JUS IN BELLO FUTURA IGNOTUS: THE UNITED STATES, THE INTERNATIONAL CRIMINAL COURT, AND THE UNCERTAIN FUTURE OF THE LAW OF ARMED CONFLICT

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The great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural appearance.[1]

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[1] CARL VON CLAUSEWITZ, ON WAR (1832).

I. Introduction

In describing the future threat environment, the United States (U.S.) Army's recently published "Operating Concept" asserts, "The enemy is unknown, the location is unknown, and the coalitions involved are unknown."[2] Not mentioned, however, is the fact that the Law of Armed Conflict (LOAC)—the body of law that will govern how the fight is conducted—has a similarly uncertain future. That uncertainty resides in the rapidity with which the LOAC is changing—as one commentator asserts, between 1991 and 1998 alone, the LOAC developed more than in the previous forty–five years.[3] This rapid change coincided with the growing influence of international tribunals in developing the LOAC,[4] prominently among them the International Criminal Tribunal for the Former Yugoslavia (ICTY).[5] Since its inception in 1993,[6] the ICTY has effectuated a "fundamental transformation in the laws of war."[7] Most significantly, in *Prosecutor v. Tadić*, the ICTY articulated the LOAC's triggering mechanism,[8] extended universal jurisdiction to war crimes committed in non–international armed conflicts (NIACs),[9] and applied Geneva Convention Common Article (CA)

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[2] U.S. DEP'T OF ARMY, PAM. 525-3-1, WIN IN A COMPLEX WORLD 2020-2040 iii (7 Oct. 2014) [hereinafter OPERATING CONCEPT].

[3] Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 463 (1998).

[4] *See generally* Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 816–37 (2010) (discussing the growing influence of non–state actors (NSAs) and international tribunals on the development of the Law of Armed Conflict (LOAC) in the two previous decades).

[5] *See* Allison Marston Danner, *When Courts Make Law: How The International Criminal Tribunals Recast the Laws of War*, 39 VAND. L. REV. 1, 23-33 (2006).

[6] S.C. Res. 808, para. 13, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing an "international tribunal" for serious violations of the LOAC "occurring in the territory of the former Yugoslavia since 1991").

[7] Danner, *supra* note 5, at 23.

[8] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (asserting "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state").

[9] *Id.* ¶¶ 140–42. Though the *Tadić* court determined that international law allowed for universal jurisdiction over war crimes in a non–international armed conflict (NIAC), *id.* (determining that the court's jurisdiction over crimes is not limited by a conflict's classification), that position is not established in the *lex scripta*. For example, Additional Protocol I to the 1949 Geneva Conventions (API), which applies only to an International Armed Conflict (IAC), uses the term "grave breach" to describe violations of the LOAC over which universal jurisdiction can be asserted. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 2(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. Specifically, the "grave breach" phraseology in API was apparently borrowed from the 1949 Geneva

3[10] to International Armed Conflicts (IAC).[11] This later determination was made in the face of CA3's textual limitation to NIACs,[12] and was nonetheless followed by the U.S. Supreme Court in *Hamdan v. Rumsfeld*.[13] These developments were not contained in the *lex scripta*,[14] and the *Tadić* court offered scant support for them in state practice.[15]

Conventions, which uses the term to describe offenses which must be prosecuted by the accused's State, or the offenders must be extradited to another State for prosecution. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2, 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded Sick and Ship–wrecked Members of Armed Forces at Sea arts. 2, 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 2, 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War arts. 2,146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Similarly, Additional Protocol II to the 1949 Geneva Conventions, which applies only to NIACs, does not contain the terms "war crimes" or "grave breaches," which, therefore, indicates the concept that universal jurisdiction does not apply to that protocol. *See generally* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 608 [hereinafter APII]. Consequently, there is no support in the *lex scripta* for the concept of universal jurisdiction over war crimes in a NIAC.

[10] Common Article 3 (CA3) is so called because it is common to each of the four 1949 Geneva Conventions. *See, e.g.*, GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

[11] *Tadić*, Case No. IT-94-1-I at ¶ 102 (explaining that under customary international law "with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant").

[12] The CA3 explicitly limits its application to "armed conflict not of an international character." GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3. By contrast, Common Article 2 (CA2) restricts application of all other provisions of the 1949 Geneva Conventions only to an "armed conflict which may arise between two or more of the High Contracting Parties." *See* GC I, *supra* note 9, art. 2; GC II, *supra* note 9, art. 2; GC III, *supra* note 9, art. 2; GC IV, *supra* note 9, art. 2. A CA2 conflict is also referred to as an "international armed conflict" (IAC) in API. API, *supra* note 9, Art. 2(3).

[13] Hamdan v. Rumsfeld, 548 U.S. 557, 631 n.63 (2006) (citing *Tadić* in support of its conclusion that CA3 is applicable in all armed conflicts, no matter the characterization).

[14] *See, supra* notes 8–9, 11–12, and accompanying text.

[15] *See, e.g.*, *Tadić*, Case No. IT-94-1-I ¶¶ 66–70 (asserting the triggering mechanism articulated by the court is the product of a logical interpretation of the 1949 Geneva Conventions and their 1977 Additional Protocols); *id.* ¶ 137 (conducting no assessment of state practice in determining whether the concept of war crimes applies in NIACs); *id.* ¶¶ 100-07 (implying that selected political speeches, proclamations by wartime leaders, and the policy of a small handful of States constitutes sufficient state practice to support expanding CA3 to IACs).

The *Tadić* court asserted these interpretations were international law,[16] thereby demonstrating how tribunals can insert themselves into the process of customary international law formation—a process which is by definition State–centric. That is, customary law forms only when state practice and *opinio juris* coincide—when States generally and consistently conduct their affairs in a certain manner because of the belief that the practice is required by international law.[17] That formal process, though, is difficult to reconcile with the following statement by Judge Antonio Cassese, the president of the ICTY at the time of the *Tadić* decision: "[I] pushed so much and we exploited the *Tadić* case to draw as much as possible from a minor defendant to launch new ideas and be creative."[18] There can be no doubt that the influence of *Tadić* was far–reaching. Any such doubt was laid to rest on July 1, 2002 when, after its 60th ratification, the Treaty of the International Criminal Court (Rome Statute) came into force,[19] permanently cementing the *Tadić* revolution within its provisions.[20]

The ICTY's influence, in turn, has been amplified by a non–state actor (NSA)—the International Committee of the Red Cross (ICRC). In particular, in 2005, the ICRC published what it considered to be 161 rules of customary

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[16] *See, supra* notes 9, 11 and accompanying text.

[17] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (c)(2) (1987) [hereinafter FOREIGN RELATIONS LAW RESTATEMENT] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). *See also* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 ("The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law . . . .").

[18] Joseph Weiler, *Nino–In His Own Words*; *The Last Page and Roaming Charges*, 22 EUR. J. INT LAW 931, 942 (2011).

[19] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (2002) [hereinafter Rome Statute]. Article 126 of the Rome Statute specifies in pertinent part that the statute will "enter into force on the first day of the month after the 60th day following the date on which the 60th nation submits its instrument for ratification to the United Nations (UN)." *Id.* The 60th ratification occurred on April 11, 2002 and the statute, therefore, went into effect on July 1, 2002. Benjamin B. Ferencz, *Misguided Fears About the International Criminal Court*, 15 PACE INT'L L. REV. 223, 241 (2003).

[20] For example, the LOAC triggering mechanism developed in *Tadić* is substantially identical to Article 8.2(f) of the Rome Statute. *Compare* Rome Statute, *supra* note 19, art. 8(f), *with Tadić*, Case No. IT-94-1-I at ¶ 70. Further, the Rome Statute, like the *Tadić* decision, extends universal jurisdiction over war crimes committed in a NIAC. *Compare* Rome Statute Statute, *supra* note 19, art. 8.2(f), *with Tadić*, Case No. IT-94-1-I ¶¶140–42.

international law[21] which relied heavily on ICTY jurisprudence,[22] and even on the ICC Statute (Rome Statute).[23] United States officials criticized the study shortly after its release, asserting among other issues that only "positive evidence . . . that States consider themselves legally obligated" can amount to *opinio juris*.[24] Nonetheless, the study has had far–reaching influence, and has been frequently cited by state and national tribunals alike, including the International Criminal Court (ICC) and the U.S. Supreme Court.[25] Interestingly, the study actually refers to tribunal decisions as "persuasive" evidence of state practice,[26] which, paradoxically, the ICRC acknowledges may not have been developed based on state practice when it stated, "It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, *provided that there is no important contrary opinio juris*."[27]

The phrase "provided there is no important contrary *opinio juris*" understates the willingness of some tribunals to subordinate the interests of States to effectuate change they term "desirable."[28] In *Prosecutor v. Krupreskić*, for example, the ICTY paid more heed to ICRC views than State national security concerns in determining that a prohibition on belligerent reprisals had crystalized

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[21] 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, (Jean–Marie Henckaerts & Louise Doswald–Beck eds. 2005) [hereinafter ICRC STUDY VOLUME I]; 2 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, (Jean–Marie Henckaerts & Louise Doswald–Beck eds. 2005) [hereinafter ICRC STUDY VOLUME II].

[22] For example, a word search of Volume I and Volume II of the International Committee of the Red Cross (ICRC) Study reveals the abbreviation "ICTY" mentioned over 1100 times. *See generally* ICRC STUDY VOLUME I, *supra* note 21; ICRC STUDY VOLUME II, *supra* note 21.

[23] For example, a word search of Volume I and Volume II of the International Committee of the Red Cross (ICRC) Study reveals the abbreviation for International Criminal Court, "ICC," is mentioned over 1400 times. *See generally* ICRC STUDY VOLUME I, *supra* note 21; ICRC STUDY VOLUME II, *supra* note 21.

[24] John B. Bellinger & William J. Haynes, *A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study*, 89 INT'L REV. RED CROSS 443, 447 (2007).

[25] *See, e.g.*, Joined cases of Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence, [2014] 1369 QB 1, 74 (U.K.) (on the customary international law authority to detain in NIACs); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, n.1641 (April 20, 2009) (on the applicability of the LOAC to both NIACs and IACs); Janowiec v. Russia, App. 55508/08, 58 H.R. Rep. 30 ¶ 126 (2013) (on the duty to investigate war crimes); Hamdan v. Rumsfeld, 548 U.S. 557, 632 (2006) (on the definition of "regularly constituted court").

[26] ICRC STUDY VOLUME I, *supra* note 21, at x1.

[27] *Id.* at xlviii (emphasis added).

[28] *Id.*

into customary international law.[29] In doing so, the court ignored that both the U.S. and the United Kingdom authorized belligerent reprisals.[30] Consequently, neither country changed its position[31] and ultimately the ICTY reversed course.[32]

Thus, the *Krupreskić* decision also illustrates the limits of the ICTY's influence. The ICTY was a temporary ad hoc tribunal with limited jurisdiction[33] and its decisions, including *Tadić*, could not have resonated had States not been willing to accept them. However, Professor Allison Danner posits that a State's willingness to accept tribunal decisions does not require those decisions be perfectly aligned with State's interests.[34] She explains that tribunal decisions can become "focal points, which States then adopt as authoritative, even if they would have preferred an alternative rule."[35] The utility of a focal point from a State perspective is that they improve coordination by resolving "ambiguities" in international relations.[36] A focal point therefore might be described as the proverbial "carrot" that incentivizes a State to comply with the rulings of international tribunals. A "stick" analogy may likewise explain an additional mechanism that ICC decisions have to gain adherents—even non–ICC member States like the U.S.,[37] who fail to adhere to its interpretations of the LOAC, risk their servicemembers being charged with war crimes.[38]

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[29] *See* Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶¶ 527–33, n. 788 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000) (acknowledging scant state practice to support its determination that belligerent reprisals are prohibited by customary international law and citing among other sources an ICRC memorandum in support of its determination).

[30] *See* The War Office, THE LAW OF WAR ON LAND 184 (1958) (authorizing reprisals); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, CHANGE NO. 1 1976, 177 (July 1956) [hereinafter U.S. LAW OF WAR MANUAL 1956] (authorizing reprisals). *See also* U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT iii (2004) [hereinafter BRITISH LAW OF WAR MANUAL 2004] (addressing the *Kupreskić* decision by stating, "The court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists.").

[31] *See* BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 423; U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 177.

[32] Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 465-67 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 12, 2007) (explaining that belligerent reprisals are permitted in some circumstances).

[33] *See* S.C. Res. 808, *supra* note 6, para. 13.

[34] Danner, *supra* note 5, at 50.

[35] *Id.*

[36] Tom Ginsberg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WILL. & MARY L. REV. 1229, 1245 (2004).

[37] THE INTERNATIONAL CRIMINAL COURT, http://www.icc-i.int/EN_Menus/icc/Pages/default.aspx (follow "About the Court"; then follow "ICC at a glance"; then follow "123 countries") (last visited May 1, 2015) (listing all ICC member States, among which the United States is not listed).

[38] *See infra* discussion Part II.

The "stick" incentive in a world with more than 120 ICC member States[39] suggests that even decisions like *Kruprešić*, in the context of the ICC, create a danger of crystallizing into customary international law. Therefore, the ICC's broad jurisdictional reach and statutory framework position the court to fundamentally transform the LOAC without regard to the interests of States. Part II of this article will explain how the Rome Statute elevates its provisions, and ICC judicial interpretations thereof, above conflicting national law, rendering servicemembers vulnerable to charges of war crimes arising out of a legitimate use of force under domestic law. Part III analyzes two subject areas where conflicts between the Rome Statute and U.S. law may already render U.S. commanders vulnerable to ICC war crimes charges. Part IV offers the ICC Pre–Trial Chambers decision in *Prosecutor v. Jean–Pierre Bemba Gombo*[40] as a case study of how the ICC, acting in concert with NSAs, can transform the LOAC. Finally, Part V explains why the ICC's development of the LOAC will inevitably run afoul of the interests of States generally, and the implications thereof for the battlefield.

II. The ICC as Lawmaker

A. The Supremacy of the International Criminal Court

In assessing the extent to which the ICC is poised to develop the LOAC, it is useful to think of its statutory regime as establishing a "supreme court"[41] and a "legislature,"[42] albeit ones which exercise their jurisdiction supra–nationally.[43] As a legislative function, the statute establishes a procedure to enact "Elements of

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[39] THE INTERNATIONAL CRIMINAL COURT, http://www.icccpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015).

[40] *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor (June 15, 2009).

[41] *See* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT LAW 543, 558 (2010) ("Unlike international criminal law generally, the Rome Statute regime could be said to have a supreme court . . . and a legislature . . .). *See also Is a U.N. International Criminal Court in the U.S. National Interest?*, *Hearing Before the Subcomm. On Int'l Operations of the Comm. On Foreign Relations U.S.S.*, 105th Cong. 724 (1998) [hereinafter *Hearings*] (statement of Lee A. Casey, Attorney Hunton & Williams, Washington, D.C.) ("In attempting to subject a [nation's nationals] to the jurisdiction of the ICC, the ICC states are in fact attempting to act as an international legislature . . . .").

[42] *See* Grover, *supra* note 41, at 558. *See also Hearings*, *supra* note 41.

[43] *Id.*

Crimes"[44] (EOCs), and a procedure to allow for future amendments to the Rome Statute.[45] The statute also establishes the hierarchical order in which the court will determine "applicable law" by which the court will adjudge criminality—that is, it places its own provisions and the EOC at the top of the hierarchy, while at the bottom is "national law," which will only be applied if it is "not inconsistent with this Statute and with International law . . . ."[46] Thus, when the ICC has personal jurisdiction over the individual concerned, even individuals from non–member States,[47] its judicial interpretations of the law reign supreme over any other law it determines "inconsistent" with that interpretation.

While the ICC judges are afforded license to interpret the law, less deference is given to sovereign States, even "[w]here there are good–faith doctrinal differences."[48] For example, the ICC's case referral procedure accommodates sovereignty only to the extent that it allows a State to refer a case to the ICC,[49] while empowering two organizations to refer without consent—the United Nations (UN) Security Council acting under Chapter VII of the UN Charter; [50] or an ICC prosecutor, who can exercise his discretion independently.[51] While the statute facially limits such discretion to "the most serious crimes of concern to the international community as a whole," it does not provide objective discerning criteria.[52]

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[44] *See* Rome Statute, *supra* note 19, art. 8. *See also* Finalized Draft Elements of Crimes, ICC–ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter EOC].

[45] Rome Statute, *supra* note 19, art. 121.

[46] Rome Statute, *supra* note 19, art. 21.

[47] *See infra* Part II.B.

[48] Ruth Wedgewood, *The International Criminal Court: Reviewing the Case (An American Point of View)*, THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT, ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 1039, 1043 (José Doria et al. eds., 2009) ("Where there are good–faith doctrinal differences [in the law], this [complementarity] is no protection.").

[49] Rome Statute, *supra* note 19, art. 13(a).

[50] *Id*.

[51] *Id*. art. 13(c) (authorizing the prosecutor to initiate an investigation). Article 13(c) of the Rome Statute authorizes the prosecutor to initiate an investigation. *Id*. After initiating an investigation under article 13(c), the prosecutor is required to notify all "state parties" who would normally exercise jurisdiction over the crimes concerned. *Id.* art. 18(1). Upon receipt of that notification, the State has thiry days to inform the Court that it is investigating the crimes at issue. *Id.* art. 18(2). The prosecutor must defer to the State unless the pre–trial chamber approves a prosecutor's request to authorize the investigation notwithstanding the State's investigation. *Id*.

[52] *See id.* art. 5.

The discretion to refer, however, is not unfettered. Article 17 of the statute entitled "Issues of admissibility"[53] (also referred to as "complementarity"),[54] places limitations on when a case can be referred. For example, this provision bars the ICC from taking action on a case if the State is investigating or prosecuting the case.[55] The protection even extends to cases where a State has investigated and decided not to prosecute.[56] The only exceptions to these protections are if the State is "unwilling" or "unable" to "genuinely" investigate or prosecute the case themselves,[57] concepts the ICC has recently interpreted in a restrictive manner.[58] Inability only occurs when there is "a total or substantial collapse or unavailability" of a State's judicial system.[59] Unwillingness only occurs when the proceedings are not conducted "independently or impartially" or "in a manner inconsistent with an intent to bring the person to justice."[60] Yet, there is one gaping hole in these protections, the substance of which Ruth Wedgewood concisely describes as follows: "The [United States] by definition will be unwilling to prosecute its pilots or military commanders for carrying out missions that it believes to be lawful."[61] In other words, the statute makes no allowance for a State's good–faith differences in interpreting the law.

B. The Long Arm of the Rome Statute

It is not surprising then that several ICC member States have amended their domestic criminal codes to comply with the Rome Statute, including Canada, United Kingdom, Australia, Germany, and France.[62] Consequently, as ICC

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[53] *See id*. art. 17.

[54] *Id.* art. 1. Article 1 of the Rome Statute provides that jurisdiction of the court "shall be complementary to national criminal jurisdictions." *Id.* Article 17 of the statute is the mechanism through which this complementarity is maintained. *Id*. art. 17.

[55] *Id*. art. 17.1(a).

[56] *Id*. art. 17.1(b).

[57] *Id*. art. 17.1(a),(b).

[58] *See, e.g.*, Prosecutor v. Saif Al–Islam Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al–Senussi, ¶ 169 (Oct. 11, 2013). In *Gaddafi*, the International Criminal Court (ICC) considered whether Libya was "either unwilling or unable genuinely to carry out the proceedings." *Id.* The court determined that Libya was not "unable genuinely" or "unwilling genuinely" to carry out the proceedings, *id.* ¶ 311, despite evidence indicating the accused would receive an unfair trial, *id.* ¶¶ 244–58, and evidence that Libya's judicial system was compromised by the security situation there. *Id.* ¶¶ 258–88. In making their decision, the court relied heavily on the active steps Libya was taking in processing the case. *Id.* a¶¶ 294–310.

[59] Rome Statute, *supra* note 19, art. 17.3.

[60] *Id*. at art. 17.2(c).

[61] Wedgewood, *supra* note 48, at 1043.

[62] *See* Michael P. Hatchell, *Note and Comment: Closing the Gaps in United States Law* and *Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. INT'L & COMP. L. 183, 184 (2005) (explaining that Canada, United Kingdom, Australia, Germany, and

member States, the court has worldwide personal jurisdiction over nationals of these countries[63] and can prosecute them for one of the four categories of crimes over which the court has subject matter jurisdiction: genocide, crimes against humanity, war of aggression, and war crimes.[64]

Additionally, for the same subject matter crimes, the Rome Statute allows personal jurisdiction over servicemembers of States that have not consented to that personal jurisdiction in the three following circumstances: first, when the UN Security Council refers the case to the ICC prosecutor;[65] second, if the crime occurs in the territory of a non–member State which requests the ICC to exercise jurisdiction;[66] and third, if the alleged crime occurs in the territory of a member State.[67] It is because of this latter circumstance, precipitated by the U.S.'s international responsibilities and force posture, that its servicemembers face greater exposure to ICC jurisdiction compared to their allied counterparts mentioned in the preceding paragraph.[68] That exposure is further aggravated as

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France have ratified the Rome Statute and incorporated the statute's punitive articles into their domestic laws).

[63] Rome Statute, *supra* note 19, art. 12.1.

[64] *Id.* art. 5.

[65] *Id.* arts. 12.2, 13(b).

[66] *Id.* art. 12.3.

[67] *Id.* art. 12.2(a).

[68] Wedgewood, *supra* note 48, at 1042–43. Wedgwood states in pertinent part,

> The [United States] [f]aces a number of crucial and hazardous military tasks in which it may have few operational allies. These include the defense of South Korea, strategic stability in the Taiwan Straits, balance in the Middle East, and measures against international terrorism. NATO allies may or may not choose to share in these responsibilities. With a commitment to maintain security in key areas of the world, Washington is logically concerned with preserving realistic standards for military operations. Innovative proposals for new battlefield standards and the use of advanced technology to save innocent lives will always warrant serious discussion among responsible governments, humanitarian agencies, religious thinkers, military analysts, political commentators, and the public. But they do not routinely belong in the escalated rhetoric of a criminal tribunal. With 220,000 military personnel serving in overseas deployment, it is not surprising that Washington should be cautious about the ICC's broad wingspan.

Id.

the U.S., unlike these allies, has not amended its domestic law to comply with the Rome Statute.[69]

III. The ICC and the Rule of Law

A. The Limits of Article 98 Agreements

The U.S. has sought to protect its servicemembers from ICC jurisdiction by entering into over one hundred Article 98 Agreements since the Rome statute came into force in 2002.[70] Article 98 of the ICC Statute provides in pertinent part that the ICC "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements . . . ."[71] Under Article 98 agreements, each signatory agrees not to hand over each other's citizens to the ICC unless both parties consent in advance.[72] While the legal validity of these agreements has been questioned,[73] there is no question that Article 98 agreements do not stop the ICC from investigating a case, issuing arrest warrants, and indicting U.S. servicemembers.[74]

The stage is set for the ICC to become "a platform to critique U.S. . . . military policy,"[75] or perhaps more aptly, an "auditor of American military operations."[76] Thus, any gap between U.S. law and the Rome Statute should be of considerable concern for U.S. commanders operating in any country where the Rome Statute allows personal jurisdiction over U.S. servicemembers. Such a gap could create

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[69] David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L. H.R. 30, 32 (2009).

[70] JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 26 (2006).

[71] Rome Statute, *supra* note 19, art. 98(2).

[72] Elsea, *supra* note 70, at 26.

[73] *Compare* Ryan Goodman, *President Certifies U.S. Forces in Mali Not at Risk of International Criminal Court, but is that Legally Valid?*, JUSTSECURITY (Feb. 3, 2014, 9:24 AM), http:justsecurity.org/6702/president-certifies-armed-forces-mali-risk-inter national-criminal-court-legally-valid/ (arguing article 98 agreements defeat the object and purpose of the Rome Statute and therefore the agreements are invalidated by Article 18 of the Vienna Convention on the Law of Treaties), *with* Jeffrey S. Dietz, *Protecting the Protectors: Can The United States Successfully Exempt U.S. Persons From The International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT'L. L. 137, 157 (2004) (arguing article 98 agreements do not defeat the object and purpose of the Rome Statute as article 98 expressly contemplates surrender requests may conflict with a State's international obligation not to surrender an accused).

[74] *See* Ruth Wedgewood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 207 (2001) (explaining that that Article 98(2) agreements do not stop the ICC from exercising its jurisdiction up to the point of arrest).

[75] *Id.*

[76] *Id.* at 198.

an opportunity for opposing forces to use ICC processes to paint U.S. actions as lawless,[77] striking directly at heart of the U.S. center of gravity, the American people.[78] Indeed, perceived loss of legitimacy can directly translate to strategic loss,[79] and in recent history the legitimacy of military operations has been called into question over allegations of violations of LOAC.[80] As nearly any force confronting the U.S. would have to fight asymmetrically—and likely violate the LOAC in the process[81]—a gap between the Rome Statute and U.S. law could paradoxically allow an enemy who violates the LOAC to occupy moral high ground,[82] the risk of which the U.S. Army Counter Insurgency Manual succinctly captures: "Lose Moral Legitimacy, Lose the War."[83]

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[77] Major General (Retired) Charles J. Dunlap, Jr., *Law of War Manuals and War Fighting: A Perspective*, 47 TEX. INT'L L.J. 265, 268 (2012) ("There is no question that many belligerents . . . seek to gain an advantage by portraying [the United States] and other forces as violating the law of war, and thus erode the popular support . . . .").

[78] William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT'L L. 431, 441 (2003). Eckhardt states in pertinent part,

> Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and or execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."

Id.

[79] *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 23 (2005) (arguing that the Nixon Administration's failure to address Vietcong allegations of "wanton destruction" during Operation Linebacker II contributed to U.S. defeat and became a model for future adversaries to discredit U.S. operations).

[80] *See* Richard A. Oppel, Jr. & Robert F. Worth, *The Conflict in Iraq: Insurgency; G.I.'s Open Attack to Take Falluja from Iraq Rebels*, N.Y. TIMES, A1 (Nov. 8, 2004) (explaining that reports of "large scale" civilian casualties forced the U.S. to cease operations in Falluja in April 2004); John J. Kruzel, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AMERICAN FORCES PRESS SERVICE (May 11, 2009), http://www.defense.gov/news/newsarticle.aspx?id=54294.

[81] Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 5, 15 (2009) (explaining that the U.S.'s technological military advantage "far out–distances" all others which compels its enemies to engage in concealment warfare in violation of the LOAC).

[82] *See* Michael N. Schmitt, *21st Century Conflict: Can The Law Survive?*, 8 MELB. J. INT'L L. 443, 470 (2007) (arguing that technically advanced militaries like the U.S. are held to a higher moral standard than the enemies they confront, which explains why "[A]bu Ghraib somehow generates a greater visceral reaction than the kidnapping and beheading of innocent civilians").

[83] U.S. DEP'T OF ARMY, FIELD MANUAL 3-23, COUNTERINSURGENCY para. 7-42 (15 Dec. 2006).

B. Preempting an International Criminal Court Investigation

A closer analysis of the Rome Statute's complementarity provisions and the court's decisions interpreting it reveal how the U.S. can preempt an ICC investigation when a violation of the Rome Statute is alleged.[84] First, the record must show that the State in question is (or already has) investigated or prosecuted the allegations.[85] Second, the ICC will defer to a State's prosecutorial decision—including a decision not to prosecute—unless the ICC determines that State was "unwilling" or "unable" to "genuinely" carry out proceedings.[86] Third, the allegations investigated must cover the "same person" and the "same conduct" as would have been investigated by the ICC.[87]

The same "person" and the same "conduct" does not mean the crimes investigated or charged under domestic law have to be equivalent to those that could be charged under the ICC statute.[88] For example, in *Prosecutor v. Gaddafi*, the Government of Libya had no equivalent of the Rome Statute's "Crimes Against Humanity" provision which was at issue in that case.[89] The court nonetheless stated this would not *per se* mean the ICC could assert jurisdiction over the matter, that "domestic investigation or prosecution for 'ordinary crimes' to the extent that the case covers the same conduct," would be sufficient to invoke the statutes complementarity protections.[90] On the other hand, failure to investigate a matter because it is not a crime under domestic law would certainly increase the risk of an ICC intervention.[91] In particular, as the court stated in *Prosecutor v. Katanga*, "[I]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute."[92]

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[84] *See* Rome Statute, *supra* note 19, art. 1 (stating that jurisdiction of the court "shall be complementary to national criminal jurisdictions"); *id.* art. 17 (establishing the mechanism through which a case is determined "inadmissible" before the court).
[85] *See id.* art. 17.1(a),(b).
[86] *Id*.
[87] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Application for Warrants of Arrest, ¶ 31 (Feb. 10, 2006) ("It is a *conditio sine qua non* for a case arising from the investigation of a situation to be admissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court").
[88] *Id.*
[89] Prosecutor v. Saif Al–Islam Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al–Islam Gaddafi, ¶ 88 (May 31, 2013).
[90] *Id.*
[91] *See* Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Appeal Judgment, ¶78 (Jun. 12, 2009).
[92] *Id.*

Indeed, particularly when it comes to investigating senior leaders, inaction would increase the risk of an ICC investigation, as seniority weighs heavily in determining whether the case is of sufficient "gravity" for the ICC to assert jurisdiction pursuant to article 17(1)(d) of the Rome Statute.[93] Specifically, in *Prosecutor v. Dyilo* the ICC established a three–part test to determine whether a given case is of sufficient "gravity" which can be summarized as follows:[94] first, is the individual a senior leader?;[95] second, is the individual implicated in "systematic or large–scale crimes?;"[96] third, is the individual among those those suspected of being most responsible?[97] As each criterion most directly bears on senior decision–makers, this section will focus on two areas where military commanders may be vulnerable to ICC prosecution due to inconsistencies between U.S. law and the Rome Statute—command responsibility and the rule of proportionality.

1. Command Responsibility—The Duty To Prevent

Command responsibility is a current issue for the U.S.. In particular, on December 2, 2014, the ICC Office of the Prosecutor (OTP) released its 2014 Report of Inquiry (2014 ROI) which referenced "U.S. senior commanders" in Afghanistan.[98] It provided the following excerpt regarding detainee operations in Afghanistan from February 2003 through June 2004, which implicated command responsibility: "[T]here is information available that interrogators allegedly committed abuses that were outside the scope of any approved [interrogation] techniques, such as severe beating, especially beating on the soles of the feet, suspension by the wrists, and threats to shoot or kill."[99]

This article will not address the facts or merits of any such cases against U.S. commanders. However, it will occasionally use the allegations to contextualize how one specific aspect of command responsibility—the duty to prevent subordinate war crimes—is handled under the Uniform Code of Military Justice (UCMJ)[100] and the U.S. criminal code applicable to all U.S. servicemembers,[101]

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[93] Rome Statute, *supra* note 19, art. 17(1)(d).
[94] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Application for Warrants of Arrest, ¶¶ 52–53 (Feb. 10, 2006).
[95] *See id.* ¶ 52.
[96] *See id.* ¶ 53.
[97] *See id.*
[98] Office of the Prosecutor, Report on Preliminary Examination Activities ¶ 95 (2014) [hereinafter 2014 ROI], http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf.
[99] *Id.* ¶ 95.
[100] 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice (UCMJ)).
[101] *See generally id.* § 825 (establishing who is subject to jurisdiction under the UCMJ).

in comparison to the Rome Statute. In so doing, this article will presume the interrogators who used the alleged unauthorized techniques violated both the UCMJ and international law, with the only issue being whether the referenced U.S. commanders can be held liable for their subordinates' crimes.

There are differences between how these commanders can be held liable for crimes of their subordinates under the UCMJ and the Rome Statute. To understand the extent of those differences, it is first necessary to understand a substantial similarity between the UCMJ and the Rome Statute—vicarious liability.[102] Each has vicarious liability provisions which, under certain circumstances, would hold an individual responsible for the crimes of others as if they had committed the crimes themselves.[103] The UCMJ refers to this type of responsibility as "principle liability" and "co–conspirator" liability, and under either legal regime, proving an offense on a vicarious liability theory requires a high threshold of *mens rea*.[104]

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[102] UCMJ art. 77 (codified at 10 U.S.C. §877 (2012)); UCMJ art. 81 (codified at 10 U.S.C. §881 (2012)). The UCMJ has two types of vicarious liability where an accused can be held responsible for the criminal acts of others—principle liability, UCMJ art. 77 (2012), and co–conspirator liability, UCMJ art. 81 (2012). The Rome Statute has similar vicarious liability provisions in Article 25.3(a), Rome Statute, *supra* note 19, art. 25.3(a) (establishing liability if an accused "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime); Article 25.3(b) and (c), *id.* art. 25.3(b), (c) (establishing liability when an accused commits a crime "jointly with or through another person").

[103] *See* UCMJ art. 77 (2012) (establishing principle liability); UCMJ art. 81 (2012) (establishing co–conspirator liability); Rome Statute, *supra* note 19, art. 25.3(a) (establishing liability when an accused commits criminal acts "jointly with or through another person"); *id.* art. 25.3(b),(c) (establishing liability when an accused "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime.).

[104] *See* UCMJ art. 77 (2012); UCMJ art. 81 (2012); Rome Statute, *supra* note 19, art. 25.3(a); *id.* art. 25.3(b),(c). Both the UCMJ, Article 77 and the UCMJ, Article 81 require a high threshold of *mens rea* to sustain a conviction for the underlying crime in that the accused must possess at least some intent to commit the underlying criminal act. *See* MANUAL FOR COURTS–MARTIAL, UNITED STATES pt. IV, ¶ 1.b.(2)(b)(2012) [hereinafter 2012 MCM] (establishing that an accused can be held responsible as a principle if he were to"[a]ssist, encourage, command," or procure another to do the same, or "[s]hare in the criminal purpose or design" of the crime); *id.* 5.b (establishing criminal responsibility for those who enter into an conspiracy to commit a crime). The Rome Statute has similar vicarious liability provisions that require a similar high level of *mens rea*. For example, an accused can be held vicariously responsible under the Rome Statute if he commits a crime "jointly with or through another person." Rome Statute, *supra* note 19, art. 25.3(a). He can also be held liable if he "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime. *Id.* art. 25.3(b),(c). Article 30 of the Rome Statute makes clear, in the absence of contrary guidance written into the statute, that the requisite *mens rea* for a given crime is intent. *Id.* art. 19 ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.").

A major difference between the Rome Statute and the UCMJ is that the former has a separate command responsibility provision that imposes liability upon commanders if they "knew" or "should have known" of their subordinates' crimes and failed to act.[105] The UCMJ, by contrast, has no such command responsibility provision.[106] Thus, aside from the co–conspirator context where a failure to act was conspired, imposing vicarious liability on a commander for a failure to act requires meeting the elements of principle liability under UCMJ Article 77.[107]

To illustrate how a commander's failure to act may be punishable by application of Article 77 and other UCMJ articles, this section will also discuss the Vietnam War era case of *United States v. Captain Ernest Medina.*[108] In *Medina* the government charged the accused commander with intentional murder under UCMJ Article 118.[109] The charge was based on the accused's omission—his failure to prevent his subordinates' massacre of hundreds of civilians over the course of hours, a short distance from him.[110] The government pursued a principal theory of liability under UCMJ Article 77.[111] The 1969 Manual for Courts–Martial (MCM) which was in effect at the time of the trial[112]—and in a nearly identical fashion to the 2012 MCM currently in effect—specified under Article 77 that an accused may be required to act if he "had a duty to interfere."[113] An

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[105] Rome Statute, *supra* note 19, art. 28(a)(i) ("That [a] 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"). *See also* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, 184–85 (Jun. 15, 2009) (confirming charges against the accused under a command responsibility theory for the crimes committed by his subordinates).

[106] *See generally* 10 U.S.C. §§ 801–946 (2012) (codifying the Uniform Code of Military Justice).

[107] *See* UCMJ art. 77 (2012) (establishing principle liability); UCMJ art. 81 (2012) (establishing co–conspirator liability).

[108] Michael L. Smidt, *Yamashita Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 195 (2000).

[109] *Id.* at 195 n. 167.

[110] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 388–89 (Cambridge University Press ed., 2010).

[111] *Id.*

[112] *Id*. at 389 n. 46.

[113] *Compare* MANUAL FOR COURTS–MARTIAL, UNITED STATES, REVISED EDITION, ch. XXVIII, ¶ 156 (1969) [hereinafter 1969 MCM] ("If he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principle."), *with* 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(a) ("If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such

earlier MCM, the 1951 version, provided a useful example of how "the duty to interfere" could operate under a principle theory of liability.

> [A] sentinel or a guard charged with the duty of preventing the removal of government property who stands passively by while such property is taken in or from his presence by persons known to him to be thieves: is guilty of larceny of such property, for he is duty–bound to prevent offenses against the property he is protecting, and his inaction in the presence of the perpetrators constitutes assent to, and concurrence in, the larceny.[114]

Regarding command responsibility, however, none of the referenced MCMs articulate when a commander in Captain Medina's situation has a "duty to interfere" under Article 77.[115] This is in contrast to the Military Commission's Act (MCA) principle liability provision, which specifically addresses when a commander has an obligation to act—if he "knew, had reason to know, or should have known, that a subordinate was about to commit" war crimes.[116]

We must therefore look outside of the MCM—to the U.S. Army's still applicable 1956 Field Manual (FM) 27-10[117]—to ascertain when Captain Medina and the U.S. Commanders referenced in the ICC's 2014 ROI[118] had a "duty to interfere" under Article 77. In particular, FM27-10 references a "custom of the service" that imposes upon commanders a duty to act in certain circumstances,[119] a custom applicable to all U.S. service components.[120] Like the MCA and the

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a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.").

114 MANUAL FOR COURTS–MARTIAL, UNITED STATES, ch. XXVIII, ¶ 156 (1951) [hereinafter 1951 MCM].

115 *See generally* 2012 MCM, *supra* note 104, pt. IV, ¶ 1; 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 156; 1951 MCM, *supra* note 114, ch. XXVIII, ¶ 156.

116 10 U.S.C. § 950q (2012).

117 While originally published in 1956, the U.S. Army's Law of War Manual, Field Manual (FM) 27-10, was updated in 1976. U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 1. The update however, did not change the command responsibility provision. *See id*.

118 *See* 2014 ROI, *supra* note 98, ¶ 95.

119 *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16.b.(3)(a) (It is an established principle of U.S. Military jurisprudence that a "duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."); *Id.;* United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience). As it pertains to FM 27-10, it specifies that its provisions are evidence of "custom and practice." U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 3. As such, it is offered here as evidence of "custom of the service"—as articulating an affirmative duty grounded in custom that requires commanders to act when they know, or should know, of their subordinates' war crimes. *Id.* at 178-79.

120 *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 18.23.3 (Jun. 2015) [hereinafter DOD MANUAL 2015]. The DoD Law of War (LOW) Manual was

Rome Statute, FM 27-10 has a command responsibility provision that requires U.S. commanders to act in two situations—when they have "actual knowledge" of their subordinates' war crimes, or when they have constructive knowledge. The latter exists if the commander "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 war crimes . . . ."[121] Also similar to the MCA and the Rome Statute, the FM 27-10 provision requires commanders to "take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[122]

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a joint effort by all U.S. Military services. *Id.* at v–vi. The LOW manual cites FM 27-10's command responsibility provision in support of its assertion that "[c]ommanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war." *Id.* ¶ 18.23.3, n. 334. Further, FM 27-10's articulation of command responsibility doctrine is substantially mirrored in legal publications across all U.S. Military services, indicating a well–ingrained and uniform "custom of the service" across the Department of Defense. *Compare* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 ("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 . . . subject to his control are about to commit or have committed a war crime . . . ."), *with* U.S. MARINE CORPS, MARINE CORPS REFERENCE PUBLICATION (MCRP) 4-11.8B, WAR CRIMES 8 (6 Sep. 2005) (stating "[c]ommanders are legally responsible for violations committed by subordinates" when they "knew of the act" or "should have known"), *and* OCEANS LAW AND POLICY DEP'T, U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para.6.1.3, n. 13 (15 Nov.1997) (stating that a commander may be "presumed" to know of his subordinates war crimes if "the commander had information which should have enabled him or her to conclude under the circumstances that such breach was to be expected"), *and* THE COMMANDANT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. AIR FORCE, AIR FORCE OPERATIONS AND THE LAW 52 (2014) (stating that a commander is responsible if he has "actual knowledge, or should have known" of his subordinates' war crimes), *and* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 276 (Mar. 2015) ("Commanders are legally responsible for war crimes that they personally committed, or know or should have known about and take no action to prevent, stop, or punish.").

[121] *Compare id.*, *with* 10 U.S.C. § 950q (2012) (requiring the commander to act if he "knew, had reason to know, or should have known" of his subordinates' war crimes), *and* Rome Statute, *supra* note 19, art. 28(a)(i) (requiring the commander to act if he "either knew or, owing to the circumstances at the time, should have known" of his subordinates' war crimes).

[122] *Compare* U.S. LAW OF WAR MANUAL 1956, *supra note* 30, at 178–79, *with* 10 U.S.C. § 950q (2012) (imposing a duty upon a commander "to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"), *and* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing a duty to take "all necessary and reasonable measures within his or her power to prevent or repress their commission [of war crimes] or to submit the matter to the competent authorities for investigation and prosecution.").

Further, as it pertains to "actual knowledge" of subordinates' war crimes, there is little difference between the Rome Statute and the UCMJ. For example, the current U.S. Military Judge's Benchbook (JBB) and the Rome Statute's EOC both provide that circumstantial evidence of knowledge can be established by the "relevant facts and circumstances" surrounding the case.[123] However, the text of both FM 27-10 and the Rome Statute reveal a risk from a prosecutor's perspective of relying solely on an actual knowledge theory of the case—if a commander's actual knowledge is not proven, it cannot be said there was an obligation to act.[124]

For example, in Captain Medina's case, the defense theory claimed he lacked knowledge that his subordinates were committing war crimes.[125] Moreover, the government relied solely on an actual knowledge theory to prove the case.[126] That is, the government requested the jury be instructed the accused must have had "actual knowledge" of his subordinates' crimes.[127] In the end, the military jury

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[123] *Compare* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 7-3, n. 3 (10 Sep. 2014) [hereinafter JBB] (explaining that circumstantial evidence of knowledge can be inferred from "all relevant facts and circumstances"), *with* EOC, *supra* note 44, at 1 ("Existence of intent and knowledge can be inferred from relevant facts and circumstances."). The ICTY in *Prosecutor v. Dario Kordi* provided an indication of how "[c]ircumstantial evidence will allow for an inference that the superior 'must have known' of subordinates' criminal acts." Prosecutor v. Dario Kordi, Case No. IT-95-14/2-T, Judgement, ¶ 427 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 26, 2001). The court listed the following factors that could be used when making the determination:

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

Id.

[124] A commander's duty to act does not arise under the text of either FM 27-10 or the Rome Statute unless he has actual or constructive knowledge of his subordinates' war crimes. *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes); Rome Statute, *supra* note 19, art. 28(a)(i) (establishing that a commander has a duty to take "necessary and reasonable measures" when he has actual knowledge ("knew") or constructive knowledge ("should have known") of his subordinates' war crimes). It follows that if the government was relying solely on an actual knowledge theory under either legal regime, a failure to prove actual knowledge would mean the commander had no duty to take "necessary and reasonable" steps or measures.

[125] *See* SOLIS, *supra* note 110, at 388–90.

[126] *See id*.

[127] *Id.*

acquitted Captain Medina.[128] While the reasons for the jury's decision will likely never be known,[129] the jury could have determined Captain Medina did not have an obligation to act because he lacked actual knowledge of his subordinates' crimes.[130] Such a determination is difficult to swallow, however, given Captain Medina's short distance from the massacre, the hail of gunfire he must have heard, and evidence, albeit non–conclusive, suggesting he either ordered or incited his subordinates to act.[131]

It is also possible that the jury found Captain Medina had "actual knowledge" of his subordinates' crimes, and that he had an obligation to act, but that his failure to act was not accompanied by the appropriate level of *mens rea.*[132] The U.S. Military Nurnberg Tribunal in *United States v. Von Leeb* established the *mens rea*

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[128] *Id.* at 390.

[129] The 1969 MCM, like the 2012 MCM, requires that military jurors take an oath of silence regarding their deliberative process; therefore, it will likely never be known why the jury acquitted Captain Medina. *See* 1969 MCM, *supra* note 113, ch. XXII, ¶ 114b (providing the oath to be given to court members, wherein they swear they "will not disclose or discover the vote or opinion of any particular member of the court . . . unless required to do in the due course of law"); 2012 MCM, *supra* note 104, R.C.M. 807 (b)(2) (establishing the "Oath for members" and requiring they swear they "will not disclose or discover the vote or opinion of any particular member of the court . . . unless required to do so in due course of the law . . .").

[130] *See, e.g.*, U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander only has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes); Rome Statute, *supra* note 19, at art 28(a)(i) (establishing that a commander only has a duty to take "necessary and reasonable measures" when he has actual knowledge ("knew") or constructive knowledge ("should have known") of his subordinates' war crimes).

[131] *See* SOLIS, *supra* note 110, at 388–90.

[132] Any UCMJ provision used to prosecute a commander for failing to act in response to his subordinates' war crimes would have both an *actus reus* element and a *mens rea* element. *See, e.g.*, UCMJ art. 77 (2012) (establishing principle liability based on a "failure to act . . . intended to . . . operate as an aid or encouragement to the actual perpetrator"); UCMJ art. 119 (2012) (requiring an involuntary manslaughter conviction be based on an act or omission that amounts to "culpable negligence"); UCMJ art. 134 (2012) (requiring a Negligent Homicide conviction be based on "failure to act" that amounts to "simple negligence"); UCMJ Article 92 (establishing "[a] person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties . . ."). The *actus reus* would be the commander's failure to act when duty bound to do so. *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have known") of his subordinates' war crimes). The *mens rea* would obviously depend upon which UCMJ provision the commander is charged with violating. In any event, it is conceivable that Captain Medina's jury determined he had committed the *actus reus*—that he failed to act when he knew of his subordinates' war crimes—but determined he did not possess the requisite *mens rea*.

standard required to prove such a failure in the command responsibility context—"a wanton, immoral disregard of the action of his subordinates amounting to acquiescence"[133]—the standard endorsed by the 2015 Department of Defense Law of War Manual[134] and which is nearly identical to the standard endorsed by the International Tribunal for Rwanda (ICTR).[135] The *Von Leeb* standard is nearly identical to the culpable negligence definition in the UCMJ applied in involuntary manslaughter cases,[136] but lower than the specific intent *mens rea* standard required by Article 77.[137] Consequently, Captain Medina could not have been held vicariously liable under Article 77 for the crimes of subordinates based on a culpable negligence standard.

In Captain Medina's case, however, the military judge reduced the intentional murder charges to involuntary manslaughter under UCMJ Article 119,[138] and, therefore, his jury would have been instructed on a culpable negligence standard.[139] Also, Article 119 envisions responsibility arising from a "failure to act"[140] which must be the proximate cause of the resulting harm[141]—a similar

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[133] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544.

[134] *See* DOD MANUAL 2015, *supra* note 120, ¶ 18.23.3.2.

[135] *Compare Von Leeb*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 544, *with* Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, ¶ 35 (Int'l Crim. Trib. For Rwanda Jun. 16, 2003) ("A military commander . . . may . . . be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.").

[136] *See* JBB, *supra* note 123, ¶ 3-44-2 ("'Culpable' negligence is a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.").

[137] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 156. Under the 1969 MCM, the *mens rea* requirement is met if a commander's failure to interfere "was designed by him to operate . . . as an encouragement to or protection of the perpetrator." *Id.* Similarly, under the 2012 MCM currently in effect, the *mens rea* requirement under Article 77 is met if the failure to act is "intended to . . . operate as an aid or encouragement to the actual perpetrator." 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(b).

[138] *See* Editor's Note to Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB L. 7, 9 (1972).

[139] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 198b. Under the 1969 MCM the applicable *mens rea* for involuntary manslaughter is culpable negligence. *Id.* In this respect, the 1969 MCM is identical to the 2012 MCM. *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 44.c.(2)(a).

[140] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 198.b (explaining "[t]he basis of a charge of involuntary manslaughter may be a [culpable] negligent act or omission"); 2012 MCM, *supra* note 104, pt. IV, ¶ 3.b.(2)(b) (requiring an involuntary manslaughter allegation be based on an "act or omission of the accused").

[141] *See* JBB, *supra* note 123, ¶ 3-44-2d n.1. Article 119, UCMJ, requires that an accused's failure to act be a proximate cause of the resulting harm. UCMJ art.119 (2012). To be the

requirement exists under Article 77[142] and international command responsibility jurisprudence.[143] Further, UCMJ Article 119 would also incorporate the duty to act referenced in FM 27-10's command responsibility provision[144]—imposing a duty to act if Captain Medina either had actual or constructive knowledge of his subordinates' war crimes.[145] He could then be held liable if he was culpably negligent in failing to carry out that duty.

In *Bemba Gombo,* however, the ICC appears to have parted with the culpable negligence standard established in *Von Leeb*[146] In particular, the court posited that the "should have known" language in the Rome Statute is a form of "negligence" and a standard of "fault."[147] Even with this negligence standard, however, the UCMJ would still provide coverage. For example, both Negligent Homicide under Article 134 and Negligent Dereliction of Duty under Article 92

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proximate cause, "an act need not be the sole cause of death, nor must it be the immediate cause—the latest in time and space preceding the death." United States v. Lingenfelter, 30 M.J. 302, 307 (C.M.A. 1990) (quoting United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)). Rather, it must have a "material role in the victim's decease." *Id.*

142 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(b) (requiring that such a failure to act under UCMJ Article 77 must have been "intended to and does operate as an aid or encouragement to the actual perpetrator.").

143 *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 399 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) (establishing a "but for" causation requirement as the "necessary causal nexus" between the crimes committed by subordinates and the superior's failure to act).

144 *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16(c)(3)(a) (stating that a duty to act may be imposed by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service"). Military jurisprudence has established that a duty to act can be imposed by rules and laws external to the MCM; United States. v. McMurrin, 72. M.J. 697, 706 (N–M. Ct. Crim. App. 2013) (citing the 2012 MCM pt. IV, ¶ 16(c)(3)(a) for the proposition that an involuntary manslaughter conviction can be sustained on the basis of failing to act when duty bound to do so); United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience).

145 *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have known") of his subordinates' war crimes).

146 United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544.

147 *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009) ("The Statute encompasses two standards of fault element. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.").

envision responsibility arising from an omission.[148] Both provisions therefore could incorporate the duty referenced in FM 27-10's command responsibility provision,[149]—imposing a duty to act, if a commander either had actual or constructive knowledge of his subordinates' war crimes.[150] Commanders could then be held liable under either provision if they were negligent in failing to carry out that duty.

The differences between U.S. law and the Rome Statute can be illustrated by first understanding how constructive knowledge is applied by the former with the *Medina* fact pattern providing context. In *Medina*, the government did not request the jury be instructed on FM 27-10's constructive knowledge standard.[151] That is, they did not request the jury be instructed the accused had a duty to act if he "should have [had] knowledge" that his subordinates were committing war crimes.[152] On the other hand, it is not clear such an instruction would have made any difference. In particular, constructive knowledge requires an accused to have had some information that would have fairly put him notice, a principle

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[148] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 85.b.(4)(b) (listing as an element of negligent homicide under UCMJ Article 134 "an act" or "failure to act"); *id.* ¶ 16.c.(3)(c) (establishing "[a] person is derelict in the performance of duties [under UCMJ Article 92] when that person willfully or negligently fails to perform that person's duties . . .").

[149] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16(c)(3)(a) (stating that a duty to act may be imposed by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service"); United States. v. McMurrin 72. M.J. 697, 706 (N–M. Ct. Crim. App. 2013) (citing the 2012 MCM pt. IV, ¶ 16(c)(3)(a) for the proposition that an involuntary manslaughter conviction can be sustained on the basis of failing to act when duty bound to do so); United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience).

[150] *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes).

[151] *See* SOLIS, *supra* note 110, at 389.

[152] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79.

established in international criminal tribunal precedent,[153] FM 27-10,[154] and the UCMJ.[155] Thus, the jury might have still concluded, even if they had received the

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[153] *See e.g.*, United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1260 (stating a commander would "normally" be considered to have knowledge of his subordinates' crimes when reports detailing them were "received at his headquarters, they being sent there for his special benefit"); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 321 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 30, 2006) (specifying a superior can be "imputed knowledge" when information of his subordinate crimes was "available to him"); United Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 94–95 (1949) ("Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry."). *See also* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Amnesty International Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶¶ 5–6 (20 April 2009) [hereinafter AI Submission] (explaining that contemporary international criminal tribunals have consistently held commanders liable for their subordinates' crimes only when the information thereof was available to them).

[154] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79. The FM 27-10 standard (nearly identically to *List*) would charge a commander with constructive knowledge "if he had information through reports received by him or through other means" of his subordinates' war crimes. *Compare id.*, *with List*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 1269. However, the FM 27-10 standard contains a refinement that *List* does not—it limits application of constructive knowledge to those circumstances mentioned in the previous sentence where the commander "should have knowledge" of his subordinates war crimes. U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79.

[155] *See e.g.*, 2012 MCM, *supra* note 104, pt. IV, ¶16.b.(2) ("Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence."). While the 2012 MCM does not specify how its "should have known" constructive knowledge standard is to be applied, its predecessors indicate that the accused must have had information readily available to be deemed to have had constructive knowledge. For example, the 1949 MCM provided that an individual could be considered to have constructive knowledge of an order or directive if it "was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused *ought to have known* of its existence." MANUAL FOR COURTS–MARTIAL, U.S. ARMY, ch. XXVIII, ¶ 140b (Feb. 1, 1949) [hereinafter 1949 MCM] (emphasis added). The 1951 MCM similarly specified that knowledge of an order or directive is "constructive" if it was "so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order." 1951 MCM, *supra* note 114, ch. XXVII, ¶ 154a(4). Further, military courts have specifically stated that "should have known" is not a form of negligence—that an accused cannot be deemed to have had constructive knowledge merely because he was negligent in failing to know. *See* United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958); ("There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis

constructive knowledge instruction, that there was insufficient information available to trigger an obligation to act.

Under the Rome Statute, by contrast, Captain Medina need not have had any information available to him regarding his subordinates' crimes to have had an obligation to act.[156] However, the difference is not manifest. The Rome Statute is worded nearly identically to FM 27-10's "should have [had] knowledge" standard.[157] Yet, in *Bemba Gombo*, the ICC interpreted the Rome Statute's "should have known" language as a "form of negligence" and a standard of "fault."[158] The court also emphasized that the "should have known" standard imposes an "active duty" upon commanders that requires them "to inquire, regardless of the availability of information at the time of the commission of the offense."[159] Thus, the Rome Statute imposes a duty on U.S. commanders where U.S. law does not. That is, it requires commanders to act even when they have no knowledge—actual or constructive—of their subordinates' crimes.[160] Consequently, the U.S. commanders referenced in the 2014 ROI[161] could have violated the Rome Statute without violating U.S. law.

To close the gap with the Rome Statute, U.S. commanders operating in ICC member states could draft general orders that impose a duty to act in situations

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of knowledge of the order and its subsequent violation."); United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958) (The same issue was before this Court in *United States v. Curtin*, when the court stated, "There we held that the instruction on constructive knowledge was erroneous and had no place in a court martial's deliberations of an Article 92 offense.").

156 *Compare* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes), *with* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009); ("The 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.").

157 *Compare* U.S. LAW OF WAR MANUAL 1956, *supra note* 30, at 178–79 ("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 . . . have committed a war crime . . . ."), *with* Rome Statute, *supra* note 19, art. 28(a)(i) ("That [a] military commander . . . either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes").

158 *Bemba Gombo*, Case No. ICC-01/05-01/08 ¶ 429 ("[t]he Statute encompasses two standards of fault elements. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.").

159 *Bemba Gombo*, ¶ 433.

160 *Id*.

161 2014 ROI, *supra* note 98, ¶ 95.

required by *Bemba Gombo*.[162] Such an order could enable prosecution under the UCMJ provisions and serve to preempt an ICC investigation.[163] On the other hand, it is difficult to contemplate how any order could be broad enough to accomplish this goal. Penal directives governing U.S. servicemembers are "rule–like" norms, while Rome Statute's command responsibility provision after *Bemba Gombo* is more akin to a "standard–like" norm.[164] Professor Louis Kaplow provides the following analogy to distinguish the two: "A rule might prohibit 'driving in excess of [fifty–five] miles per hour on expressways' . . . . A standard might prohibit 'driving at an excessive speed on expressways.'"[165] According to Professor Kaplow, the two are distinguished by "[t]he extent to which efforts to give content to the law are undertaken before or after individuals act." [166]

The UCMJ requires the promulgation of statutes, orders, and directives that are analogous to the fifty–five miles per hour speed limit—that is, they must proscribe an unambiguous duty that can be applied before the fact.[167] By contrast, after *Bemba Gombo*, the Rome Statute's command responsibility provision is more analogous to prohibiting "driving at an excessive speed." In particular, commanders now have an undefined "active duty" to seek out their subordinates' crimes and they need not even have knowledge of them—actual or constructive—to be responsible for their commission.[168] More to the point, the Rome Statute's command responsibility provision is likely broader than any order or directive that could be promulgated by the U.S.

2. Rule of Proportionality

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[162] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(1)(a) (establishing the authority to issue general orders and regulations).

[163] *See e.g.*, 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(1). For example, a General Officer could publish an order that imposes an "active duty" on his commanders to seek out evidence of their subordinates' war crimes. *See id.* (criminalizing "[v]iolation of or failure to obey a lawful general order or regulation").

[164] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

[165] *Id.*

[166] *Id.*

[167] *See* United States v. King, 60 M.J. 832, 835 (C.G. Ct. Crim. App. 2005) ("Given the ambiguity surrounding the scope of Appellant's military duty under the Personnel Manual to support his son, we cannot affirm a conviction for dereliction of this duty based on the record before us."). *See also* United States v. Dedder 24 M.J. 176, 179 (C.M.A. 1987) ("[P]enal statutes applicable to service members and military directives intended to govern their conduct must convey some notice of the standards of behavior they require.").

[168] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 432–33 (June 15, 2009).

Differences between how the United States and the ICC would assess whether the rule of proportionality was violated also has consequences for complementarity protection. A major difference between the two resides in how they respectively criminalize a violation of the proportionality rule. The ICC has broken down the proportionality rule into criminal elements in the EOC, and does thereby directly criminalize a violation of the rule.[169] That is, under the EOC, an individual violates the rule if he "knew" the collateral damage (CD) resulting from an attack would be "*clearly* excessive" in relation to "the concrete and direct *overall* military advantage anticipated."[170]

With the exception of the italicized text in the previous sentence, the version of the proportionality rule the U.S. follows (U.S. version)[171] is nearly identical to the proportionality rule in the EOC (EOC version).[172] However, the U.S. version is not codified into the UCMJ.[173] Consequently, a commander who violates the U.S. version would have to be charged with an ordinary crime under the UCMJ to be criminally liable for the violation.[174] In a proposed treaty reservation to API—whose proportionality provision is nearly identical to the U.S. version[175]—U.S. officials provided the following indication as to the type of ordinary crime that would constitute a violation of the proportionality rule: "It is the understanding of the United States of America that collateral civilian losses . . . are excessive only when they are tantamount to the intentional attack of the civilian population, or to the total disregard for the safety of the civilian population."[176]

This interpretation is also consistent with the views of Hays Parks, a U.S. LOAC scholar, who states, "[T]he concept of proportionality (as it is codified in Protocol I) is not violated unless acts have occurred that are tantamount to the direct attack of the civilian population . . . or involve wanton negligence that is tantamount to an intentional attack of the civilian population."[177]

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169 EOC, *supra* note 44, art. 8(2)(b)(iv).
170 *Id.*
171 *See* DOD MANUAL 2015, *supra* note 120, ¶ 5.12.
172 *Compare* API, *supra* note 9, art. 51(b), *with* EOC, *supra* note 44, art. 8(2)(b)(iv)(2)–(3).
173 *See generally* 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice).
174 *See generally id.*
175 *Compare* API, *supra* note 9, art. 51(b), *with* DOD MANUAL 2015, *supra* note 120, ¶ 5.12.
176 *See generally* REPORT BY THE J–5, JCS REVIEW OF THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, A–I5B (1982) [hereinafter JCS REPORT] (on file with the author).
177 W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 173 (1990).

The proposed treaty reservation and Hays Parks' comments reflect that the lowest level of culpability that would result in a proportionality violation is culpable negligence.[178] The UCMJ defines culpable negligence as "a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others."[179] The UCMJ contains two contextually applicable provisions that would criminalize CD resulting from culpably negligent conduct: Involuntary Manslaughter in the case of death;[180] and in the absence of death, Aggravated Assault if the attack was "likely to produce death or grievous bodily harm."[181]

The extent to which the U.S. could preempt an ICC investigation rests centrally on answering the following question: can a violation the EOC version occur that does not amount to a violation of the above–mentioned UCMJ provisions? The answer to this question is likely "yes." For example, if a commander ordered an attack on a valid "military objective,"[182] took "all feasible precautions" to protect civilians,[183] and subjectively determined the CD would not be excessive, it would be difficult to conceive how he could still be culpably negligent. By contrast, as will be explained in the paragraph below, under at least

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[178] *Compare id*., *with* JCS Report, *supra* note 176, at A-I5B, and 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(2)(a)(i) ("Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission.").

[179] JBB, *supra* note 123, ¶ 3-44-3.

[180] *Id*.

[181] *Id.* ¶ 3-54-8.

[182] API, *supra* note 9, Art. 52(2) ("Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization . . . offers a definite military advantage.") *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.7.3.

[183] For example, Article 57 of API requires the attacker take "all feasible precautions in the choice of means and methods of attack." *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11. Thus, if the attacker has available two equally viable times of neutralizing a military objective—for example, a night attack verses a day time attack—Article 57 of API would require the attack occur at the time when the least amount of collateral death would occur. *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11.2. Similarly, if the attacker has two available weapon systems to neutralize the target, Article 57 would require he use the means that causes the least amount of harm to civilians and civilian objects. *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11.3. Finally, Article 57 would also require that if the attacker has the choice between two targets offering a similar military advantage, that he select the target that is expected "to cause the least danger to civilian lives and to civilian objects." *See* API, *supra* note 9, art. 57(3). As to this final requirement however, the recently released Department of Defense (DoD) Law of War Manual provides "this rule is not a requirement of customary international law." DOD MANUAL 2015, *supra* note 120, ¶ 5.11.5.

one interpretation of the EOC version, the ICC could still determine whether in such a case the CD was excessive, and therefore the attack was disproportionate.

There is a difference of opinion as to whether the EOC version requires a subjective assessment, as opposed to an objective assessment, concerning whether the CD is "excessive" in relation to the military advantage.[184] During the drafting of the EOC version, one group of states (first group) believed the attacker "must personally make a value judgement and come to the conclusion that the civilian damage would be excessive."[185] A second group of states (second group) believed "that the perpetrator need only know the extent of the injury or damage he/she will cause and the military advantage anticipated."[186] For the second group, whether the CD was "excessive" should be determined by the Court on an objective basis from the perspective of a reasonable commander."[187] In the end, neither interpretation was definitely adopted and, therefore, the EOC version can be interpreted either way.[188] Thus, the latter group's interpretation could criminalize conduct that falls below the culpable negligence threshold. That is, it would allow a determination that that the CD was excessive even if an accused commander took all feasible precautions, and subjectively determined the CD would not be excessive.

There is reason to believe that the ICC prosecutor may be applying this second group's interpretation. In particular, in their "Report on Preliminary Examination Activities 2013," the OTP asserted,

> [T]he United Nations Assistance Mission Afghanistan UNAMA has observed that a high number of air–strikes launched by members of pro–government forces which were directed at military targets have caused incidental loss of civilian life and harm to civilians which *appears* to be excessive by comparison with the anticipated concrete and direct military advantage.[189]

The ICC did not open an investigation into the referenced airstrikes; however, the stated reason for not doing so was that: the Rome Statute does not criminalize disproportionate attacks in a NIAC.[190] Nonetheless the excerpt is revealing as it

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[184] KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 164 (Cambridge University Press ed. 2003).
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 165.
[189] Office of the Prosecutor, Report on Preliminary Examination Activities ¶ 47 (2013) (emphasis added).
[190] *Id.*

shows the OTP's willingness to assert a disproportionate attack based on what "appears" to be so. That is, without indicating whether the commanders in question personally made a "value judgement"—a prerequisite to qualify as disproportionate attack under the first group's interpretation.[191]

Perhaps then, to close the gap with the Rome Statute, to ensure complementarity protection, the U.S. could incorporate the broadest interpretation of the EOC version into the UCMJ. According to Hays Parks, however, this likely would not be possible.[192] Parks asserts that the proportionality rule would be "void for vagueness" under U.S. constitutional jurisprudence,[193] a view recently shared by Professor Robert D. Sloane.[194] According to Professor Sloane, the "hypothetical constitutional infirmity" referenced by Hayes Parks likely resides in the fact that the attacker must weigh two "incommensurable" concepts—"civilian welfare" and "military advantage"—concepts which are open to a broad range of subjective interpretation.[195]

Finally, the EOC version does appear to mitigate any risk that U.S. commanders may be investigated for a violation of the proportionality rule that does not violate U.S. law. That is, it requires the CD to be "clearly excessive" as opposed to just "excessive" in the U.S. version, and adds the term "overall" before "military advantage."[196] However, the commentary to the EOC version warns against such an interpretation, stating, "[T]he addition of the words 'clearly' and 'overall' in the definition of collateral damage is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law."[197] Consequently, the differences between the UCMJ and the EOC version appear to create an unmitigated risk that the former is not extensive enough to cover a violation of the latter.

3. Maximum Punishment

Even if the UCMJ was extensive enough to cover the same conduct as the Rome Statute, preempting an ICC investigation may still not be possible. In particular, the maximum confinement under the UCMJ for the most serious crime

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191 DÖRMANN, *supra* note 184, at 164.
192 Parks, *supra* note 177, at 173.
193 *Id*.
194 Professor Robert D. Sloane, *Puzzles of Proportion and the 'Reasonable Military Commander': Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 299, 309 (2015).
195 *Id.*
196 *Compare* 2015 Manual, *supra* note 142, ¶ 5.12., *with* EOC, *supra* note 41, art. 8(2)(b)(iv)(2)–(3).
197 DÖRMANN, *supra* note 184, at 169.

mentioned above—involuntary manslaughter—is normally ten years,[198] compared to life under the Rome Statute.[199] For the following crimes referenced above, the gulf is much larger: for aggravated assault, the maximum confinement is normally three years;[200] for negligent homicide, three years;[201] and for negligent dereliction of duty, just three months.[202] While the Rome Statute does not consider "punishment" in determining whether a country is "genuinely" unwilling or unable to process a case, the Office of the Prosecutor (OTP) recently indicated, with regard to Colombia, that it would consider punishment.

> [T]he Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine.[203]

The Office of the Prosecutor was referring to Colombia's so–called "Justice and Peace Law," put into force on July 25, 2005, as part of a peace–process to bring over forty years of bloodshed to an end.[204] To that end, the law established a minimum punishment of five years and a maximum of eight years for members of certain armed groups accused of genocide, crimes against humanity, and war crimes[205]—crimes for which the ICC imposes a maximum penalty of confinement for life.[206] It should be noted, however, that the ICC has not ruled on whether

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[198] 2012 MCM, *supra* note 104, pt. IV, ¶ 44.e (establishing the maximum period of confinement for involuntary manslaughter as ten years unless the victim was a child, in which case it would be fifteen years).

[199] Rome Statute, *supra* note 19, art. 77.1.

[200] 2012 MCM, *supra* note 104, pt. IV, ¶ 54.e(b),(c) (establishing the maximum period of confinement for aggravated assault as 3 years, unless the victim was a child, in which case it would be five years).

[201] *Id.* at pt. IV, ¶ 85.e.

[202] *Id.* at pt. IV, ¶ 16.e.(3)(A)–(B). *But see* THE DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 45 (2014) ("The MCM should be amended to increase the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases.").

[203] 2014 ROI, *supra* note 98, ¶ 114.

[204] Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 50, 50–51 (2009).

[205] KAI AMBROS, THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT 4 (Springer ed., 2010) (explaining that in order to reintegrate former fighters, the Colombian government established "law 975 of 2005," establishing a minimum punishment of five years, and a maximum of eight years, for irregular armed groups).

[206] Rome Statute, *supra* note 19, art. 77.1.

punishment bears on complementarity, though some scholars would concur with the OTP's interpretation quoted above.[207]

IV. The Anatomy of Judicial Lawmaking—*Prosecutor v. Bemba Gombo*

A. Hurdling Safeguards against Judicial Lawmaking

When the ICC does rule, it must comply with the restrictions contained in the Rome Statute that address judicial law making. In particular, Article 22(2) of the Rome Statute contains three fundamental protections that are designed to guard against the type of creativity that occurred at the ICTY.[208] The first protection requires that the definition of a crime be "strictly construed" by the court. The second prohibits extending the law "by analogy," [209] which is designed to discourage the legislation of new crimes.[210] The third requires that "[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favor of the person being investigated, prosecuted, or defended."[211] Despite these limitations, however, "[t]he scope for judicially creative interpretation remains . . . ."[212] Indeed, the ICC appears to have begun to engage in the type of judicial creativity Article 22(2) was designed to prohibit.

In *Bemba Gombo,* for example, the ICC fundamentally transformed the "should have known" standard contained in Article 28 of the Rome Statute.[213] They did so first by concluding the standard "is in fact a form of negligence" and

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[207] *See e.g.*, Kevin Jon Heller, *A Sentence–Based Theory of Complementarit*y, 53 HARV. INT'L L.J. 201, 226 (2012) (arguing the ICC should "focus exclusively on sentence when determining whether a national prosecution of an ordinary crime is admissible"); Easterday, *supra* note 204, at 104 (suggesting that Colombia's "Justice and Peace Law" is evidence that Colombia is "shielding" persons from criminal responsibility).

[208] Rome Statute, *supra* note 19, art. 22(2).

[209] *Id.*

[210] *See* Grover, *supra* note 41, at 555 ("The ban on analogy is . . . intended to discourage the creation of substantially new crimes.").

[211] Rome Statute, *supra* note 19, art. 22(2).

[212] SHANE DARCY, JUDGES, LAW AND WAR 278–79 (Cambridge University Press, ed., iBooks ed. 2014) (discussing the ICC statute).

[213] *Compare* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing responsibility when "[t]he military commander . . . 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 "failed to take all necessary and reasonable measures"), *with* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009) ("The 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.").

thus a standard of "fault."[214] Second, this led the court to conclude that the "should have known" standard imposes upon the commander "more of an active duty" to seek out information of subordinates' war crimes than its "had reason to know" counterpart in the ICTY and ICTR statutes.[215] Third, in stark contrast to contemporary international criminal tribunal precedent, the court determined the "should have known" standard imposes responsibility upon a commander "regardless of the availability of information."[216] Thus, as the court would have it, commanders are now responsible for knowing information that is not readily available to them; they have an affirmative duty to seek out information, the extent to which the court has refrained from defining.[217] Further, a commander apparently can be liable for mere "negligence" in violating that ambiguous duty. As discussed in Part IV.B thru IV.D., the court reached these conclusions by misreading the Rome Statute's legislative history, equating constructive knowledge with fault, and over–relying on the ordinary meaning of the phrase "should have known."

B. Misreading the Legislative History of the Rome Statute

The *Bemba Gombo* court reached the conclusion that the "should have known" standard was a negligent culpability standard by apparently relying on Amnesty International's *amicus curiae* submission, which misinterpreted the legislative history of the Rome Statute.[218] In that submission, Amnesty International asserted the legislative history of the "should have known" standard in the Rome Statute indicated "the drafters . . . deliberately departed from the 'had reason to know' formulation of the statutes of the ad hoc tribunals, and

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[214] *Id.* ¶ 429 ("The Statute encompasses two standards of fault elements. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.")

[215] *Id.* ¶¶ 433–34.

[216] *See* AI Submission, *supra* note 153, ¶ 5. Under traditional command responsibility doctrine, the commander had a duty act if he had information readily available to him, putting him on notice of his subordinates' crimes. *See* AI Submission, *supra* note 153, ¶ 5. The ad hoc tribunals of the ICTY and ICTR have consistently found that a commander has no active duty to seek out information of his subordinates' crimes. *Id.* Amnesty International argued in their submission to the *Bemba Gombo* court that the Rome Statute's command responsibility provision actually imposes an affirmative duty on the part of the commander to seek out such information of his subordinates' crimes. *Id.* ¶ 7. The court apparently adopted Amnesty International's position in this regard. *See Bemba Gombo*, Case No. ICC-01/05-01/08 ¶ 433–34.

[217] *Id.*

[218] *Id.* at ¶ 432 (citing Amnesty International's amicus curiae submission in support of its determination that the "should have known standard" requires the superior to have merely been negligent in failing to acquire knowledge of his subordinates crimes). *See also* AI Submission, *supra* note 153, ¶¶ 3, 6.

intentionally incorporated a *negligence standard* for the mental element of superior responsibility for military commanders."[219] The lynchpin of Amnesty International's argument was a statement made by the U.S. representative during the Rome Statute's legislative conference.[220] Amnesty International asserted "widespread support" for the following "proposal," made by the same U.S. Representative, that was really just an observation—one that mischaracterized "should have known" as a negligence–based culpability standard:

> An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of criminal responsibility. Thus, a military commander was expected to take responsibility if he knew or should have known that the forces under his control were going to commit a criminal act. That appeared to be justified by the fact that he was in charge of an inherently lethal force.[221]

The actual proposal Amnesty International omitted from their brief regarded expanding command responsibility to civilian supervisors.[222] When viewed in this context, it is clear the reference to military commanders was intended merely as juxtaposition to the liability being proposed for civilian supervisors.[223] The actual proposal is as follows:

> Ms. Borek (United States of America), introducing the draft proposal, said that her delegation had had serious doubts about extending the concept of command responsibility to a civilian supervisor because of the very different rules governing criminal punishment in civilian and military organizations. Recognizing, however, that there was a strong interest in some form of responsibility for civilian supervisors, it was submitting a proposal in an endeavor to facilitate agreement. The main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter's authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries. Another difference was that a military commander was in charge of a

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219 *See* AI Submission, *supra* note 153, ¶ 10.
220 *Id.*
221 Plenary and Committee Meetings, Rome, Italy, June 15–July 17, 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 67 U.N. Doc. A/CONF.183/13 (Vol. II) (2002) [hereinafter UN Report] (emphasis added).
222 *Id.*
223 *Id.*

> lethal force, whereas a civilian supervisor was in charge of what might be termed a bureaucracy.[224]

The final version of the statute adopts the U.S. Representative Ms. Borek's, proposal by establishing command–like responsibility for civilian superiors who "knew" of their subordinates' crimes, though modifying the "should have known" phraseology.[225] That is, civilian superiors can be deemed to have knowledge if they "consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes."[226] The reason for the higher threshold for civilians is apparently based on Ms. Borek's concern that "[t]he negligence standard was not appropriate in a civilian context, and was basically contrary to the usual principles of criminal law responsibility."[227] The proposal plainly received "widespread support," as it was adopted.[228] It is just as clear that support was aimed only at establishing command–type responsibility for civilians.[229]

C. Equating Constructive Knowledge with Fault

Nonetheless, the *Bemba Gombo* court interpreted the Rome Statute's "should have known" language as creating a standard of "fault" by which guilt or innocence would be assessed.[230] In so doing, they lowered the command responsibility's *mens rea* requirement to negligence, and forewent any analysis of how *mens rea* and constructive knowledge interact with the two core elements of "indirect" command responsibility: first is a duty to act; and second, an omission.[231] These elements have their origins in the first modern command

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[224] *Id.*

[225] Rome Statute, *supra* note 19, art. 28(a)(i).

[226] *Id.* at art. 28(a)(ii).

[227] UN Report, *supra* note 221, ¶ 68.

[228] *See id.* at art. 28(a)(ii) (establishing that a civilian "superior" can be held liable for the crimes of his subordinates if he "knew, or consciously disregarded information which clearly indicated" his subordinates were engaging in criminal conduct).

[229] *See* AI Submission, *supra* note 153, n.28. Amnesty International cites "¶¶69-82" of the UN Report documenting the Rome Statute's legislative history to support its assertion that there was "widespread support" for a proposal to establish a negligence based command responsibility standard. *Id.* However, even a cursory review of "¶¶69-82" reveals this is not the case—the universal support pertained only to creating a differing standard of responsibility for civilian superiors. UN Report, *supra* note 221, ¶ 68-82 (quoting representatives from the following countries who supported the U.S. proposal to create a different standard of responsibility for civilian superiors: Netherlands, Jordan, Israel, Slovenia, Russian Federation, France, Mexico, and Australia).

[230] *Id.* ¶ 433.

[231] "Indirect" command responsibility arises when a commander fails to act with regard to his subordinates' behavior when he has a duty to do so. Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 333 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998).

responsibility case that occurred in the aftermath of World War II, *United States v. Yamashita*,[232] and are also present in the ICTY, ICTR, and Rome Statutes.[233] An understanding of how *mens rea* and constructive knowledge interplay with these elements under each statute is therefore necessary to understand the extent of the court's error.

1. The Core Elements of Command Responsibility—A Duty to Act and an Omission

Under each statute, knowledge is established if the accused actually "knew" of his subordinates' crimes, or if it can be established constructively that the accused "had reason to know" or "should have known," the latter phraseology the Rome Statute adopted.[234] These constructive knowledge standards also have their

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This is in contrast to "direct" command responsibility where the commander engages in positive acts such as ordering, instigating, or planning criminal acts of his subordinates. *Id.* Under either theory, the commander can be held liable for the acts of his subordinates. *Id.*

[232] United Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 1 (1949) (explaining the case against the accused was he "knew or must have known" of his subordinates' war crimes, and that by "[u]nlawfully disregarding and failing . . . to control" his subordinates, he was responsible for their war crimes); *See also* BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 438 ("The concept of command responsibility was first enunciated in the case of General Yamashita.").

[233] *See infra* Part C.1.

[234] *See* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing a duty act if the accused "knew or should have known" of his subordinates' crimes and specifying that failure to "take all necessary and reasonable measures" results in liability); 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] (establishing a duty to act if the commander "knew or had reason to know" of his subordinates' crimes and specifying that failure to take "necessary and reasonable measures" results in liability); Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute] (establishing a duty to act if the commander "knew or had reason to know" of his subordinates' crimes and specifying that failure to take "necessary and reasonable measures" results in liability). *See also* 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (establishing the commander has a duty to act where he has actual or constructive knowledge of his subordinates' crimes and fails to take "appropriate measures as are within his power to control," which results in liability); United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1259–60 (establishing a rebuttable presumption of a commander's duty to act when subordinate crimes contained in reports are "received at his headquarters, they being sent there for his special benefit" or when such crimes occur "within the area of his command while he is present therein").

origins in World War II tribunal cases[235] and are also referred to as "imputed knowledge."[236] Constructive knowledge has also been articulated in other doctrines as "ought to have under the circumstances"[237]; "information that would have enabled them to conclude;"[238] and as "should have known through reports or other means."[239] Once the accused is on notice, either actually or constructively, of his subordinates' crimes, he can be held liable if he fails to take "necessary and reasonable measures."[240] This phrase is similar to the U.S.'s World War II era Tribunal case law,[241] and is identical in each statute, with the significant exception that the Rome Statute adds the word "all" before "necessary."[242]

2. The Requisite Mens Rea

Once the *actus reus* is established under any of the statutes—that the accused failed to act when duty bound to do so[243]—a *mens rea* element must too be assessed, as none of the statutes establish a strict liability offense.[244] The

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[235] *See* Major Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 95 (1973) ("Almost universally the post–World War II Tribunals cases concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had actual knowledge or should have had knowledge, and thereafter failed to act.").

[236] *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 321 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 30, 2006) (referencing "Imputed Knowledge" if an accused "had reason to know" of his subordinates' crimes); Prosecutor v. Dario Kordi, Case No. IT-95-14/2-T, Judgment, ¶ 429 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 26, 2001) (referencing "imputed knowledge" as a commander "having reason to know"). *See also* Prosecutor v. Zejnil Delaić, Case No. IT-96-21-T, Judgment, ¶ 1220 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) (using the term "constructive knowledge").

[237] *Yamashita*, 4 Law Reports of Trials of War Criminals 1 at 94.

[238] API, *supra* note 9, art. 86.

[239] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178.

[240] *See, e.g.*, ICTR Statute, *supra* note 234, art. 6(3) (requiring "necessary and reasonable measures"); ICTY Statute, *supra* note 234, art. 7(3) (requiring "necessary and reasonable measures"). *But see* Rome Statute, *supra* note 19, art. 28(a)(ii) (requiring "all necessary and reasonable measures").

[241] *See* 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (requiring "appropriate measures"); In Re Yamashita, 327 U.S. 1, 15 (1946) (requiring "such measures as were within his power and appropriate in the circumstances . . .").

[242] *See* Rome Statute, *supra* note 19, art. 28(a)(ii).

[243] *See supra* Part IV.C.1.

[244] *See* Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Judgment, ¶ 65 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 2005) ("Superior responsibility is not a form of strict liability."); Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the

previously discussed post–World War II military tribunal case of *United States v. Von Leeb* established the *mens rea* standard for command responsibility cases.

> There must be a personal dereliction . . . 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. [245]

The *Von Leeb* standard is also consistent with the holding of the International Tribunal for Rwanda (ICTR) in *Prosecutor v. Bagilisiiema,* which specifically rejected an ordinary negligence standard.

> References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought as the Judgment of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.[246]

Further, while the ICTY has been less forthcoming in articulating the *mens rea* requirement for command responsibility,[247] it has endorsed the ICTR's *Bagilishema* holding that mere negligence is not the appropriate standard.[248] Also

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Prosecutor, ¶ 427 (Jun. 15, 2009) ("[T]he Rome Statute does not endorse the concept of strict liability."); Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (Int'l Crim. Trib. For Rwanda Jun. 16, 2003) ("A military commander . . . may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.").

[245] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544 (emphasis added). *See also* COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 6 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 August 1949 ¶ 3546 (Yves Sandoz et al. eds. 1987) [hereinafter API Commentary] (citing the *Von Leeb mens rea* standard).

[246] *Bagilishema*, Case No. ICTR-95-1A-A ¶ 35.

[247] *Halilović*, Case No. IT-01-48-T ¶ 70 (stating the requisite *mens rea* in command responsibility cases depended on the "specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question").

[248] *Compare* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 313-33 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000) (asserting command responsibility is a negligence based assessment), *with* Prosecutor v. Tihomir Blaškić, Case

noteworthy is Judge Fausto Pocar, former ICTY President and a current member of the ICTR Appeals Chamber, who explicitly rejects the notion that command responsibility under any of the referenced statutes establishes responsibility for "mere negligence."[249]

D. Misled by the Ordinary Meaning of "Should Have Known"

The ordinary meaning of "should have known" naturally lends itself to the conclusion that mere negligence is the appropriate standard for command responsibility. At least, that appears to be the *Bemba Gombo* court's justification when it states that "the term 'should have known' is in fact a form of negligence."[250] In this regard, the ICC's ruling again appears to be consistent with Amnesty International's *amicus curiae* submission, which states in pertinent part that "should have known" must "be interpreted in accordance with the ordinary meaning of its terms in context and in light of the object and purpose of the Statute."[251]

As discussed in Part IV.D.1, this "ordinary meaning" has been a source of confusion that both the ICC and Amnesty International now appear to also have fallen victim to.[252] To be fair, the ICC and Amnesty International are not alone in their error—some academic literature does refer to the phrase "should have known" as establishing a negligence *mens rea* standard in the context of command responsibility.[253] To understand why this interpretation is wrong, it is first necessary to know modern command responsibility doctrine has its origins in cases the U.S. prosecuted in post–World War II military tribunals.[254] It is also

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No. IT-95-14-A, Appeal Judgment, ¶ 63 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 29, 2004) (rejecting the lower court's determination that command responsibility is a negligence–based assessment).

[249] Interview with Judge Fausto Pocar, President, International Institute of Humanitarian Law, in Sanremo, Italy (May 22, 2015).

[250] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009).

[251] AI Submission, *supra* note 153, ¶ 7.

[252] *See infra* Part IV.D.1.

[253] *See, e.g.*, Joshua L. Root, *New Frontiers in the Laws of War: Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute*, 23 J. TRANSNAT'L L. & POL'Y 119, 136 (2013-2014); Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 3, 51 (2007); Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?,* 11 USAFA J. LEG. STUD., 54 (2000).

[254] *See*, *e.g.*, BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 438 ("The concept of command responsibility was first enunciated in the case of General Yamashita."); United

necessary to understand that almost "universally the post–World War II Tribunals cases concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had actual knowledge or should have had knowledge, and thereafter failed to act." [255] As such, in examining how the concept of constructive knowledge was understood by those tribunals, it is useful to explore how U.S. military manuals of the era defined the phrase "should have known."

1. Searching for the Meaning of "Should Have Known"

On February 1, 1949, the U.S. Army published a new Manual for Courts–Martial,[256] just over three years after the judgment in *United States v. Yamashita*[257] and mere months after the *United States v. Von Leeb* judgment.[258] That manual differed from its 1943 predecessor in at least one important aspect—it was updated to incorporate the concept of "constructive knowledge."[259] It articulated that concept as follows:

> [B]efore a person can properly be held responsible for a violation . . . it must appear that he knew of the order or

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Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 1 (1949) (establishing the case against the accused was he "knew or must have known" of his subordinates' war crimes and that by "[u]nlawfully disregarding and failing . . . to control" his subordinates he was responsible for their war crimes); 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (establishing the commander has a duty to act where he has actual or constructive knowledge of his subordinates' crimes and failure to take "appropriate measures as are within his power to control" results in liability); United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1259–60. (establishing a rebuttable presumption of a commander's duty to act when subordinates' crimes contained in reports are "received at his headquarters, they being sent there for his special benefit" or when such crimes occur "within the area of his command while he is present therein"). *See also* United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544 (establishing that the *mens rea* for command responsibility cases is "a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence").

[255] *See* Parks, *supra* note 235, at 95.

[256] *See generally* 1949 MCM, *supra* note 155.

[257] *Yamashita,* 4 Law Reports of War Criminals 1 at 33 ("The findings of the commission were delivered on December 7, 1945.").

[258] *Von Leeb*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 462) (specifying the judgment date as "October 27, 1948").

[259] *Compare* 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b, *with* MANUAL FOR COURTS–MARTIAL, U.S. ARMY 1928 (corrected to April 20, 1943) (emphasis added).

> directive either actually or constructively. Constructive knowledge can be found to have existed when the order or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused *ought to have known* of its existence.[260]

Interestingly, the *Yamashita* case reporter also uses the phrase "ought to have" and otherwise describes constructive knowledge in congruence with the 1949 MCM, albeit with the difference that the case reporter applies the standard to knowledge of facts rather than knowledge of law.

> Short of maintaining that a Commander has a duty to discover the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows:
>
> Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him . . . . In other words, whatever fairly puts a person on inquiry is sufficient notice when: the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice; he does wrong not to heed to "signs and signals" seen by him.[261]

Constructive knowledge, however, was a source of confusion at U.S. military courts–martial.[262] This confusion resided in an apparent propensity to interpret the phrase "should have known" according to its ordinary meaning, as establishing a negligent fault standard rather than a constructive knowledge standard.[263] That confusion was at issue in the 1958 U.S. court–martial case of *United States v. Curtin*, where the accused was charged with violating an order for which his knowledge was at issue.[264] The military judge in that case provided the following erroneous instruction to the jury regarding the accused's knowledge

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[260] 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b.
[261] 39 AM. JUR., pp. 236-237, § 12; *Yamashita*, 4 Law Reports of Trials of War Criminals 1 at 94–95.
[262] *See e.g.*, United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958); United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958).
[263] See *Curtin*, 9 C.M.R. at 432; *Crane*, 9 C.M.R. at 437.
[264] *Curtin*, 9 C.M.R. at 429.

of the order, which contributed to the accused's conviction being reversed on appeal: "Constructive knowledge of a matter exists when the accused, by the exercise of ordinary care, *should have known* of the matter, whether or not he did so in fact."[265]

Before explaining how that instruction was incorrect, the Court of Military Appeals (CMA) examined the definition of constructive knowledge in the 1951 MCM,[266] whose definition of the concept was nearly identical to 1949 MCM quoted above.[267] However, the 1951 MCM added the following detail in the discussion portion of Article 92, for which the court explains:

> [M]anual for Courts–Martial, United States, 1951, in discussing the offense here in issue, states that such knowledge "may be actual or constructive." It defines "actual" knowledge as knowledge which has been conveyed directly to the accused. Knowledge on the other hand is "constructive" when it is shown that "the order was so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order."[268]

The CMA reasoned the military judge's instruction was incorrect because the 1951 MCM articulated the "should have known" standard as a knowledge standard, not a fault standard:

> There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis of knowledge of the order and its subsequent violation. The main thrust of the offense is knowing disobedience of an order rather than negligent failure to ascertain knowledge of the order.[269]

The same error was repeated in the U.S. court–martial case of *United States v. Crane*.[270] Again, the accused's knowledge of an order was at issue, and the military judge gave an instruction substantially similar to the one given in Curtin, which resulted in the CMA overturning the case on appeal. "[C]onstructive

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[265] *Id.* (emphasis added).
[266] *Id.* at 432.
[267] *Compare* 1951 MCM, *supra* note 114, ch. XXVII, ¶ 154a(4), *with* 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b.
[268] *Curtin*, 9 C.M.R. at 432. *See also* 1951 MCM, *supra* note 114, ¶ 171b.
[269] *Curtin,* 9 C.M.R. at 432–33.
[270] *Crane*, 9 C.M.R. at 437.

knowledge of a matter exists 'when the accused, *by the exercise of ordinary care, should have known of the matter whether he did so in fact*."[271]

With the context of *Curtin* and *Crane* in mind, it is clear that the U.S. representative to the Rome Statute deliberations fell into the same trap as the judges in these cases had by characterizing "should have known" as a negligent fault standard.[272] Nor can there be any doubt that the Pre–Trial Chamber in *Bemba Gombo* fell into the same trap, as their following statement makes clear that they too have interpreted it as a fault standard:

> [T]he Chamber considers that article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term "knew," requires the existence of actual knowledge. The second, which is covered by the term "should have known," is in fact a form of negligence.[273]

2. A Continuous and Ongoing Duty to Know?

In addition to interpreting "should have known" as a "form of negligence," the court also determined that the failure to acquire information is likewise punishable.[274] In doing so, they created a new duty—a "duty to know," a duty that is not delimited; or contained in the statute[275]—the same conceptual mistake made by the military judges in *Curtin* and *Crane.* Turning to *Curtin* and *Crane*, the CMA points to the heart of what went wrong: the military judge's instructions articulated the "should have known" standard as criminalizing the accused's "negligence in failing to acquaint himself with the order . . . ."[276] More to the point, if "negligence in failing to acquaint" is punishable, the instructions implied

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[271] *Id.* (emphasis added).

[272] *See* UN Report, *supra* note 221, at ¶ 67.

[273] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009).

[274] *Id*. ¶ 429.

[275] See Rome Statute, *supra* note 19, art. 28(a)(i),(ii).

[276] United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958) ("There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis of knowledge of the order and its subsequent violation."). *See also* United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958) ("The same issue was before this *Court in United States v. Curtin* . . . . There we held that the instruction on constructive knowledge was erroneous and had no place in a court martial's deliberations of an Article 92 offense.").

an accused had a duty "to know" of his commander's orders.[277] Yet the law in question imposed a very different duty, a duty to *obey* a commander's orders.[278] Further, while the UCMJ provision specifically delineated when the duty to obey arose—when an accused "knew or should have known" of the orders[279]—neither jury instruction contained such a limitation on this "duty to know."[280] As such, the military judges interpreted "should have known" as implicitly creating a continuous and ongoing duty "to know," a duty not imposed by the underlying UCMJ offense, which is the reason the CMA overturned the convictions.[281]

Turning back to *Bemba Gombo,* we see that their following articulation of the "should have known" standard is identical in substance to the jury instructions in *Curtin* and *Crane*: "The 'should have known' standard requires the superior to 'ha[ve] merely been negligent in failing to acquire knowledge' of his subordinates' illegal conduct."[282] Thus, as commanders are liable for failing "to acquire knowledge" when they "should have known," it follows that they have a duty "to know" of their subordinates' crimes—a point the court tacitly acknowledges when they assert commanders have an "active duty" to "take the necessary measures to secure knowledge."[283] Yet, this duty "to know" is in stark contrast with the duty imposed by the Rome Statue—the duty to "take necessary and reasonable measures" to prevent, repress, or report war crimes.[284] Further, as there is no delimitation on when this judicially created "duty to know" arises, it follows that it is continuous and ongoing. This too is in contrast with the Rome Statute which imposes a duty only when the commander "knew" or "should have known" of his subordinates' war crimes.[285] Thus, *Bemba Gombo* transformed the Rome Statute's command responsibility provision—just as the military judges' instruction in *Curtin* and *Crane* transformed the UCMJ's violation of orders offense[286]—by creating a continuous and ongoing "duty to know."

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[277] *See Curtin*, 9 C.M.R. at 429 ("Constructive knowledge of a matter exists when the accused, by the exercise of ordinary care, should have known of the matter, whether or not he did so in fact."); *Crane*, 9 C.M.R. at 437 (C.M.A. 1958) ("[C]onstructive knowledge of a matter exists "when the accused, by the exercise of ordinary care, should have known of the matter whether he did so in fact.").

[278] *See also* 1951 MCM, *supra* note 114, ¶ 171b.(c) (listing as an element of the offense "Failure to Obey Other Lawful Order" that the accused "willfully disobeyed" the order).

[279] *Id.* ¶ 171b.

[280] *Curtin*, 9 C.M.R. at 429; *Crane*, 9 C.M.R. at 437.

[281] *Curtin*, 9 C.M.R. at 432. ("The main thrust of the offense [of violating a lawful order] is knowing disobedience of an order rather than negligent failure to ascertain knowledge of the order."). *See also Crane*, 9 CMR at 437 (citing *Curtin*).

[282] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 432 (Jun. 15, 2009) (citations omitted).

[283] *Id*. ¶ 433.

[284] Rome Statute, *supra* note 19, art. 28(a)(i),(ii).

[285] *Id.*

[286] *See Curtin*, 9 C.M.R. at 432; *Crane*, 9 C.M.R. at 437.

E. Immediate Consequences for the U.S.

Unfortunately, the *Bemba Gombo* interpretation of command responsibility has implications for the U.S. In particular, the ICC has a basis to determine whether the *Bemba Gombo* interpretation of command responsibility is reflective of customary international law and therefore binding on all countries, including the U.S.[287] In particular, the *Bemba Gombo* decision cited, with approval, the ICTY Trial Chamber decision of *Prosecutor v. Blaškić*,[288] which determined that the "should have known" standard was customary international law.[289] The *Blaskić* Trial Chamber also determined that "should have known" was a negligence–based *mens rea* standard, following the same flawed logic as the military judges in *Curtin* and *Crane*.[290]

On appeal, the ICTY appeals chamber rejected the idea that the ICTY statute encompassed a mere negligence–based *mens rea* requirement for command responsibility.[291] However, it did not refute the *Blaškić* Trial Chamber's assertion that "should have known" created a negligence *mens rea* standard, or that the standard had become customary international law.[292] Thus, the *Blaškić* appeals chamber paved the way for the ICC to determine that the "should have known" standard, as *Bemba Gombo* and the *Blaškić* trial chambers have interpreted it, is customary international law.[293]

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[287] *See Bemba Gombo,* Case No. ICC-01/05-01/08 ¶¶ 432–33 (citing Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 322 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 2, 2000)) (citing *Blaškić* in support of its assertion that the "should have known" standard is a negligent fault standard, and implying that interpretation is customary international law).

[288] *Id.* ¶¶ 432–33.

[289] *Blaškić*, Case No. IT-95-14-T ¶¶ 313-33.

[290] *See id.*

[291] *See* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 63 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 29, 2004).

[292] *See id.*

[293] While only States make customary international law, *see* FOREIGN RELATIONS LAW RESTATEMENT, *supra* note 17, § 102, as the ICRC has observed, "[I]nternational courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary opinio juris." ICRC STUDY VOLUME I, *supra* note 22, at xlviii. It also follows than that the referenced "international courts and tribunals," *id*., will be less inhibited in articulating a particular rule as customary international law if other tribunals have already done so. In this regard, the *Blaškić* Tribunal has laid the groundwork for the ICC to determine that the "should have known" standard is a negligent fault standard. *See Blaškić*, Case No. IT-95-14-T ¶¶ 313-33.

The implications of the *Bemba Gombo* decision for the U.S. are also immediate. The ICC's 2014 ROI illustrates that the ICC is considering investigating U.S. commanders for the actions of their subordinates in allegedly abusing detainees.[294] There can be no doubt those commanders at some point "knew" of such abuses as indicated by the fact the U.S. investigated and prosecuted the alleged perpetrators in both Iraq and Afghanistan, achieving a conviction rate of eighty–six percent.[295] Yet, the *Bemba Gombo* decision, following the same logic as the courts in *Curtin* and *Crane*, would convict those commanders for mere negligence in failing to obtain prior knowledge of their subordinates' illegality, and even if such information was not readily available to them.[296] The *Bemba Gombo* court did not elaborate the extent to which these commanders would have been required to proactively seek out knowledge.[297]

V. The International Criminal Court's Dual Role—Lawmaker and Adjudicator

A. The Long Term Consequences for the LOAC

A more important function of the Rome Statute is overlooked when focusing solely on how the ICC may adjudicate guilt or innocence. That is, the Rome Statute does not allow good–faith differences of opinion in interpreting the LOAC.[298] ICC member States appear to have delegated lawmaking authority to an institution that will inevitably run afoul of their interests.[299]

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[294] *See* 2014 ROI, *supra* note 98, ¶ 95.

[295] UNITED STATES OF AMERICA THIRD PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE, ¶ 199 (August 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en.

[296] *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶¶ 429, 433 (Jun. 15, 2009).

[297] *See id.* ¶ 433.

[298] *See* Wedgewood, *supra* note 48, at 1043 ("Where there are good–faith doctrinal differences [in the law], this [complementarity] is no protection."). *See also* Rome Statute, *supra* note 19, art. 1 (stating the jurisdiction of the court "shall be complementary to national criminal jurisdictions"); *id*. art. 17 (establishing the mechanism through which this complementarity is maintained); *id.* at Rome Statute, *supra* note 19, art. 21 (establishing a hierarchical order in which the court will determine "applicable law"—the Rome Statute and the EOC are at the top of the hierarchy, while at the bottom is "national law," which will only be applied if it is "not inconsistent with this Statute and with International law . . . .").

[299] Danner, *supra* note 5, at 42, 43. Professor Allison Danner posits States are reluctant to acknowledge they are delegating authority to international tribunals "[b]ecause of concerns about accountability," and consequently "judicial lawmaking may be the truth of international politics that cannot be named." *Id.* She further asserts the legal academy has

In particular, while each State has unique interests, a State's interest generally in developing the LOAC consists of balancing two competing concepts within the law—humanity and military necessity—a balance States are incentivized to carefully foster.[300] That is, States have civilian populations vulnerable to the ravages of war and military servicemembers who may be captured. States are thus incentivized to develop the law in a manner that requires these individuals be treated humanely. On the other hand, States have militaries to "pursue and safeguard vital national interests."[301] States are thus also incentivized to develop the law in a manner that ensures the military necessity component is preserved—that the law does not "unduly restrict their freedom of action on the battlefield."[302]

International Tribunals, by contrast, are headed by judges who focus on guilt or innocence and the applicability of rules and their exceptions to reach those conclusions. The following statement from Judge Cassese illustrates how that process can lead to legal precedent that misses the dilemma States face in maintaining the LOAC's delicate balance:

> We have all made judgments. We know that we are prone to manipulation. We manipulate laws, standards, political principles, and principles of interpretation. Very often, particularly in a criminal case, I sense that the defendant is guilty, and common sense leads me to believe that we should come to a particular conclusion. Then I say, 'All right, let us now build sound legal reasoning to support that conclusion.'[303]

The ICTY's *Krupreskić* decision is an illustration of how State concerns can be ignored by tribunals in developing the law.[304] By determining that the use of

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been similarly silent as international judges "reinforce the political slight–of–hand [sic] by denying that they make law." *Id.* at 42. *See also* Colonel Stuart W. Risch, *Hostile Outsider or Influential insider? The United States and the International Criminal Court*, ARMY LAW., Aug. 2009 (advocating the United States ratify the Rome Statute, but not addressing the ICC's power to make law); David J. Scheffer, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (urging the United States to ratify the Rome Statute, but not analyzing the implications on the future development of the LOAC); Jordan J. Paust, *The U.S. and the ICC: No More Excuses, The International Criminal Court at Ten (Symposium)*, 12 WASH. U. GLOBAL STUD. L. REV. 563 (asserting the United States has no valid excuse for not joining the ICC, but not addressing the ICC's lawmaking authority).

300 *Schmitt*, *supra* note 4, at 798–99.

301 *Id.* at 799.

302 *Id.*

303 DARCY, *supra* note 212, at 694–95.

304 *See* Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶¶ 527–33, n. 788 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000)

belligerent reprisals is a violation of international law, the court apparently took no account of the national security concerns of States who explicitly authorize them to deter attacks against their civilian populations.[305] For example, the U.S. would allow reprisals when confronted with "massive and continuing attacks" on the U.S. population.[306] Additionally, the United States would permit "reprisals against the civilian population or civilian objects" of the attacking State within certain bounds, to the extent necessary and solely for bringing such attacks to end, as long as this response did not violate the 1949 Geneva Conventions.[307]

The United States has a pressing reason to be concerned about the legality of reprisals—the Chinese Doctrine of Unrestricted Warfare.[308] The doctrine is reminiscent of the Prussian doctrine of *Kriegraison geht vor Kriegsrecht*—meaning "military necessity in war overrides the law of war"—practiced by some German Military Officers from 1871 through World War II.[309] A September 2014 white paper by the U.S. Army Special Operations Command explains how Chinese doctrine similarly elevates military necessity above all other concerns.

> Recent Chinese doctrine articulates the use of a wide spectrum of warfare against its adversaries, including the United States. The People's Liberation Army (PLA) Colonels Liang and Xiangsui outline China's vision on how China will attack the United States through a combination of military and non-military actions. Qiao Liang states "the first rule of unrestricted warfare is that there are no rules, with nothing forbidden." Qiao Liang's rule suggests any method will be used to win the war at all cost. Liang's theory presents challenges because the United States must prepare for all worse case scenarios.[310]

The Rome Statute, however, does provide avenues to allow State influence to permeate the court's decisions that could conceivably stave off decisions like *Krupresić*. For example, ICC member States nominate and elect judges[311] to represent their interests on the court and a similar process exists for prosecutors.[312] Further, the Rome Statute permanently cements the influence of NSAs within its statutory framework, which will permit domestic politics to influence the court.[313]

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[305] *See id.*
[306] JCS REPORT, *supra* note 176, at A–5A (1982).
[307] *Id.*
[308] OPERATING CONCEPT, *supra* note 2, at 13.
[309] SOLIS, *supra* note 110, at 265–66.
[310] WHITE PAPER BY THE UNITED STATES ARMY SPECIAL OPERATIONS COMMAND, COUNTER–UNCONVENTIONAL WARFARE, B–3a (2014).
[311] Rome Statute, *supra* note 19, art. 38(3).
[312] *Id.* art. 42(4).
[313] *See* Rome Statute, *supra* note 19, art. 15(2) (specifying the prosecutor may enlist the assistance of non–governmental organizations (NGOs) in acquiring information); *id.* at art.

Additionally, the court allows *amicus curiae* submissions, a process States could use to shape the court's decisions.[314] On the other hand, these mechanisms by no means guarantee States' interests will prevail. For example, the *Bemba Gombo* decision was largely consistent with the flawed legal analysis of an *amicus curiae* submission from Amnesty International.[315]

B. The Consequences on the Battlefield

The *Bemba Gombo* decision is an illustration of how the ICC too can become detached from the realities that State military forces confront on the battlefield. There, the court's failure to detail how commanders have an "active duty" to secure knowledge of a subordinate's crime leaves commanders uncertain as to what their obligations are.[316] As commanders can be held liable for mere negligence in violating that unspecified duty, the impact of that decision could be to deter commanders and the forces they control from engaging in combat operations.[317]

The so called "Nangar Khel" incident illustrates it could take just one criminal investigation to deter servicemembers from doing their jobs and undermine morale.[318] The incident involved Polish forces in Afghanistan who, in August 2007, came under attack from a local village.[319] Their patrol returned fire with mortar rounds, one of which killed several civilians, including children and a pregnant woman.[320] A Polish prosecutor filed murder charges against seven of the soldiers and afterward the so–called "Nangar Khel Syndrome" set in, as the Polish soldiers came to believe they could no longer trust their leaders to protect them.[321] Sergeant First Class Nicolae Bunea, a U.S. soldier, who accompanied Polish units on patrol after the incident observed,

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44(4) (permitting the court to enlist the assistance of NGOs to "assist with work of any of the organs of the Court") .

[314] *See* Rules of Procedure and Evidence, Rule 103, UN Doc. PCNICC/2000/INF/3/Add.3 (2000).

[315] *Compare* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ ¶ 429–34 (Jun. 15, 2009), *with* AI Submission, *supra* note 153, ¶ 5–11.

[316] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009).

[317] *Id.* ¶ 429.

[318] Aleksandra Kulczuga, *Poland's "Vietnam Syndrome" in Afghanistan*, FOREIGN POLICY (July 7, 2011) http://foreignpolicy.com/2011/07/07/polands-vietnam-syndrome-in-afghanistan/.

[319] *Id.*

[320] *Id.*

[321] *Id.*

> If there was even a chance of killing a civilian, they wouldn't shoot . . . I would try to explain to them, "You're with me—if I shoot, you need to shoot too" . . . They were afraid of going to jail. They were always thinking about [Nangar Khel]. They would say, "You don't understand—I go to jail if I kill people."[322]

Colonel Martin Schweitzer, a Brigade Combat Team commander in Afghanistan at the time posited that the Polish team's actions were "proportional," "acceptable," and "not out of the norm," and commented that U.S. servicemembers have been involved in similar incidents.[323]

On the battlefield of the future, U.S. adversaries will pursue hybrid strategies specifically designed to inflict this "Nangar Khel Syndrome" that will also strike at the heart of the U.S.'s center of gravity. At least this is what can be deduced from a recent report authored by several retired U.S. Generals on the 2014 "Gaza War" between Israel and Hamas.[324] In that report, the authors explain that Hamas had "adopted and adapted the doctrine of unrestricted warfare in a manner that is likely to be studied by other nations and terrorist organizations."[325]

Part of Hamas's 2014 strategy was to deliberately provoke and exacerbate collateral damage caused by Israeli attacks,[326] damage created when Israel responded to Hamas launching indiscriminate rocket attacks on Israeli cities.[327] The strategy employed a sophisticated media campaign that included intimidating international journalists who attempted to film rocket launches from the Gaza Strip, while allowing the international media unrestricted access to hospitals to report causalities.[328] The strategy was part of an ultimately successful information campaign designed to depict Israeli responses as violating the LOAC and thereby undermine its "international legitimacy."[329] The report refers to this strategy as "death by a thousand casualties" and warns that it requires "regular and prolonged bouts of armed conflict" to succeed.[330] The report therefore concludes,

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322 *Id.*
323 *Id.*
324 *See generally* Jewish Institute for National Security Affairs, 2014 *Gaza War Assessment: The New Face of Conflict* (2015), http://www.jinsa.org/files/2014GazaAssessmentReport.pdf [hereinafter Gaza Report].
325 *Id.* at 31.
326 *Id.* at 9.
327 *Id.* at 19.
328 *Id.* at 50.
329 *Id.* at 9.
330 *Id.*

> When confronting such a foe, unnecessary greater restraint in U.S. military operations will not deliver victory. Therefore this Task Force recommends American political and military leaders take additional steps now to prepare to encounter this new face of war.[331]

Hamas recently gave consent for Palestine to join the ICC, underscoring the role the court could play in exasperating this "new face of war."[332] As no Israeli military personnel will likely be tried by the ICC,[333] Hamas has apparently determined the risks of the ICC prosecuting its indiscriminate rocket attacks[334] are outweighed by the perceived benefit that an ICC investigation could delegitimize Israel.[335] Professor Mike Schmitt has coined the phrase "Bully Syndrome" that likely explains Hamas's cost–benefit analysis.[336] According to Professor Schmitt, the syndrome is a product of the natural human desire to root for the "underdog" and hold a technologically superior "bully," for example, Israel in this case, to a higher standard in order to level the playing field.[337] Contributing to the syndrome is that most technologically advanced militaries come from democracies that facilitate transparent journalism as a matter of national values, which readily exposes their battlefield conduct.[338] Thus, a disproportionate number of the "bully's" violations are exposed, thereby distorting perceptions about their compliance with the law.[339] By contrast, the technologically disadvantaged parties like Hamas actively conceal their LOAC violations,[340] and even when exposed, their crimes receive scant attention.[341] According to Professor Schmitt, this "bully syndrome" explains why "[A]bu Ghraib somehow generates a greater visceral reaction than the kidnapping and beheading of innocent civilians."[342]

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331 *Id.* at 7.
332 *Id.* at 41.
333 THE INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015) (listing all ICC member States, of whom Israel is not listed).
334 *See generally* Gaza Report, *supra* note 324, at 19.
335 *See* Rome Statute, *supra* note 19, art. 12.2(a). The Rome Statute's jurisdiction can be geographical. *Id.* Thus, if one State party has consented to ICC jurisdiction, then jurisdiction would extend to non–state parties for qualifying crimes that occur on the consenting party's territory. *Id.* Therefore, a risk to the Palestinians and Hamas is they too could be prosecuted for the war crimes they committed on Palestinian territory.
336 Schmitt, *supra* note 82, at 470.
337 *Id.*
338 *Id.* at 471.
339 *Id.*
340 Gaza Report, *supra* note 324, at 50.
341 Schmitt, *supra* note 82, at 471.
342 *Id.*

C. The Consequences for the U.S.

There are two core components of U.S. policy toward the ICC that appear ideally suited to address the perverse incentives the court's jurisdiction brings to conflicts like the 2014 Gaza War. First, U.S. law prohibits transferring U.S. personnel to the ICC for prosecution,[343] and the U.S. has Article 98 agreements with over 100 countries who also agree not to transfer U.S. personnel.[344] Second, the United States has implemented domestic legislation that authorizes the President of the United States to "use all means necessary to bring about the release" of U.S. servicemembers detained by the court.[345] In future conflicts, these two policy components can improve the U.S.'s prospects for victory in two ways. First, they inoculate servicemembers against "Nangar Khel Syndrome"—that is, the prospect of being prosecuted by the ICC is reduced, and with it, a reduced disincentive for U.S. servicemembers to use legitimate force against enemy combatants. Second, it protects civilians by lessening the incentives for enemy combatants to deliberately co–mingle military objectives among them, for example, with the aim of provoking a U.S. response that could be investigated by the ICC.

Off the battlefield, by contrast, the U.S. opposition to the ICC will have at least one negative effect—it will negatively impact the U.S.'s ability to shape the LOAC through the ICC which would directly impact state practice of its more than 120 member States.[346] For example, were the United States an ICC member State, it could nominate judges[347] and prosecutors[348] and could thereby ensure those nominees are experts in the LOAC. It could also use its diplomatic weight to convince other ICC member States to agree to amendments to the Rome Statute it believes are desirable.[349] Additionally, it could advocate for the removal of ICC judges and prosecutors[350] it believed were perpetuating politicized prosecutions, a concern often cited by U.S. opponents of the ICC.[351]

VI. Conclusion

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[343] 22 U.S.C. §7423(d) (2012) (prohibiting extradition of any person from the United States to the ICC).
[344] Elsea, *supra* note 70, at 26.
[345] *See* 22 U.S.C. §7427(a) (2012).
[346] THE INTERNATIONAL CRIMINAL COURT, http://www.icccpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015).
[347] Rome Statute, *supra* note 19, art. 36.4(a).
[348] *Id.* art. 42.4.
[349] *Id.* art. 121.1.
[350] *Id.* art. 46.2.
[351] Elsea, *supra* note 70, at 7.

The ICC's power to adjudicate war crime allegations and generate law through the issuance of decisions will reverberate across future battlefields. When those decisions differ from U.S. interpretations of the LOAC, it will increase the risk that U.S. operations could be delegitimized. In particular, it creates the risk that U.S. servicemembers could be investigated and indicted by the ICC for crimes that don't violate U.S. law, a risk this article has illustrated already exists in the context of command responsibility and the prohibition on disproportionate attacks. While ratifying the Rome Statute would certainly increase the U.S.'s ability to shape the court and by extension the LOAC, it would also bring with it a vulnerability. Ratification would necessarily mean the U.S. would abandon its current policy of opposing the ICC, a policy this article has argued is ideally suited to deal with the battlefield environments like the 2014 Gaza war, which may be the "new face of war."[352]

If the United States were to ratify the Rome Statute, it follows U.S. commanders would be loath to ignore ICC LOAC interpretations—to do so could risk indictment and prosecution. Thus, the ICC's law making ought to be the primary concern of the United States in deciding whether to ratify the Rome Statute. Even a cursory look at the Rome Statute's war crime provisions reveals that there is a great deal of room for the court to fundamentally transform the LOAC. For example, what does "taking direct part in hostilities" mean under the Rome Statute?[353] Does it mean that individuals assembling and storing improvised explosive devices cannot be targeted on that basis alone, as the ICRC has suggested?[354] How does the Rome Statute define military objective?[355] Would the ICC reject, as some scholars have, the U.S. interpretation of that phrase as including "war sustaining" objectives?[356] What about belligerent reprisals—are they permitted under the Rome Statute,[357] or does it virtually prohibit them like API?[358] Does the statute require belligerents to minimize harm to opposing forces—to wound or capture enemy forces rather than kill, as some have

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[352] Gaza Report, *supra* note 324, at 41.

[353] Rome Statute, *supra* note 19, arts. 8(b)(i), 8(e)(i).

[354] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 54 (Nils Melzer Ed., 2009).

[355] Rome Statute, *supra* note 19, arts. 8(b)(ii), 8(b)(v), 8(b)(ix), 8(e)(iv).

[356] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 95–96 (2d ed. 2010); Major Edward C. Linneweber, *To Target or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means*, 207 MIL. LAW REV. 155, 157 (2011).

[357] *See generally* Rome Statute, *supra* note 19. The Rome Statute does not address belligerent reprisals. *Id.*

[358] *See* API, *supra* note 9, art. 51(6) (prohibiting reprisals against civilians). *See also* API Commentary, *supra* note 245, ¶ 1398 ("Reprisals are no longer authorized, except in the conduct of hostilities, and even then they cannot be carried out arbitrarily.").

suggested the LOAC requires?[359] These questions are merely the tip of the iceberg, and underscore the fact that any discussion regarding the merits of ratifying the Rome Statute requires a discussion about the future of the LOAC.

[359] INTERPRETIVE GUIDANCE, *supra* note 354, at 77–82; Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN J. INT'L L. 819, 822 (2013) ("Under the modern LOAC, the legal right to use armed force is limited to rendering individuals hors de combat . . . .").