with other government officials where the massacres of Tutsis were monitored, but nothing was done to stop them.[109] Omar Serushago, a prominent local civilian and leader of the Interahamwe militia group in the Gisenyi Prefecture, also pled guilty to being responsible for acts of genocide and crimes against humanity in violation of Article 6(3) of the ICTR Statute.[110] A director of a tea factory, Alfred Musema was convicted of acts of genocide and the crime

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[105] *Id.* ¶ 395; *see Halilović*, Case No. IT-01-48-T, Judgement, ¶ 73; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 302, 335; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 81 (June 25, 1999).

[106] *Halilović*, Case No. IT-01-48-T, Judgement, ¶ 73; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 395.

[107] *Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 78. The trial chamber in Aleksovski recognized that a civilian superior's power to discipline subordinates may not be the same as that of a military commander.

> 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. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities.

Id.; *see Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 302, 335; *Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶¶ 70–77.

[108] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement & Sentence, ¶ 5 (Sept. 4, 1998).

[109] *Id.* ¶ 39.

[110] Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 26 (Feb. 5, 1999).

of extermination committed by the employees of the tea factory.[111] The Musema tribunal found that he had both de jure and de facto control over the employees of the tea factory.[112] In another ICTR case, Clement Kayishema, a prefect in Rwanda, was found guilty as a superior for acts of genocide committed by his subordinates.[113]

In ICTY cases, Zdravko Mucic, a civilian, was found to be the de facto commander of the Čelebici prison-camp and therefore criminally responsible as the superior for the acts of the personnel of the camp.[114] Also, Zlatko Aleksovski the civilian prison warden of the Kaonik prison was held responsible as a superior for the detention conditions and the crimes committed by the guards inside the prison.[115]

The ICTY and ICTR tribunals provide the first application of the law of superior responsibility to actual cases since the end of World War II. The analysis of the trial and appellate chambers in identifying customary international law with respect to superior responsibility and its application to cases involving both international and internal armed conflict, and to both military and civilian superiors, should prove to be an instructive reference when the International Criminal Court begins adjudicating cases involving these issues.[116]

C. International Criminal Court (ICC)

On 17 July 1998, the Statute of the ICC was adopted by the Rome Diplomatic Conference.[117] This marked the culmination of earlier

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[111] Prosecutor v. Musema, Case No. 96-13-T, Judgement & Sentence, ¶¶ 894–95, 949–51 (Jan. 27, 2000).
[112] *Id.* ¶ 894.
[113] Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, ¶¶ 555, 559, 563, 569 (May 21, 1999).
[114] Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 775 (Nov. 16 1998).
[115] Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶¶ 118, 138 (June 25, 1999).
[116] In its review of the *Čelebici* case, the ICTY Appellate Chamber made the following recognition of the state of customary law with respect to civilian superiors: "Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law." *Čelebici*, Case No. IT-96-21-A, Appeal Judgement, ¶ 240 (Apr. 8, 2003).
[117] Rome Statute for the International Criminal Court Adopted by the United Nations Diplomatic Conference of Plenipotentiares on the Establishment of an International

efforts, beginning with the post-World War I attempt to create an international court to hold responsible those charged with starting that war, the Nuremburg and Tokyo trials after World War II, and the ad hoc trials of the ICTY and ICTR, to the creation of a permanent international criminal court.[118] The goal of the Rome Statute is a court providing "for the effective prosecution and punishment of serious violations of international humanitarian law wherever such abuses may occur and by whomever they may be perpetrated."[119] The Rome Statute entered into force on 1 July 2002.[120]

Of primary importance to the doctrine of superior responsibility is the establishment of Article 28 of the Rome Statute, entitled Responsibility of Commanders and other Superiors.[121] Article 28 of the ICC reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control,

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Criminal Court, 17 July 1998, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999. *See also* THE STATUTE FOR THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 39 (M. Cherif Bassiouni ed., 1998).

[118] *See* Antonio Cassese, *From Nuremburg to Rome: International Military Tribunals to the International Criminal Court*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3–18 (Antonio Cassese et al. eds., 2002).

[119] *Id.* at 18. Under the Rome Statute, the ICC has jurisdiction over the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. Rome Statute, *supra* note 1, art. 5. Article 5 states in part: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." *Id.* The ICC can exercise jurisdiction if a State that is a party to the Rome Statute is: (1) the location of the criminal conduct in question; (2) the State of registration of a vessel or aircraft where the criminal conduct occurred; (3) the State of which the accused person is a national; or (4) a State that is not a party to the statute accepts the jurisdiction of the ICC. *Id.* art. 12. Crimes are brought to the attention of the ICC by: referral to the ICC prosecutor from either a State party to the Rome Statute or the United Nations Security Council; or the prosecutor's independent initiation of an investigation. *Id.* arts. 13, 14, 15.

[120] International Criminal Court, http://www.icc-cpi.int/about/ataglance/history.html (last visited Dec. 5, 2007). As of 17 October 2007, there are 105 countries who are States Parties to the Rome Statute. International Criminal Court, http://www.icc-cpi.int/asp/statesparties.html (last visited Dec. 5, 2007). The United States is not a State Party. *Id.*

[121] Rome Statute, *supra* note 1, art. 28.

> or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (b) That military commander or person 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.
> 2. With respect to superior and subordinate relationships not described in paragraph (1), 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:
> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (c) 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.[122]

For the first time, the superior responsibility of civilians is specifically distinguished from that of military commanders.

The doctrine of command responsibility, identified as direct responsibility in the introduction, is also addressed in the Rome Statute, but independent of Article 28. Direct responsibility is covered under Article 25 which is entitled Individual Criminal Responsibility.[123] Article

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[122] *Id.*
[123] *Id.* art. 25.

25 specifically addresses the individual who orders, solicits, or induces the commission of a covered crime.[124]

D. International Committee of the Red Cross (ICRC)—Customary International Law Study

In a 2005 publication cataloguing customary international law of armed conflict, two ICRC authors addressed the individual responsibility of superiors for the actions of subordinates in their Rule 153.[125] Rule 153 states:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[126]

The ICRC interprets a number of points about the doctrine as being established in customary international law. These include: application of the doctrine in both international and non-international armed conflict;[127] liability for both military personnel and civilians under the doctrine;[128] that the command subordinate relationship can be both de jure and de facto;[129] that the doctrine is not limited to the direct knowledge of the superior but also constructive knowledge;[130] that failure to punish subordinates who commit war crimes can result from failing to investigate or report to higher authorities;[131] and that the term "necessary and reasonable measures" is limited to such measures within a superior's

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[124] *Id.* art. 25(3).
[125] 1 JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 558 (2005).
[126] *Id.*
[127] *Id.* at 559–60.
[128] *Id.* at 561.
[129] *Id.*
[130] *Id.* at 561–62.
[131] *Id.* at 562–63.

power to include taking an important step toward dispensing punishment or reporting the matter to competent authorities.[132]

E. Summarizing the Development and Application of Superior Responsibility

The doctrine of superior responsibility has evolved from a general concept of the responsibility of a military commander, to a legal concept of a superior's criminal responsibility for the crimes of subordinates. Responsibility now applies to both military and non-military or civilian superiors. Additionally, the doctrine has evolved from essentially judge or tribunal-crafted law to internationally drafted codifications, most recently that contained in the Rome Statute. Part IV will discuss this most recent codification of the doctrine.

IV. Examination of Civilian Liability under ICC Article 28

This section will examine the elements of the superior responsibility doctrine as they exist in Article 28. As previously stated, the superior responsibility doctrine essentially has three elements: (1) the existence of a superior-subordinate relationship; (2) actual or constructive knowledge of the superior that a criminal act was about to be or had been committed; (3) failure by the superior to take reasonable and necessary measures to prevent the crimes or punish the wrongdoers.[133] Article 28(2)(b) of the Rome Statute addressing non-military superiors arguably creates another element which will be discussed below.[134]

A. The Superior–Subordinate Relationship

Article 28 of the ICC bifurcates the approach to dealing with superiors. Article 28(1) applies to a "military commander or person effectively acting as a military commander,"[135] whereas Article 28(2) applies to "superior and subordinate relationships not described in

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[132] *Id.* at 563.
[133] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 346 (Nov. 16, 1998).
[134] *See infra* notes 150 to 157 and accompanying text.
[135] Rome Statute, *supra* note 1, art. 28(1).

paragraph 1."[136] Under Article 28, a factual analysis needs to be undertaken to determine if a civilian (non-military) accused is "effectively acting as a military commander" or not, in order to determine which elements under the statute apply. It appears that during the drafting of the Rome Statute, the need to differentiate these two types of superiors resulted in this final product.[137] Some have criticized this bifurcation and argue that it will allow a civilian superior to avoid criminal responsibility.[138] In Part V, this article will apply Article 28(2) to a number of civilian superior scenarios, determine a possible outcome, and evaluate whether this argument is fair.

The key aspect of the superior-subordinate relationship with respect to liability is the superior's effective authority and control.[139] "The possibility of control forms the legal and legitimate basis of the superior's responsibility; it justifies his or her duty of intervention."[140] With respect to civilian superiors under Article 28(2), this is potentially even more important.[141] Effective authority and control applies to both a de jure and de facto superior.[142] At trial, just how effective an accused's authority and control was over the subordinates in question will strengthen the prosecution's case.[143]

Another aspect to the superior-subordinate relationship is identified in Article 28(2)(b). "The crimes concerned activities that were within the

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[136] *Id.* art. 28(2).

[137] *See* Saland, *supra* note 3, at 189. Saland was a member of the ad hoc committee who worked on the drafting of the Rome Statute.

> An idea developed for a new structure for the article that would incorporate different requirements for military and civilian superiors. But another very difficult issue entered the debate. It was pointed out that there could very well be situations where crimes were committed by de facto forces. It would not be acceptable to have less stringent requirements for de facto commanders than those for military commanders in regular armed forces. One could also imagine situations where regular military units were put under a civilian command to perform, for example, public works.

Id. at 203.

[138] *See* Vetter, *supra* note 3, at 116.

[139] *See* Fenrick, *Article 28*, *supra* note 10, at 520–21.

[140] Ambos, *supra* note 3, at 853.

[141] *See id.* at 857–60; Bantekas, *supra* note 25, at 582–83.

[142] *See* Fenrick, *Article 28*, *supra* note 10, at 521.

[143] *See, e.g.*, Prosecutor v. Musema, Case No. 96-13-T, Judgement & Sentence, ¶¶ 894–95, 949–51 (Jan. 27, 2000).

effective responsibility and control of the superior."[144] This element does not apply to the military commander or person effectively acting as a military commander. It appears to be a limitation on the imposition of criminal liability on a civilian superior. One interpretation posited is that it is a causation requirement.[145] Another is that it identifies the fact that civilian superiors don't have the same degree of control over subordinates as military commanders have.[146] A third and final interpretation is that this represents the idea that there cannot be effective control "with regard to non-work related activities of the subordinates."[147] Along these lines, this could also be viewed as a limitation on liability based on the scope of the relationship of the superior and subordinate.[148] If the criminal acts are unrelated to the nature of the relationship, the argument goes, then it is unfair to impose liability for not controlling subordinates' behavior where there is no duty to do so, as it is outside the responsibility of the superior.[149]

B. Mens Rea

Perhaps the most controversial of the elements in Article 28 is the knowledge element and the differences that exist for military and civilian superiors. Actual knowledge on the part of any type of superior that his subordinates, "were committing or about to commit such crimes,"[150] is sufficient and an easy way to satisfy the knowledge requirement if that evidence exists. The controversy surrounds the more stringent requirement from the prosecutor's perspective regarding civilian superiors under Article 28(2)(a), which states that "[t]he superior . . . consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes."[151] This

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[144] Rome Statute, *supra* note 1, art. 28(2)(b).
[145] *See* Vetter, *supra* note 3, at 119.
[146] *See id.* at 120.
[147] Ambos, *supra* note 3, at 858; *see also* Fenrick, *Article 28*, *supra* note 10, at 522 ("[Non-military subordinates] are within the effective responsibility and control of a superior while at work or while engaged in work related activities. . . . Their work superiors do not normally have control over them when they are not so engaged.").
[148] *See* Ambos, *supra* note 3, at 858 (identifying the related argument made in Wu & Kang, *supra* note 25, at 295).
[149] Wu & Kang, *supra* note 25, at 290–95.
[150] Rome Statute, *supra* note 1, art. 28(1)(a), (2)(a).
[151] *Id.* art. 28(2)(a). For discussion or recognition of the controversy between the knowledge requirements for military superiors and civilian superiors *see* Saland, *supra*

is in contrast to the "owing to the circumstances at the time, should have known" standard applied to military superiors.[152] One commentator has identified that in order to satisfy this knowledge element, the prosecution must prove: "that information clearly indicating a significant risk that subordinates were committing or were about to commit offenses existed, that this information was available to the superior, and that the superior, while aware that such category of information existed, declined to refer to the category of information."[153]

This standard for civilian superiors essentially eliminates culpability for negligent supervision. At least one commentator has identified this as a reckless or a willful blindness standard.[154] It falls somewhere between actual knowledge and negligence.[155]

With respect to the impact that the new knowledge standard for civilian superiors will have in the courtroom, it has been identified that the key question may be the ICC's determination as to whether a superior's duty to remain informed is reduced.[156] If the duty is lowered,

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note 3, at 204; Ambos, *supra* note 3, at 863–70; Vetter, *supra* note 3, at 120–24; Lippman, *supra* note 3, at 165.

[152] Rome Statute, *supra* note 1, art. 28(1)(a).; *see also* Fenrick, *Article 28*, *supra* note 10, at 521.

[153] *See id.* Fenrick also identifies the following factors, taken from *Čelebici*, that might be used to determine if a non-military superior had the requisite knowledge:

> [T]he number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved; the location of the commander at the time.

Id. at 519.

[154] Ambos, *supra* note 3, at 870; *see also* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 387 (Nov. 16, 1998) (differentiating the situation where a superior "ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates," with that where the superior "lacks such information by virtue of his failure to properly supervise his subordinates."); Wu & Kang, *supra* note 25, at 284–85 (examining the various mens rea standards employed by the superior responsibility doctrine).

[155] Ambos, *supra* note 3, at 870.

[156] *See* Vetter, *supra* note 3, at 124. In addressing the issue of the superior's duty with regards to remaining informed, the *Čelebici* trial chamber stated:

> In this respect, it is to be noted that the jurisprudence from the period

this will allow the superior to fail to acquire the necessary information to learn of any criminal or questionable behavior of subordinates and ultimately affect the evidence available at trial.[157] On the other hand, if the duty to remain informed remains the same, the level of information and reports received by the superior should be the same and increase the potential evidence available at trial.[158] Ultimately, this controversy will be decided when and if the ICC actually applies it in a case.

C. Failure to Act

The final element under Article 28 is the superior's failure to act. This element is identical for both military commanders and civilian superiors, requiring proof that 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."[159] The latter part of this element, submitting the matter to a competent authority, was added to address the situation where either a civilian superior or a military commander is not in a position to prosecute.[160] International law recognizes that superiors

> immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates. Indeed, from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was 'at fault in having failed to acquire such knowledge.'

Čelebici, Case No. IT-96-21-T, Judgement, ¶ 388; *see also* United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946-Nov. 1949, 751, 1271 (1951).

[157] *See* Vetter, *supra* note 3, at 124.

[158] *See id.*

[159] Rome Statute, *supra* note 1, arts. 28(1)(b), (2)(c).

[160] *See* Saland, *supra* note 3, at 204.

> Another issue which needed further discussion related to a commander's or civilian superior's power to prevent or repress the commission of crimes. It was pointed out that civilian superiors, in particular, are not always themselves in a position to prosecute. In some systems the same would be true of military commanders, who have to submit the matter to the civilian system of police, prosecutors and courts. For these reasons submission of crimes to the competent authorities for investigation and prosecution was added in both sub-paragraphs 1(b) and 2(c) of Article 28, as part of the responsibility applicable to both commanders and civilian superiors.

may be limited in the amount of power they have in this area and does not require them to perform the impossible.[161]

A superior's required action or failure to act depends on the timing of when he acquires knowledge of the criminal actions of subordinates.[162] If knowledge is acquired prior to the crimes taking place, the superior is required to take all necessary and reasonable preventive measures within his power.[163] If the crime has already taken place, then the superior is required to take repressive action or to submit the matter to competent authorities to conduct an investigation.[164] Essentially, a prosecutor will need to establish that after the accused acquired knowledge of the potential criminal act, he failed to take all necessary and reasonable measures to prevent the act from happening. If the accused acquired knowledge after the criminal act occurred, then the prosecutor will need to prove that the accused failed to discipline the subordinate perpetrator, or if the superior does not have the power to discipline, that she failed to submit the matter to an authority with disciplinary power over the subordinate.[165]

Id.

[161] *See* Protocol I, *supra* note 70, arts. 86, 87; COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶¶ 3524, 3548, 3562. In *Čelebici*, the trial chamber stated: "It must, however, be recognized that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers." *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 395.

[162] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 519–20.

[163] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 519–20.

[164] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 518.

[165] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394 (recognizing that this is a fact-specific analysis).

> It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard in abstracto would not be meaningful.

Id.

V. Scenario Applications

This section will apply Article 28 to three hypothetical scenarios involving different civilian superiors and analyze the potential outcomes before the ICC. Analysis will focus on the factual development of the scenarios as they relate to the elements of Article 28(2). Assume for the purposes of all three scenarios that the country of Latvia has invaded Estonia in order to secure access to the Gulf of Finland. Additional facts will be provided for each scenario.

A. Civilian Contractor

1. Factual Scenario

In this scenario, the Acme Security & Support Services (Acme) is a private Australian contractor who has contracted with the government of Latvia to provide logistical support to Latvia's military. Support includes the delivery of fuel, food, and other supplies from Riga, the capital of Latvia, to Estonia where the Latvian Army is engaged in armed conflict with Estonia. The logistical support is carried out primarily by armed truck convoy. All personnel on the convoys are members of Acme to include the security contingent. Mick Dundee is the CEO of Acme. Over the course of a two-week period, large numbers of civilians of Estonia are found dead along the Main Supply Route (MSR) used by the Acme convoys. On the Acme website, a video showing civilians being shot, a grenade being tossed at them, and even apparently being hit by vehicles, is accessible through a link. The video is shot from the view of a moving vehicle with a time date image located on the video indicating these events have occurred twice over the last two weeks.[166]

As a result of public outrage over the video an investigation is conducted by Latvia's Minister of Justice. The results of the investigation indicate that on three occasions, convoys returning from Estonia to Latvia operated by Acme intentionally targeted Estonian civilians along the MSR and killed or wounded over three hundred. Evidence exists that Mick was on-site at the Acme Logistics base located in Latvia during the entire time these crimes took place. He was not on any of the convoys. Further evidence suggests that the video was posted to the Acme website between the second and third incident. There is no

[166] This hypothetical is not based on any specific incident.

evidence clearly establishing that he knew that Acme employees were committing these crimes or that he effectively acted as a military commander. Finally, after the investigation was initiated Mick fired all the Acme employees on the convoys in question. Mick is formally brought to trial before the ICC charged with a violation of Article 28 as the superior criminally responsible for the war crimes of his subordinates.[167]

2. Application of legal framework

First, the prosecutor must prove that Mick was the superior of the Acme employees who committed the crimes. This can be done by showing that as the CEO of the company, he holds the power to hire or fire any of the employees. The prosecution must also establish the company leadership structure. Second, the prosecutor must establish that the crimes in this case concerned activities that were within the responsibility and control of Mick, that is, the delivery of supplies by Acme to Latvia's military. These crimes occurred while the Acme convoys were returning from making their deliveries in Estonia along the MSR. As the subordinates did not deviate from their assigned route these facts should satisfy the element.

The more difficult issue will be proving the knowledge element. As required by Article 28(2)(a), the prosecutor must prove that Mick "consciously disregarded information which clearly indicated" that his subordinates "were committing or about to commit such crimes."[168] Evidence indicating that Mick saw the video, heard of the video, heard his subordinates talking about what occurred on the convoys, the existence of any after action reports indicating that the convoy needed to defend itself or came across the victims, would assist in proving the knowledge element. The issue of accountability over ammunition could also help the prosecution. If it could be shown that Mick knew of the expenditure of large amounts of ammunition this could strengthen the argument that he consciously disregarded information indicating that crimes were being committed.

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[167] For purposes of the scenario assume there are no problems with jurisdiction over Mick or the crimes described.

[168] Rome Statute, *supra* note 1, art. 28(2)(a).

Under the Article 28(2)(a) knowledge standard it is very likely that the prosecution will be unlikely to succeed in satisfying the ICC that Mick had the required mens rea. Contrast this with the knowledge standard under Article 28(1)(a), and those factors just listed have a much stronger probability of satisfying the knowledge element.

The prosecution also needs to satisfy the final element—showing that Mick failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes.[169] Because this element is so closely related to the knowledge element assume for purposes of this discussion that the prosecutor satisfied the knowledge element. Is Mick's action of firing his subordinates enough to satisfy this requirement? The defense would probably argue that Mick had no power to discipline the subordinates. What about the fact that an investigation had already started? This factor hinges on when the prosecution established that Mick had the requisite knowledge. Before the final convoy left base? Immediately after the convoy returned to Acme LOGbase? If Mick learned of the conduct before either the final convoy left base or the investigation started and fired the subordinates without reporting the conduct to the proper authorities, the prosecution should meet its burden.[170]

3. Result—Just or Unjust?

Given the facts and evidence in this scenario, without the assumptions, a finding of not guilty is probably the just result. There is little evidence to establish that Mick consciously disregarded information clearly indicating that these crimes were taking place. Even under the military commander standard this evidence doesn't appear to satisfy the knowledge element.

B. Civilian Mayor

1. Factual Scenario

In the Estonian capital of Tallinn, Mayor Igor Hertz has remained in his position despite the occupation of Tallinn by Latvian forces. Igor

[169] *Id.* art. 28(2)(c).
[170] *See supra* notes 160–64 and accompanying text.

sympathizes with the Latvians, and his cooperation is rewarded by being placed in charge of the rebuilding, security, and safety of the city after its destruction in its capture. The Latvian Army is extremely disciplined and adheres strictly to the laws of war and customary international law. Early reports of the ICRC have commended the Latvian military in this adherence. To assist in the rebuilding of Tallinn, Igor is given the services of a Latvian Infantry Battalion to secure construction projects from sabotage from Estonian insurgents. Igor is able to tell the battalion commander which projects to guard, but he does not have the power to discipline the commander or any of the soldiers.

The main project is the repair of port facilities. The neighborhood closest to the port received the least amount of damage and its inhabitants have either remained in or returned to their homes. Igor directs the battalion to guard the port and to police the neighborhood closest to the port. A report is aired in the local newspaper that several women living in this neighborhood have been raped by Latvian soldiers guarding the port. Igor hears this story, but dismisses it because he cannot believe these disciplined soldiers would do such a thing. After the story airs, his office begins to receive a number of complaints from the women of the neighborhood indicating that this is true. After two days of complaints, he visits the Latvian battalion commander who assures him that there is no truth to these stories. Igor feels assured and returns to his duties at the mayor's office. The complaints do not subside.

After a few months, the port facility is repaired. Igor is rewarded with an invitation to come to Riga, the Latvian capital, to discuss becoming the Minister of Northern Estonia. While in Riga, the ICRC publishes a report indicating that rapes have been committed throughout Tallinn and most especially in the neighborhood closest to the port. The report also indicates that numerous reports and complaints about this were made to the mayor's office. The world media grabs the story. Extremely upset, the Latvian President decides to turn Igor over to the ICC for prosecution. The battalion commander and his unit are returned to Latvia where the perpetrators are subject to the Latvian military justice system. Igor is brought to trial and charged under Article 28.

2. Application of legal framework

The first question here is whether Igor had effective authority and control over the Latvian infantry battalion. The evidence indicates that the battalion was placed under Igor's control and that he had the authority to direct their actions. The only limit indicated was his ability to discipline the soldiers. This will probably not prevent the prosecution from proving that the Latvian soldiers were subordinates of Igor. As discussed prior, the drafters of Article 28 identified that there may be situations where military units are placed under the control of civilian superiors and civilian superiors may be unable to discipline.[171]

Were the rapes crimes concerning activities within the effective responsibility and control of the superior? The facts indicate that Igor directed the infantry battalion to guard the port and police the neighborhood where the rapes occurred. The prosecution should be on firm ground here to satisfy its burden as to this element.

Did Igor consciously disregard information which clearly indicated that his subordinates were raping the women in the neighborhood? Again, as with the previous scenario, this is the tougher element for the prosecution to prove. Under these facts, Igor first hears of the rape allegations in the local paper. He chooses to ignore the story and does nothing. Does a story in a newspaper rise to the level of clearly indicating as Article 28(2)(a) requires? Probably not. The facts then tell us that his office began to receive reports directly about the alleged rapes. Again, Igor chooses to do nothing after the first day, but then after the second day of reports he approaches the battalion commander. The defense should be able to successfully argue that this action indicates that he did not disregard information, and in fact reported these allegations to someone who had the authority to investigate and possibly prosecute. The prosecution's response is to argue that Igor's reliance on only the commander's assertions is not enough, especially when the complaints continued to come to his office. The outcome is difficult to determine, but the ICC will probably decide in Igor's favor.

Change the facts to Igor never confronting or speaking to the battalion commander. Under these facts, the prosecution's chances are stronger in satisfying both the knowledge element and the failure to act element. Igor is ignoring numerous reports that arguably clearly indicate

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[171] *See supra* note 136 and accompanying text.

that his subordinates are raping the women of the neighborhood under their protection. Satisfy the knowledge element here and the failure to act is satisfied because no action is taken by Igor.

3. Result—Just or Unjust?

An acquittal of Igor under the facts above appears to be an unjust result. As the mayor is charged with the safety of the city, Igor's duty encompasses the prevention of rape of local women. His reliance on the battalion commander's assurance was misplaced especially with the repeated complaints. Igor had the ability to direct the soldiers' actions, he could have conducted an investigation, he could have reassigned the unit, he could have raised his concerns to a higher authority than the battalion commander.

C. Civilian Area Administrator

1. Factual Scenario

Tom Jones is appointed to be the Administrator of the Estonian Provisional Authority (EPA). He is responsible for the reconstruction of post-conflict Estonia. Within this responsibility is the authority to enter into contracts, spend money, and represent the Latvian government with respect to matters concerning reconstruction. All employees of the EPA ultimately fall under the responsibility of Jones. He can take administrative action against them and terminate their employment.

One area of particular interest is the city of Parnu. The EPA plans to relocate the capital of Estonia there. Insurgent activity and large scale resistance to reconstruction efforts plague the city. Jones directs a working group to solve the problem and to work with the military to do so. The solution is the forced relocation of thousands of civilian citizens of Parnu. While the actual physical removal of the citizens is done by military and police forces, the logistics of the relocation is planned, funded, and supervised by the EPA working group.

Months after beginning, the reconstruction of Parnu is well underway. Jones visits the city and sees remarkable progress. He receives no reports of continued resistance and congratulates his working group for their resolution of this problem. He never asks how they

decided to resolve the issue. Reports generated concerning the contracting and spending of EPA reconstruction efforts come into his office, but are sent to individuals responsible for those areas. Jones receives a monthly report, but only in the big picture. He does not question the spending for the relocation of the citizens of Parnu. Again, an ICRC report exposes the forced relocation of the Parnu citizens. Mr. Jones and his staff are turned over to the ICC for prosecution.

2. Application of legal framework

Did Jones have effective authority and control over the EPA working group that carried out the forced relocation?[172] The answer to this is yes. As the facts indicate, the employees of the EPA are all subject to Jones's authority. Was the forced relocation an activity within the effective responsibility and control of Mr. Jones? This element is slightly more difficult. While not personally directing the relocation, it was still carried out by EPA employees and with EPA funding as a process to satisfy the EPA's charge of reconstructing and particularly relocating the capital. This element is probably satisfied by those facts.

Did Jones consciously disregard information which clearly indicated that his subordinates were committing or about to commit this crime? Once again, this is the toughest element for the prosecution to prove. The evidence indicates that there were reports dealing with the spending to relocate the citizens, but how detailed were they? The more details as to what exactly this money was being spent on would strengthen the prosecution's case. Also, the facts indicate a lack of clear follow up as to how the initial problem with the resistance was dealt with. This could be Jones trying to turn a blind eye to this problem, but the facts do not entirely support a conclusion that he was trying to ignore the resolution of the problem. As mentioned before, one of the key aspects of this case will be how the ICC interprets the civilian superior's duty to remain informed.[173] If the ICC adopts the duty to remain informed of a subordinate's actions, then in this case, Jones arguably should have asked how the problem was resolved.

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[172] For purposes of this scenario, assume the forced relocation of the Parnu citizens is criminal under Article 7(1)(d) of the Rome Statute. *See* Rome Statute, *supra* note 1, art. 7(1)(d).

[173] *See supra* notes 155–57 and accompanying text.

3. Result—Just or Unjust?

It would appear that resolution of this case depends on how the ICC determines a civilian superior's duty to remain informed. If the historical trend is followed, then the duty remains high and Jones will most likely be convicted. If the duty standard is lowered, the prosecution's chances of success are weakened. In this case and under the facts given, that may not necessarily be the wrong decision. Does Jones truly deserve to be criminally responsible for his subordinates' actions here because he failed to know what was happening? While clearly if he had known about it, Jones could have taken action to prevent or repress the actions, it is unclear that he knew of the crimes and so should not be held criminally responsible.

D. Summation of Scenarios

As the scenarios indicate, there are a number of critical elements that the prosecution will need to establish: whether the superior had effective authority and control, whether the crimes were within the superior's effective responsibility, what information existed, and what the information indicated. The critical issue will be what is meant by "consciously disregarded." Perhaps assistance can be found in examining why this difference in knowledge standards exists in the first place. The answer appears to start with the United States delegation to the Preparatory Committee to the Rome Statute.[174] Concerns over a civilian superior's degree of control and ability to prevent and punish apparently generated the distinction in knowledge standards found in Article 28.[175] Furthermore, it appears that there were extensive negotiations and political compromises in drafting the text of what

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[174] *See* Saland, *supra* note 3, at 203, stating:

> During the Preparatory Committee meetings, the United States raised an important point: whether civilian superiors would normally have the same degree of control as military commanders and should therefore incur the same degree of responsibility. A further elaboration of this point was also raised, namely, whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates and punish the perpetrators.

Id.

[175] *Id.*

eventually became Article 28.[176] Given these concerns, this author concludes that eliminating the application of criminally culpable negligence to civilian superiors addressed the Preparatory Committee's concerns. This is accomplished in the sense that a non-military organization may be organized in any of a multitude of ways, from the strict hierarchical to one of loose control. The degree of supervision can also vary. By requiring more than negligence for civilian superiors, Article 28 attempts to eliminate the risk that a civilian superior will be held to a higher standard than is appropriate given his or her situation.

VI. Conclusion

Superior responsibility has evolved from its application to military commanders to encompassing civilians acting as military commanders to non-military civilian superiors. The post-World War II tribunals developed the doctrine with actual cases and shaped a concept into a more refined doctrine.[177] From the end of those tribunals until the creation of the ICTY and ICTR tribunals, the doctrine developed through various efforts to codify it.[178] The recent creation of the ICC has taken the doctrine and not only codified it, but added new elements.[179] Article 28 has created requirements that the subordinates' crimes concern an activity within the superiors' effective responsibility and control. Furthermore, Article 28 has created a new knowledge standard applicable to non-military civilian superiors.[180]

It is the difference in knowledge standards that has raised concerns.[181] Presently, the ICC has not heard a case and therefore has not interpreted what this new civilian superior standard means. The concern appears to be that civilian superiors will be able to avoid criminal responsibility because of the difficulty in proving that they consciously disregarded information clearly indicating that subordinates

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[176] E-mail from Michael A. Newton, Acting Associate Clinical Professor of Law, Vanderbilt University School of Law, to author (Mar. 20, 2006, 10:33 EST) (on file with author) (discussing the drafting of Article 28 by the working group and departure of final draft of Article 28 from previous drafts, specifically language unique to civilian superiors, in order to achieve consensus to extend doctrine to civilian superiors).
[177] *See supra* notes 28 to 59 and accompanying text.
[178] *See supra* notes 63–64, 70–76, 90–95 and accompanying text.
[179] *See* Rome Statute, *supra* note 1, art. 28(2)(a).
[180] *Id.* art. 28(2)(a), (b).
[181] *See, e.g.*, Vetter, *supra* note 3, at 120–24.

were committing or planning to commit crimes.[182] Also, this different standard will weaken any deterrent effect the doctrine might have as to civilian superiors.[183] In raising these concerns, comparison has been drawn to previous cases, arguing that the outcomes would be different and now the convicted would be acquitted.[184] The failure in this argument is ignoring whether those prior cases were rightly decided.[185] How much did victor's justice have to play in the outcome?[186]

The Rome Statute recognizes a difference between a military commander or someone effectively acting as a military commander, and a civilian superior.[187] This is an important difference primarily because of the different levels of inherent responsibility that each holds. Military commanders are entrusted with a tremendous amount of responsibility, and the nature of the military commander-subordinate structure allows a commander the requisite tools to fulfill his duty. The military by its nature requires a higher standard of discipline.[188] A civilian non-military hierarchy does not have this structure. In recognition of the military's heightened discipline, most nations in the world have separate justice systems for the military and civilians. Thus, Article 28 recognizes that civilian superiors operate in an environment lacking the disciplined structure of the military. It would appear from the limited history of the drafting of the Rome Statute, that concerns over a civilian superior's degree of control and ability to prevent and punish prompted this decision.[189] Because of these concerns, a civilian superior should not be held to the same mens rea requirement, because this could impose criminal responsibility where it should not exist. This cautious approach appears to be a response to the outcomes of some of the cases decided immediately after World War II. The ICTY Trial Chamber in *Čelebici* also appeared to take a cautious approach in applying criminal responsibility to non-military civilian superiors.[190]

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[182] *See id.*
[183] *See id.* at 94.
[184] *See id.* at 125–36.
[185] *See, e.g.*, Ambos, *supra* note 3, at 831.
[186] *See, e.g.*, 1 THE TOKYO JUDGMENT, *supra* note 57, at 457–58; 2 *id.* at 1126–28, 1137–38.
[187] Rome Statute, *supra* note 1, art. 28(1), (2).
[188] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3549.
[189] *See supra* note 174 and accompanying text.
[190] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶¶ 364–378 (Nov. 16, 1998).

From the scenarios in Part V, it is unclear whether the creation of a separate knowledge standard for civilian superiors is necessarily unfair compared to the standard required for the military-type superior. Ultimately, the ICC will actually have to apply Article 28(2)(a) to a genuine set of facts to resolve the issue. Leading to that day, it appears that the elements of Article 28(2) do not diminish its deterrent value or impose an insurmountable obstacle for successful prosecution of civilian superiors.