COMMAND RESPONSIBILITY: HOW THE INTERNATIONAL CRIMINAL COURT'S JEAN-PIERRE BEMBA GOMBO CONVICTION EXPOSES THE UNIFORM CODE OF MILITARY JUSTICE

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When things go wrong in your command, start searching for the reason in increasingly larger concentric circles around your own desk.[1]

I. Introduction

Military commanders[2] exercise great power over their subordinates and have ultimate authority over their units to ensure readiness and develop disciplined and cohesive units.[3] However, with great authority

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[1] William Safire & Leonard Safire, Good Advice, More Than 2,000 Apt Quotations to Help You Live Your Life 14 (1982) (quoting General (Retired) Bruce D. Clark).

[2] The term "military commander" has a specific meaning across the service components in the U.S. military. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5a (6 Nov. 2016) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE, INSTR. 51-604, APPOINTMENT TO AND ASSUMPTION OF COMMAND para. 3.2 (4 Apr. 2006); U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 802 (14 Sept. 1990). But, generally, the term military commander as used in this article refers to a military leader that has command authority or direct authority over military subordinates.

[3] AR 600-20, *supra* note 2, para. 1-5c.

comes great responsibility.[4] The U.S. Army's Command Policy Regulation, Army Regulation 600-20, paragraph 2-1b, states, "Commanders are responsible for everything their command does or fails to do."[5] In other words, commanders are accountable not only for their personal actions, but also bear responsibility for the acts and omissions of their subordinates.[6] In U.S. Army doctrine, commanders may delegate authority to subordinate leaders and Soldiers to accomplish their assigned duties, and where necessary, may hold these subordinates accountable for their failures.[7] However, the commander retains overall responsibility for the actions within his or her command, including the actions of individuals in the command.[8] This principle underlies the legal doctrine of command responsibility, where, as a general rule, commanders may be held criminally responsible for the war crimes of their subordinates even though they did not participate in the commission of the actual offense.[9]

The U.S. military has long recognized this principle as applicable to U.S. commanders and still considers it a core tenet to the functioning of well-trained, disciplined units.[10] But, while the U.S. military may hold fast to the principle of command responsibility, questions remain as to whether the current punitive system provides an adequate standard to adjudicate

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[4] *Id*. para. 1-5b. Army Regulation 600-20 breaks the key elements of command into two subcomponents: authority and responsibility.
[5] *Id*. para. 2-1b.
[6] Gary D. Solis, The Law Of Armed Conflict 381 (2010).
[7] *See* AR 600-20, *supra* note 2, para. 1-5c.
[8] *Id*.
[9] *See* SOLIS, *supra* note 6, at 381. Command responsibility is also referred to as "superior responsibility." *Id*.
[10] *Id*. *See also* U.S. Dep' Of Army, Field Manual 27-10, The Law Of Land Warfare para. 501 (18 July 1956) [hereinafter FM 27-10]; U.S. Dep't of Def., DoD Law of War Manual para. 18.23.3 (Dec. 2016) [hereinafter Law of War Manual].

U.S. command failures that lead, or contribute, to war crimes[11] by subordinates.[12]

A. Command Responsibility Vignette

One way to evaluate the feasibility of the U.S. domestic system to prosecute crimes under a theory of command responsibility is to consider a hypothetical scenario involving U.S. forces. The following scenario attempts to provide context to the analysis contained in this article and to

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[11] There is no universally accepted or definitive definition of what constitutes a "war crime." SOLIS, *supra* note 6, at 302 (citing John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 866 INT'L REV. OF THE RED CROSS 443, 467 (2007)). However, The War Crimes Act of 1996, 18 U.S.C. § 2441(c) (1996) defines the term "war crime" as any conduct:

> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
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> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
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> (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
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> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

[12] See, e.g., Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 1-2 (1982) [hereinafter Eckhardt]; Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 156 (2000) [hereinafter Smidt]; 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. 335, 338 (2007) [hereinafter Hansen].

illustrate the facts of recent, and potentially future, command responsibility cases.[13]

A high-level U.S. commander[14] receives a mission to aid a coalition partner to repel rebel forces threatening the security and stability of the coalition government.[15] Within the context of this scenario, the commander holds broad formal powers for discipline and training over his subordinate forces, including the authority to develop training guidance, initiate investigations and establish courts-martial. Upon receiving the mission, the commander, along with the military staff, develops an operational plan that calls for the deployment of three subordinate battalions totaling approximately 1,500 Soldiers to aid the coalition partner. The three battalions move to the relevant area of operations where intelligence posits there are many known or suspected rebels and rebel sympathizers hiding among the civilian population. The commander does not move with the subordinate forces, but maintains constant direct lines of communication with subordinate leaders in the field. Furthermore, over the course of the operations, the commander receives periodic intelligence and situational reports.

The mission is difficult and exacts a toll on the Soldiers. The rebel forces engage in hit-and-run tactics, inflicting gruesome injuries on U.S. and coalition forces using a variety of homemade explosives and complex ambush techniques. The civilians are openly hostile to the United States presence in the area with many helping the rebels by providing information and caching weapons and supplies. U.S. forces begin clearing operations and move to different villages, searching homes for rebels and attempting to disrupt rebel activities.

After a few weeks, a small number of Soldiers in the battalions begin to steal items of value from the local populace, including money, food, electronics and vehicles. Later, the misconduct becomes widespread with a greater number of Soldiers stealing and engaging in behavior that is more egregious. Discipline continues to erode and Soldiers begin to engage in sexual assaults and rapes upon random civilians in the area of operations.

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[13] What follows is a situation based loosely on the International Criminal Court's (ICC) conviction of Jean-Pierre Bemba Gombo. Discussion and analysis of this case occur *infra* Section III.

[14] In this situation, consider a high-level U.S. commander a general officer.

[15] For the purposes of this illustration, assume there are no *jus ad bellum* considerations as to the lawful deployment of the forces. The purpose of this scenario is to highlight the actions of both the subordinate military members and the commander.

Over the course of the operation, which lasts five months, the Soldiers victimize and rape at least twenty-eight persons, mostly young women and girls. In some cases, Soldiers hold victims at gunpoint during the rapes with members of victims' family present. Often, multiple Soldiers also assault the victims being held at gunpoint. Approximately four months into the operation, U.S. forces murder three civilians resisting the pillaging of their belongings.

Throughout the entirety of the operation, the U.S. commander continues to receive various reports. In fact, the commander receives specific reports of the criminal allegations committed by U.S. forces. Additionally, local and international media begin reporting the atrocities. The U.S. commander travels to the area of operations and meets with a number of local leaders and international aid organizations. The U.S. commander admonishes the Soldiers for their behavior and issues stern public warnings to his troops for any further acts of unlawful violence. He orders additional training for all Soldiers on the proper treatment of noncombatants and the rules of engagement. Furthermore, the commander commissions two investigations to determine the facts and circumstances surrounding the allegations, and convenes seven courts-martial to try Soldiers for pillaging. After approximately five months, the commander orders the redeployment of the unit from the area.

B. What to do with the U.S. Commander?

This fictional scenario raises a number of questions concerning the culpability of the high-level U.S. commander. Considering the commander had actual knowledge that the U.S. forces were committing the crimes based on the periodic operational reports and media accounts, did he take reasonable measures to prevent the atrocities? Were the investigations into the allegations fair and impartial? Did the courts-martial serve to punish the perpetrators and deter others from committing other criminal acts? Did the U.S. commander take sufficient action to remedy the clear deficiencies in training prior to the deployment, or when he first became aware of the allegations? Was the commission of the offenses a result of the commander's failure to control the forces under his command? Assuming the commander is culpable, in what forum should he be tried and for what offenses? These questions raise some relevant and remarkable issues underscoring the current U.S. system to deter and punish commanders for behavior akin to the foregoing. Moreover, in light of the recent conviction of Jean-Pierre Bemba Gombo in the International

Criminal Court (ICC), these questions highlight fundamental flaws in the U.S. application of command responsibility to its own forces.

C. The Bemba Decision Highlights the Flaws in the U.S. System

On 21 March 2016, Trial Chamber III (TC III) of the ICC[16] delivered a historical judgment in the case of The Prosecutor v. Jean-Pierre Bemba

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[16] Adopted on 17 July 1998 at conference in Rome, Italy, 120 States established the first treaty-based permanent international criminal tribunal—the Rome Statute of the International Criminal Court (ICC). *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf (last visited Jan. 18, 2017) [hereinafter INT'L CRIM. CT.]. Located in The Hague in the Netherlands, the ICC is an international tribunal charged with investigating, and where warranted, the prosecution of perpetrators of the most serious crimes committed after July 1, 2002, in the territories or by the nationals of the parties to the Rome Statute. *Id*. Since 2002, four additional States have become parties to the Rome Statute, bringing the total number to 124. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 6, 2016) [hereinafter *The States Parties to the Rome Statute*]. The Rome Statute grants the ICC jurisdiction over four main crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 6, 2016). The statute defines the crime of genocide as,

> the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.

Id. The Rome Statute lists fifteen forms of crimes against humanity that are serious violations as part of a large-scale attack against a civilian population, including murder, rape, imprisonment, sexual slavery, torture, and apartheid. Rome Statute of the International Criminal Court art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9 (amended Jan 16, 2002) [hereinafter Rome Statute]. Article 8 of the Rome Statute provides jurisdiction to prosecute war crimes defined as grave breaches of the Geneva Conventions, including, for example, willful killing or torture of civilians and intentionally directing attacks against hospitals, monuments, or buildings dedicated to religion, education, or sciences purposes. *Id*. Lastly, the crime of aggression is defined as the use armed force by a State against the sovereignty, integrity or independence of another State. *How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 6, 2016). This definition was adopted through the amendment mechanism at the First Review Conference of the Statute on Kampala, Uganda in 2010. *Id*. However, it will not enter into force until ratified by at least thirty

Gombo.[17] The ICC found Bemba guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging).[18] Three months later, on June 21, 2016, the ICC sentenced Bemba to 18 years imprisonment.[19]

This conviction and sentence represents a landmark decision for the ICC.[20] In significant part, because it represents a first move by the ICC toward imputing liability to individuals at the highest levels of military command for the criminal acts of their subordinates using a theory of command responsibility.[21] In finding Bemba guilty, the ICC signaled its willingness to advance from its previous judgments and find high-level leaders criminally responsible for the derelict discharge of their command functions.[22] Furthermore, while Bemba's conviction is groundbreaking in and of itself, it also exposes substantive flaws in the current U.S. system

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State parties and voted on by the State parties in 2017. *Id.* In addition to creating ICC jurisdiction and codify the punitive articles, the Rome Statute establishes the rules of procedure and the mechanisms for States to cooperate with the ICC. Rome Statute, *supra*.

[17] The Prosecutor v. Jean–Pierre Bemba Gombo, ICC-01/05-01/08-3343, Judgment pursuant to Art. 74 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf [hereinafter Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo]. Decisions and documents of the Court cited herein are available online at its website, INT'L CRIM. CT., http://www.icc-cpi.int (last visited Nov. 6, 2016).

[18] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 742.

[19] The Prosecutor v. Jean–Pierre Bemba Gombo, ICC-01/05-01/08-3399, Decision on sentence pursuant to Art. 76 of the Statute (June 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04476.pdf [hereinafter Sentence Decision, The Prosecutor v. Jean–Pierre Bemba Gombo].

[20] In addition to being noteworthy for a conviction based on a theory of command responsibility, this conviction represents the ICC's first ever conviction for crimes of sexual violence. Niamh Yvonne McDermott, *International Decision: Prosecutor v. Bemba*, 110 AM J. INT'L L. 526, 532 (July 2016); Niamh Hayes, *The Bemba Trial Judgement—A Memorable Day for the Prosecution of Sexual Violence by the ICC*, PHD STUDIES IN HUMAN RIGHTS (Mar. 21, 2016, 6:32 PM), http://humanrightsdoctorate.blogspot.com/2016/03/hayes-bemba-trial-judgement-memorable.html. Additionally, the eighteen-year sentence is the longest ever handed down by the ICC. Wairagala Wakabi, *Bemba Given 18-Year Jail Sentence at ICC*, INT'L JUST. MONITOR (June 21, 2016), https://www.ijmonitor.org/2016/06/bemba-given-18-year-jail-sentence-at-icc.

[21] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 741.

[22] Alexandre Skander Galand, First Ruling on Command Responsibility before ICC: The ICC Enters its First Conviction on Command Responsibility in the Bemba Case, CASE MATRIX NETWORK (Mar. 29, 2016), http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1474978207.9296619892120361328125.

and represents a bold and aggressive move in the application of the doctrine of command responsibility. In light of the ICC's first-ever conviction for a commander under a theory of command responsibility, it is time for the United States to reexamine the doctrine of command responsibility under the Uniform Code of Military Justice (UCMJ)[23] and adopt a punitive command responsibility article.

This article will provide a brief background on the modern development of command responsibility and its application in a number of historical tribunals. Thereafter, a more in-depth analysis of the Bemba case will provide insight into the ICC's historic conviction. The next section will use the foregoing vignette to illustrate the shortcomings of the U.S. system while contrasting the Bemba case as it relates to convictions under a theory of command responsibility. The final section will examine two scholarly proposals and call for the United States to make appropriate changes to the UCMJ to account for its limitations.

II. Background and Modern Legal Development of Theory Command Responsibility

The concept of command responsibility dates back to at least as early as the 15th century when Charles VII of Orleans issued an ordinance stating:

> [T]he King orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company . . . . If, because of his negligence or otherwise the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself . . . .[24]

Following the 15th century, the doctrine saw use in at least two United States conflicts including the American Revolution and the Civil War.[25]

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[23] 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice [hereinafter UCMJ]).

[24] SOLIS, *supra* note 6, at 382 (quoting LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 283 (2d ed. 1999) (internal quotations omitted).

[25] *Id*. (citing George L. Coil, *War Crimes in the American Revolution*, 82 MIL. L. REV. 171, 197 (1978)) (citing COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 297 n.2 (2d ed. 1920)). British Lieutenant Governor of Quebec Henry Hamilton was tried for the pillaging committed by American Indians allied with the British even though

However, it was not until the conclusion of World War II that the doctrine of command responsibility fully developed into its current form.[26]

A. General Yamashita to Captain Medina

The case of Japanese General Tomoyuki Yamashita saw the doctrine applied to the highest levels of military command.[27] His conviction stemmed from the October 1944 American invasion of Manila where in the midst of their retreat, Japanese defenders murdered approximately 8,000 civilians and raped almost 5,000.[28] While Yamashita argued that he neither ordered nor had knowledge of the crimes, the military commission found Yamashita guilty and ordered him to hang because "[t]he crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by [Yamashita], or secretly ordered by [Yamashita]."[29] In a *habeas corpus* petition to the U.S. Supreme Court, the Court affirmed his conviction, holding:

> [T]he law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war . . . . and he may be charged with personal responsibility for his failure to take such measures when violations result.[30]

This decision was groundbreaking. Failing to supervise and control subordinates during the commission of war crimes constituted a punishable and executable offense for a military commander where there was evidence that he "knew or should have known" about the offenses.[31] The *Yamashita* case greatly expanded the scope of command actions and omissions deemed potentially criminal, and along with a few other post-

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he took no part in the offenses. *Id*. After the Civil War, Major Henry Wirz was hanged for thirteen counts of murder and conspiracy to maltreat prisoners. *Id*.

[26] Timothy Wu & Yong-Sung Kang, Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law, 38 HARV. INT'L L. J. 272, 274 (1997).

[27] SOLIS, *supra* note 6, at 383.

[28] *Id*.

[29] United States of America vs. Tomoyuki Yamashita, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces, Western Pacific, dated 1 Oct. 1945, Tr. 4059-4063.

[30] *In re* Yamashita, 327 U.S. 1, 14 (1946) [hereinafter Yamashita Case].

[31] Smidt, *supra* note 12, at 177.

World War II cases, laid the groundwork for the modern development of the doctrine over the course of the next sixty years.[32]

The *Yamashita* concept of command responsibility and the "knew or should have known" standard seemed reaffirmed and incorporated into U.S. military policy with the issuance of the 1956 edition of the Army's Field Manual 27-10, Law of Land Warfare (FM 27-10).[33] Issued approximately ten years after General Yamashita's conviction, the manual contains paragraph 501, entitled "Responsibility for Acts of Subordinates."[34] This section states:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. *The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.*[35]

Despite FM 27-10 making a clear statement of accountability for command failures, these "violations" are not actionable under this manual because it provides no independent basis for criminal liability.[36] Instead,

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[32] Jeremy Dunnaback, Command Responsibility: A Small-Unit Leader's Perspective, 108 NW. L. REV. 1385, 1393 (2014).
[33] FM 27-10, *supra* note 10, para. 501.
[34] *Id*.
[35] *Id*. (emphasis added).
[36] FM 27-10, para. 1.

The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare . . . This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party

the manual appears to educate military members as to the current status of the law of war with the end goal to prevent and deter potential violations.[37] Furthermore, the U.S. military's primary system for disciplining its forces, the UCMJ, contains no punitive article on command responsibility, and thus, no ready-made charge to prosecute commanders for actions envisioned under paragraph 501.[38] Thus, while the U.S. military showed a willingness to prosecute enemy leaders for command failures, and even purported to apply such a standard to its own forces through FM 27-10, the UCMJ fails to contain a punitive article necessary to dispose of serious command transgressions.

B. The Lessons of My Lai and Captain Medina

The My Lai massacre and the subsequent court-martial of Captain Ernesto Medina is probably the most noteworthy U.S. case concerning the doctrine of command responsibility.[39] Extensive scholarship exists on the *Medina* case, but a brief recounting of the facts leading up to the prosecution will provide context and serve to highlight some of the shortcomings present in the UCMJ at the time of the court-martial.

Captain Medina was the company commander of Charlie Company, Task Force Barker of the 11th Brigade of the Americal Division.[40] On the morning of 16 March 1968, his unit assaulted an area known as Pinkville in the Quang Nai province in the Republic of South Vietnam.[41] Believing the unit was to face resistance from a large Viet Cong force in the area, the company prepared for a fight.[42] However, upon arriving to the Pinkville objective, the three platoons of Charlie Company met no resistance and

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should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

Id.; *see also* Smidt, *supra* note 12, at 186.

[37] *Id*.

[38] UCMJ (1956). The UCMJ was first enacted in 1950 and has underwent major revisions in 1968 and 1983. *Index and Legislative History of the UCMJ (1950)*, LIBR. OF CONGRESS, https://www.loc.gov/rr/frd/Military_Law/index_legHistory.html (last visited Nov, 18, 2016).

[39] Eckhardt, *supra* note 12, at 12. Colonel William Eckhardt was the Chief Prosecutor in the Medina case. *Id.* at 12 n.21.

[40] *Id*.

[41] *Id*.

[42] *Id*.

began to clear the various villages.[43] The evidence shows that members of Charlie Company, in particular the members of the platoon led by Lieutenant William Calley, engaged in the systematic killing of noncombatants, including old men, women, and children.[44] Additionally, the U.S. forces burned a village and committed multiple acts of rape and sexual assault.[45] While the exact number of noncombatants killed is unknown, some estimates range as high as five hundred.[46]

No evidence placed Captain Medina at the scenes of the crimes throughout the entirety of the commission of the offenses.[47] Additionally, the prosecution had no credible evidence that Captain Medina either ordered his men to commit these atrocities or took part in them himself.[48] Thus, the case was an ordinary case of command responsibility, in particular, a case of inaction or command omission.[49]

The "knew or should have known" standard articulated in the *Yamashita* case, and later adopted in the 1956 version of FM 27-10, section 501, would seem to apply to the Medina prosecution. However, that was not to be the case. By policy, FM 27-10, section 507 provided that service members who commit war crimes are normally tried for violations of the UCMJ, rather than violations of the laws of war.[50] Therefore, the military judge instructed the panel members to consider Captain Medina's culpability under an instruction on Article 77, Principals, UCMJ.[51] In other words, the panel members were to determine whether Captain Medina acted as a principal for aiding and abetting the atrocities committed by members of Charlie Company.

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[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 13.
[48] *Id*.
[49] *Id*.
[50] FM 27-10, *supra* note 10, para. 507b.

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy state. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice, and, if so, will be prosecuted within the United States that code.

Id.
[51] Smidt, *supra* note 12, at 194.

While critics argue the military judge erred in providing the instructions to the panel,[52] this case remains important because it provides guidance when scrutinizing the correct legal standard to apply to domestic prosecutions under a theory of command responsibility.[53] Although, had the UCMJ at the time of the Medina court-martial contained a specific punitive article for command responsibility allegations that tracked the post-*Yamashita* FM 27-10, practitioners and scholars need not engage in such analysis. And, perhaps the outcome of *Medina* would have been different.[54]

C. Command Responsibility under International Law

The *Yamashita* legal standard for command responsibility became the cornerstone of the doctrine in the international community and over time developed into customary international law (CIL).[55] Furthermore, considering the U.S. Army adopted the doctrine in the 1956 version of FM 27-10, it is indisputable that the United States acknowledged it as controlling CIL as well.[56] However, despite the United States and the international community agreeing that the *Yamashita* standard reflected CIL, U.S. domestic law saw no change in command responsibility even after the *Medina* case. However, the international community did take measures to codify the CIL doctrine of command responsibility in 1977

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[52] See generally Roger S. Clark, Medina: An Essay on the Principles of Criminal Liability for Homicide, 5 RUT-CAM. L.J. 59 (1973).

[53] Smidt, *supra* note 12, at 198-99.

[54] On 22 September 1971, the court acquitted Captain Medina of the charged offenses stemming from the allegations during the My Lai massacre on 16 March 1968. Eckhardt, *supra* note 12, at 11 n.19.

[55] Smidt, *supra* note 12, at 200. Customary international law is unwritten law that results from a general and consistent practice of states followed by them from a sense of legal obligation. *See* I RESTATMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2), at 24 (AM. LAW. INST. 1987).

[56] Smidt, *supra* note 12, at 201 (citing FM 27-10, *supra* note 10, para. 501; The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945)). As this article will further illustrate, the United States still considers the *Yamashita* standard for command responsibility and its later adoption into the FM 27-10 as reflective of customary international law with the recent publication of the Department of Defense (DoD) Law of War Manual. *See* LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See infra* Section II.E. for a more thorough exploration on the background of this manual.

with the adoption of Additional Protocol I (AP I) to the 1949 Geneva Conventions.[57] In pertinent part, AP I, article 86, paragraph 2 states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[58]

Even though the United States is not a party to AP I,[59] the codification of the foregoing article nearly forty years ago, coupled with its similarities to the standard announced in *Yamashita*, certainly make it binding CIL.[60] Consequently, between the prosecution of General Yamashita in 1946, and the 1977 codification of command responsibility into a treaty, it would seem a reasonable United States position that domestic law fell short in handling the litany of command responsibility cases arising from an increasingly complex operating environment.[61] Nevertheless, despite

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[57] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[58] *Id*. art. 86(2).

[59] *Treaties, State Parties and Commentaries to AP I*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Nov. 22, 2016).

[60] *See generally* Martin Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987). At a conference in 1986, Mr. Michael Matheson, former U.S. Department of State Deputy Legal Advisor, expanded on the provisions of Additional Protocol I to the Geneva Conventions the United States considers customary international law. *See generally id.* Mr. Matheson's comments reflect the position that, at the time, the United States viewed Articles 85-89 as customary international law. *Id*. at 428.

[61] The type of cases that may arise from a complex operating environment include two noteworthy U.S. cases. The first case concerned the 2003 abuses of detainees at the Abu Gharib detention facility. *Iraq Prison Abuse Scandal Fast Facts*, CNN LIBR. (Mar. 12, 2016, 4:05 PM), http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts. After extensive investigations and reports, only lower-ranking Soldiers were prosecuted and no officers were found criminally liable for the actual mistreatment of detainees. *Id*. The second case stemmed from the killings of at least twenty-four civilians in the town of Haditha, Iraq by members of Kilo Co., 3d Battalion,

calls to the contrary,[62] the United States took no action to amend the UCMJ to account for likely prosecutions under a theory of command responsibility.

D. Rome Statute and ICC

The next consequential development in the command responsibility doctrine occurred with the creation of the ICC and the 1998 ratification of the Rome Statute. In establishing the jurisdiction of the ICC and codifying punishable offenses, the parties to the Rome Statute also adopted a specific article concerning superior responsibility.[63] Interestingly, the Rome Statute provided a command responsibility theory applicable to both military and civilian leaders.

The provision for holding both military commanders and superiors liable for the acts of their subordinates appears in Article 28. It states:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

5th Marines. *Haditha Killings Fast Facts*, CNN LIBR. (Apr. 1, 2016, 11:13 AM), http://www.cnn.com/2013/10/30/world/meast/haditha-killings-fast-facts. In that case, the military judge dismissed all charges against the unit's battalion commander, including charges of dereliction of duty, before trial. *Id*.

[62] Colonel William G. Eckhardt was one of those persons who saw the drafting of the Additional Protocols to the Geneva Convention, approximately ten years removed from My Lai, as an opportunity to address the shortcomings reflected in domestic law. *See generally* Eckhardt, *supra* note 12. As it related to command responsibility, he called for substantive changes not only to the UCMJ, but also to the Manual for Courts-Martial and saw a need for the promulgation of new executive orders, directives, and regulations. *Id*. at 27. Specifically, when considering the deficiencies in the UCMJ, Colonel Eckhardt stated:

> [T]he civilian-oriented Uniform Code of Military Justice does little to assist in legally categorizing possible breaches of command responsibility. No article of the Code concerns the battlefield responsibility of a commander. The Manual for Courts-Martial is equally and painfully silent. One must make the legislatively-expressed, ancient common law work, although it teaches little regarding the terrors and the pressures of the battlefield.

Id. at 21. Interestingly, he also called for a tri-service manual on the law of war. *Id*. at 27. His desire was realized, albeit, thirty-three years later, with the 2015 release of the DoD Law of War Manual. *See generally* LAW OF WAR MANUAL, *supra* note 10.

[63] Rome Statute, *supra* note 16, art. 28.

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That the military command or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for the investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or

> repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[64]

As evidenced by the foregoing statutory language, the drafters of Article 28 clearly adopted the *Yamashita* legal standard of "knew or should have known." However, Article 28 contains two unique features not seen in previous international *ad hoc* tribunals,[65] in the 1956 version of FM 27-10, nor in AP I.[66] First, for both military and civilian superiors, Article 28 contains a causation element. Both subparts provide for a superior's culpability where the crimes were committed "*as a result of his or her failure to exercise control properly over such forces* (or subordinates)."[67] The second interesting feature of Article 28 is that it contains two separate negligence standards for military and civilian leaders. The *Yamashita* standard, and the one contained in Article 28(a) for military commanders—"knew or should have known"— becomes "*knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes*."[68] Alternatively, the standard for civilian superiors becomes "*knew or consciously disregarded information which clearly indicated*" that subordinates were committing or about to commit crimes.[69]

During the drafting of Article 28 at the Rome Conference in 1998, the U.S. objected to extending a "knew or should have known" standard to non-military leaders or civilian superiors.[70] In doing so, the United States argued that this negligence standard was one not normally applied to civilians in criminal prosecutions.[71] And, civilians would likely exercise less authority and control over their subordinates than would military

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[64] *Id*. Notably, Article 28 draws a distinction between military and civilian leaders. *Id*. Article 28(a) concerns military commanders, whereas part (b) concerns civilian leaders. *Id*.

[65] These ad hoc tribunals include, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[66] Adria De Landri, *Command Responsibility in the International Tribunals: Is There a Hierarchy?* 49 NO. 1 CRIM. LAW BULLETIN ART. 1, 8 (2013) [hereinafter Landri]; *see also* Smidt, *supra* note 12, at 211.

[67] Rome Statute, *supra* note 16, art. 28 (emphasis added).

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

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

[70] Landri, *supra* note 66, at 8 (citing United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court art. 28, A/CONF.183/13 (Vol. I) (June 15-July 17, 1998) http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf.

[71] *Id*.

commanders, making it unfair to extend this standard to civilians.[72] Nevertheless, apart from these objections, Article 28's standard for holding military leaders responsible reflected, for the most part, the longstanding U.S. view of command responsibility.

E. Current Status of U.S. Command Responsibility Doctrine

Between the Rome Conference in 1998 and the release of the overhauled U.S. Department of Defense (DoD) Law of War Manual in 2015,[73] the world bore witness to a number of conflicts that helped continue shaping the law governing and regulating the use of force.[74] The release of the DoD Law of War Manual, more than 25 years in the making and the first comprehensive manual on the law of war since 1956, provided an opportunity for the United States to address a number of legal developments.[75] This institutional publication reflects decades of work by civilian and military lawyers from all U.S. service components and is intended to serve as a resource for DoD personnel.[76]

Section 18.23.3 of the DoD Law of War Manual addresses command responsibility, reaffirming the doctrine first recognized in *Yamashita* and later incorporated into FM 27-10.[77] Additionally, the manual cites to a number of cases and statutes arising out of various international criminal tribunals,[78] as well as references Article 28 of the ICC's Rome Statute.[79]

The DoD Law of War Manual reaffirmed the longstanding principle of command responsibility and the resulting liability commanders may face should they fail to ensure their troops do not commit war crimes. Under the DoD Law of War Manual, "commanders may be punished

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[72] Per Saland, *International Criminal Law Principles, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 203 (Roy S. Lee ed., 1999).

[73] LAW OF WAR MANUAL, *supra* note 10.

[74] These conflicts include, for instance, the conflict in Kosovo, the war in Iraq, the war in Afghanistan, and the Russian incursion into Crimea.

[75] Marty Lederman, *A Reader's Guide to Our Mini-Forum on DoD's New Law of War Manual*, JUST SECURITY (Aug. 12, 2015, 2:07 PM), https://www.justsecurity.org/25371/readers-guide-mini-forum-dods-law-war-manual/.

[76] LAW OF WAR MANUAL, *supra* note 10, at ii-iii.

[77] *Id*. para. 18.23.3.

[78] *Id*. para. 18.23.3.2 (discussing the statutes of international tribunals incorporation of command responsibility as a mode of liability).

[79] *Id*.

directly for their failure to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[80] This language mirrors FM 27-10, requiring "necessary and reasonable measures" to ensure subordinate compliance with the law of war.[81] It also tracks closely with article 86 of AP I which requires military leaders to take "all feasible measures within their power" to ensure subordinate compliance with the law of war.[82] Similar to FM 27-10, the DoD Law of War Manual does not create an individual basis for liability.[83] Rather, the "purpose of the manual is to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations."[84] Yet, the manual goes into extensive detail outlining the various legal theories under which a commander may be liable for the war crimes of his or her subordinates.[85] For example, a commander may face liability under the theory of conspiracy if he or she agreed to commit a law of war violation.[86] Or, a commander may face an offense triable under a theory of aiding and abetting if the commander had some knowledge of the war crime and provided some type of assistance.[87] The closest and most similar charge for a command responsibility violation as a distinct offense is under UCMJ Article 92, dereliction of duty.[88] Using this charge as a basis for liability is certainly reasonable for most conduct that falls within the purview of command responsibility under international law. However, given the maximum confinement under the UCMJ for article 92 violations range from three months to two years,[89]

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[80] *Id*. para. 18.23.3.
[81] FM 27-10, *supra* note 10, para. 501.
[82] AP I, *supra* note 57, art. 86(2).
[83] LAW OF WAR MANUAL, *supra* note 10, at 1.

> [T]his manual is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law of in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Id.
[84] *Id*.
[85] *Id*. para. 18.23.3.
[86] *Id*. para. 18.23.5.
[87] *Id*. para. 18.23.4.
[88] UCMJ art. 92(3) (2012).
[89] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16e(3)(B) (2016) [hereinafter MCM] (providing for a maximum punishment of forfeiture of two-thirds pay per month for 3 months and confinement for 3 months for dereliction of duties through neglect or culpable inefficiency; providing for a maximum punishment of a bad conduct discharge, forfeiture of all pay and allowance, and 18 months confinement for dereliction of duties through neglect or culpable inefficiency results in death or grievous bodily

a conviction of a commander for being derelict is rather trivial. Furthermore, there exists a drastic and obvious difference between a simple dereliction conviction and one that imputes the actual war crimes to commander.

The DoD Law of War Manual is an excellent resource for commanders and legal practitioners and provides a long overdue update across a number of legal topics. It restates the long held principle that commanders may be liable for the war crimes of their subordinates.[90] But, as the Bemba case portrays, substantive changes in U.S. domestic law are necessary so that the United States may fall into line with the international community and apply the doctrine of command responsibility to its own service members should the need arise.

III. The Case: *Prosecutor v. Jean-Pierre Bemba Gombo*

A. Bemba's Forces

While the facts and circumstances as to Bemba's rise to prominence are not at issue in the case, they do provide some context as to the eventual commission of the brutalities that formed the basis of the conviction. Bemba was born on November 4, 1962 in Bokada, Équateur Province, Democratic Republic of Congo (DRC).[91] His father was a successful businessman and close ally of the former Congolese dictator, Mobutu Sese Seko.[92] Bemba enjoyed a privileged childhood, spending his early years shuttling between Brussels, Belgium, and the Congolese capital of Kinshasa.[93] He was well-educated, eventually earning a master's degree in finance from the Institut Catholique dese Hautes Etudes Commerciales business management school in Brussels.[94] In 1997, at the age of thirty,

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harm; providing for a maximum punishment of a bad conduct discharge, forfeiture of all pay and allowance, and confinement for 6 months for willful dereliction of duty cases; and, providing for a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowance, and confinement for 2 years for willful dereliction of duty resulting in death or grievous bodily harm).

90 LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.

91 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 1.

92 *Profile: Jean-Pierre Bemba*, BBC NEWS (Apr. 26, 2010, 4:30 PM), http://news.bbc.co.uk/2/hi/africa/6085536.stm [hereinafter *Profile: Jean-Pierre Bemba*].

93 *Id*.

94 Integrated Regional Information Networks (IRIN) Profile, *Jean-Pierre Bemba Gombo-Mouvement de libération du Congo*, IRIN (Aug. 23, 2006), http://www.irinnews.org/news/2006/08/23/profile-jean-pierre-gombo-bemba-

Mobutu named Bemba as a personal assistant advising on financial matters.[95] However, this post proved short-lived as forces loyal to Laurent Kabila overthrew Mobutu and gained control of the DRC in May of 1997.[96] Approximately one year later, with the help of Uganda, Bemba formed a rebel group named the *Mouvement de libération du Congo* (MLC) to oppose Mr. Kabila's regime with a goal of overthrowing his government.[97] He also became the Commander-in-Chief of the MLC's paramilitary division, the *Armée de libération du Congo* (ALC).[98] The MLC [99] quickly succeeded in capturing much of the territory of northwestern DRC including the Équateur Province and the provincial capital city of Gbadolite.[100] In 2003, after a period fighting both MLC forces and those loyal to other rebel groups, Mr. Kabila eventually entered into a peace deal and a power-sharing arrangement where Bemba became one of four vice-presidents.[101] Thereafter, Bemba established himself as a politician, running, but losing a bid for the presidency against Joseph Kabila, the son of former dictator, Laurent Kabila.[102] In 2008, at the time of his arrest in Belgium he was a senator in Congo and leader of the MLC.[103] However, the facts that form the basis of this case begin in October 2002.[104] To the northwest of the DRC is the Central African

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mouvement-de-lib%C3%A9ration-du-congo. Located in Brussels, the Institut Catholique dese Hautes Etudes Commerciales (ICHEC) business management school offers both bachelors and master's degrees in business engineering and business management. ICHEC, http://www.ichec.be (last visited Dec. 28, 2016 9:39am).

95 *Id.*

96 *Profile: Jean-Pierre Bemba*, *supra* note 92.

97 *Id. See also* The Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08-3343, Summary of Judgment Pursuant to Art. 74 of the Statute 3 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf [hereinafter Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo].

98 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 1.

99 The ICC's final judgment and much of the other documents referenced in the case refer to the atrocities committed by the *Mouvement de libération du Congo* (MLC) as opposed to the military specific, *Armée de libération du Congo* (ALC). *See generally* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, supra note 17.

100 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 382.

101 *Profile: Jean-Pierre Bemba Gombo*, *supra* note 92.

102 *Id.*

103 Wairagala Wakani, *Bemba Found Guilty over Rapes, Murders in Central African Republic*, INT'L JUST. MONITOR (Mar. 21, 2016), https://www.ijmonitor.org/2016/03/bemba-found-guilty-over-rapes-murders-in-central-african-republic.

104 Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 97, ¶ 11.

Republic (CAR).[105] At some point in October 2002, rebel forces loyal to General François Bozizé, the former Chief of Staff of the CAR forces known as the *Forces armées centrafricaines* (FACA), advanced from Chad through the CAR.[106] These rebel forces were composed of former FACA soldiers and Chadian nationals.[107] The rebels engaged the FACA troops and captured various towns before entering the capital city of Bangui on October 25, 2002.[108] Forces loyal to the CAR president, President Ange-Félix Patassé responded with force to repel the attack.[109] President Patassé, in an attempt to further defend against the rebels and preserve his grip on power, sought Bemba's assistance in the form of his MLC forces located across the border in the DRC.[110] Thereafter, Bemba ordered the deployment of three MLC battalions totaling 1,500 men to the CAR to aid the forces of President Patassé in repelling General Bozizé's rebels.[111]

Beginning on October 26, 2002, MLC forces, along with a limited number of accompanying FACA troops, entered a number of towns and villages in the CAR.[112] The fighting between MLC forces supporting President Patassé and General Bozizé's rebels continued at various locations in the CAR beginning toward the end of October 2002 and culminating with an attack on the town of Mongoumba by MLC forces on 6 March 2003.[113] However, by 15 March 2003, MLC forces had completely withdrawn from the CAR across the border to the DRC.[114]

The ICC found that MLC forces committed a number of atrocities during the five-month period they were located in the CAR. First, the ICC found beyond a reasonable doubt that MLC forces committed the war crime of murder and the crime against humanity of murder by killing three

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[105] *See* GOOGLE MAPS, https://www.google.com/maps/place/Democratic+Republic+of+the+Congo/@-3.9834054,12.6744027,5z/data=!3m1!4b1!4m5!3m4!1s0x1979facf9a7546bd:0x4c63e5eac93f141!8m2!3d-4.038333!4d21.758664 (last visited Jan. 18, 2017) (current map of Africa).

[106] Summary of Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 97, ¶¶ 11-12.

[107] *Id*. ¶¶ 11-13.

[108] *Id*. ¶ 11.

[109] *Id*.

[110] *Id*. ¶ 12.

[111] *Id*. ¶ 13.

[112] *Id*. ¶ 14.

[113] *Id*. ¶ 14.

[114] *Id*. ¶ 15.

persons in their homes who were unarmed and not taking part in the hostilities.[115] Second, the ICC found that MLC forces committed the war crime of rape and the crime against humanity of rape as part of a widespread attack directed against the civilian population of the CAR.[116] Specifically, the court found twenty-eight persons were victims of rape, with some victims assaulted multiple times and sometimes with multiple MLC forces engaged in the conduct.[117] Lastly, the ICC found MLC forces committed the war crime of pillaging by taking property without consent from twenty-nine persons.[118]

B. Bemba's Knowledge of the Allegations and His Actions During the Five-Month Operation

Unlike the command responsibility cases of Yamashita and Medina,[119] the ICC found that Bemba had actual knowledge of the allegations leveled against his troops in the CAR.[120] Furthermore, his actions fell short of the affirmative duties in Article 28(a)(ii) of the Rome Statute to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for the investigation and prosecution.[121]

Although he was located primarily in Gbadolite, DRC, during the five-month operation, the ICC found that Bemba maintained ultimate authority over military operations and strategy, including making decisions regarding personnel, discipline, and finances.[122] However, despite his lack of proximity to his forces, he communicated directly to commanders in the field via radio, mobile phones, satellite phones, and other communications devices, and received constant updates about the status of the MLC and the operation.[123] Through his field commanders and intelligence apparatus, he received periodic intelligence reports detailing not only operational information, but also allegations of crimes committed

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[115] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 625. The court did find there was insufficient evidence to enter findings for the five additional alleged murders. *Id*. ¶ 623.
[116] *Id*. ¶ 631.
[117] *Id*. ¶¶ 632-633.
[118] *Id*. ¶¶ 639-640.
[119] *See* discussion *supra* Section II.
[120] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 710.
[121] *Id*. ¶ 734.
[122] *Id*. ¶ 733.
[123] *Id*. ¶ 707.

by MLC forces.[124] Additionally, the ICC found that Bemba had direct knowledge that MLC forces were committing acts of rape, pillaging, and murder against the CAR civilian population from a number of media outlets.[125] In particular, international media outlets like the Radio France Internationale, the British Broadcasting Corporation, the Associated Press, the Integrated Regional Information Networks, and the Voice of America consistently reported the allegations as did local CAR media accessible in French to MLC troops.[126]

The evidence shows that Bemba discussed the media allegations with his senior officials and decided to take various measures during the course of the operation.[127] Early in the operation, upon first learning of the allegations and discussing them with senior MLC officials, he established the Mondonga Inquiry charged with investigating allegations of rape, murder and pillaging.[128] The inquiry, completed by MLC Colonel Germain Mondonga, substantiated allegations of rape and pillaging by MLC forces and caused Bemba to convene a publically broadcasted court-martial against seven MLC troops.[129] Because of further allegations of pillaging and rape made during the court-martial, Bemba established the Zongo Commission.[130] Comprised of MLC officials, this commission was unable to corroborate MLC forces committed the pillaging allegations raised at the court-martial, but did substantiate other actions of pillaging by MLC forces in the CAR.[131]

Approximately one month into the operation, Bemba traveled to the CAR after hearing reports against his troops.[132] While in the CAR, he met with the United Nations (U.N.) representative in the CAR, General Cissé, and President Patassé, promising to take measures in response to the allegations.[133] Additionally, he gave a speech reprimanding his soldiers

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[124] *Id.* ¶ 708.
[125] *Id.* ¶ 709.
[126] *Id.* ¶¶ 576-577.
[127] *Id.* ¶ 711.
[128] *Id.*
[129] *Id.* ¶¶ 582-589. The Mondonga Inquiry did not address the responsibility of the commanders in the field that may have known or should have known about the allegations. *Id.* ¶ 589. Additionally, convictions of the seven soldiers were for low-level offenses relating to pillaging a few items and small sums of money. *Id.* ¶ 589.
[130] *Id.* ¶ 722.
[131] *Id.* ¶ 713.
[132] *Id.* ¶ 719.
[133] *Id.*

for their mistreatment of the civilian population.[134] In February 2003, toward the end of the operation, Bemba established the Sibut Mission following media allegations of crimes committed by MLC forces in the towns of Bozoum and Sibut.[135] While the exact nature of this group's primary purpose is unclear from the ICC's final judgement, it appears Bemba formed this group to be yet another quasi-investigative body charged with looking into MLC allegations.[136]

On 4 January 2003, Bemba engaged in correspondence with General Cissé after reports of MLC abuse.[137] The letter advised General Cissé of appropriate and remedial measures taken and requested assistance in further investigations of allegations by MLC forces.[138] In response, General Cissé offered support and participation in any inquiries.[139]

Lastly, on February 13, 2003, the International Federation on Human Rights (FIDH) issued a report into its investigation and visit to Bangui, CAR between November 25 and December 1, 2002.[140] Based on interviews with a number of individuals, including CAR authorities, representatives of non-governmental organizations (NGOs), international organizations, medical personnel and victims, the FIDH report found various acts of rape, pillaging, and murder attributable to MLC forces.[141] Bemba responded to the allegations by letter to FIDH president, Sidiki Kaba, articulating the actions taken once he became aware of the MLC allegations, including the court-martial of the seven MLC soldiers and vowing to work in concert with the FIDH to discover the facts of the events in Bangui.[142]

A reasonable observer of a military commander's response to wrongdoing by their subordinates might find Bemba's actions sensible and

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134 *Id*.
135 *Id*. ¶ 725.
136 *Id*. ¶¶ 725-728.
137 *Id*. ¶ 723.
138 *Id*.
139 *Id*.
140 *Id*. ¶ 607. The International Federation on Human Rights (FIDH) (or in French, *Fédération internationale des ligues des droits de l'Homme)* is a non-governmental organization federating 184 organizations from 122 countries. *What is FIDH*, THE INT'L FED'N ON HUMAN RIGHTS, https://www.fidh.org/en/about-us/What-is-FIDH (last visited Jan. 12, 2016).
141 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 607-608.
142 *Id*. ¶¶ 610-611.

measured. Forming a few investigative committees, calling publically for his forces to cease any unlawful acts against the local population, court-martialing a handful of offended soldiers, and generally agreeing to work with NGO's in further investigations all seem like practical responses by a military commander. Certainly, these responses are ample to absolve a commander of liability when viewed in light of previous command responsibility cases. Yet, as the following sections of this article will demonstrate, the Bemba case unsettles many of the command responsibility norms and highlights potential flaws in the current U.S. system.

IV. Revisiting the U.S. Commander in Light of Bemba's ICC Conviction

A. Actions after Learning of War Crime Allegations

The fictional scenario involving the U.S. commander in the introduction of this article generally tracks the facts of the Bemba case.[143] Similar to Bemba, the U.S. commander became aware of the allegations against his Ssoldiers through media reports and periodic situational reports. Additionally, like Bemba, the U.S. commander took a number of measures in an attempt to punish the perpetrators and deter future misconduct. These actions included, for example, convening courts-martial, ordering retraining, and commissioning a number of investigations. However, because these actions may not be sufficient under the law, questions remain as to how to dispose of the case against the U.S. commander.

As a threshold matter, it is important to examine the decisions made by the commander upon becoming aware of the allegations against his subordinate soldiers. As previously noted, under FM 27-10 and the DoD Law of War Manual, commanders are responsible if they fail to take "necessary and reasonable steps to ensure their subordinates comply with

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[143] There are a few differences between the cases. For example, Bemba exercised complete control over his MLC forces. *See* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 399-403. As commander-in-chief of the MLC forces, he exercised broad authority over strategic military decisions, issuing orders through his general staff or directly to subordinate field commanders. *Id*. Additionally, he had authority to convene courts-martial and dispense justice through the appointing officials and judges to hear cases. *Id*. He also held ultimate authority for all personnel matters as far as promotions and appointments within the MLC, including arresting, sanctioning, and dismissing leaders and soldiers. *Id*.

the law of war."[144] Without additional evidence and the benefit of a developed record, it is difficult to conclude whether the U.S. commander's actions conclusively ran afoul of the command responsibility standard. Yet, the Bemba case provides an excellent vehicle to analyze the limits of these actions according to the ICC.

The ICC summarily dismissed as inadequate all of Bemba's actions upon becoming aware of the allegations against the MLC forces.[145] The ICC found that the investigation completed by MLC Colonel Mondonga was self-serving, incomplete, failed to pursue relevant leads, and omitted the responsibility of commanders.[146] Likewise, the Zongo Commission, established in light of serious allegations of murder, rape, and pillaging, addressed only the pillaging of goods and failed to scrutinize the more serious charges.[147] Additionally, the ICC found this commission, composed primarily of MLC forces, made a poor attempt at uncovering the facts by only questioning witnesses that had public functions or worked directly for the MLC.[148] Similarly, the ICC found Bemba's Sibut Mission was not a genuine investigation and designed more along the lines of a public relations mission to counter the continued allegations.[149]

According to the ICC, Bemba's public warnings to his troops proved to be nothing more than empty threats as he failed to follow up with concrete measures to repress and further deter the commission of the crimes.[150] Furthermore, the ICC found Bemba's exchange with General Cissé, the U.N. representative, and Mr. Kaba, of the FIDH, were primarily motivated to counter the public allegations against the MLC and to restore its image.[151]

In finding all of Bemba's actions as grossly inadequate to repress and prevent the crimes, the ICC retrospectively offered a number of measures it deemed sufficient to absolve Bemba of liability. Other than the actions he took, according to the ICC, Bemba could have:

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144 *See* FM 27-10, *supra* note 10; LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.
145 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 719-741.
146 *Id*. ¶ 720.
147 *Id*. ¶ 722.
148 *Id*.
149 *Id*. ¶ 725.
150 *Id*. ¶ 721.
151 *Id*. ¶¶ 726-728.

> (i) ensured that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervised during the 2002-2003 CAR operation; (ii) initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes, and properly tried and punished those responsible; (iii) issued further and clear orders to the commanders of the troops in the CAR to prevent the commission of crimes; (iv) altered the deployment of troops, for example, to minimize contact with civilian populations; (v) removed, replaced, or dismissed officers and soldiers found to have committed or condoned any crimes in the CAR; and/or (vi) shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.[152]

Had Bemba Gombo taken action similar to one or more of these six measures, it is possible to deduce that such measures would have been sufficient to excuse him from liability.

However, before turning back to the U.S. commander and the fictional scenario, the ICC's articulation of adequate command actions in its final judgment provide insight into the ICC's view of appropriate responses to subordinate war crime allegations. For instance, the adequate training of personnel on the law of war and the requirement to conduct genuine and thorough investigations are two examples where U.S. military leaders exercise substantial influence to prevent possible violations of the law of war.[153]

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[152] *Id*. ¶ 729.

[153] Army Regulation 600-20, paragraph 1-5c(4)(c), charges Army commanders with developing disciplined and cohesive units with a high state of readiness. AR 600-20, *supra* note 2, para. 1-5c(4)(c). Furthermore, AR 350-1, paragraph G-23, lays out the specifics for annual training on the law of war by Army leaders and Soldiers. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. G-23 (19 Aug. 2014). This provision of AR 350-1, along with the guidance in AR 600-20, provides commanders wide latitude and opportunities to provide law of war training. As far as investigating allegations of law of war violations, DoD policy requires "[A]ll reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action." U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.4 (9 May 2006, Certified Current as of 22 Feb. 2011). The requirements to report and investigate, coupled with the Army's administrative investigative process outlined in AR

Assuming the U.S. commander's actions, like Bemba's, were inadequate and failed as reasonable and necessary steps to ensure that the U.S. Soldiers complied with the law of war, the next questions are what charges could the commander face, and what forum should adjudicate the case. Because the United States is not a signatory to the Rome Statute,[154] and has sought to shield its service members from the ICC by entering into Article 98 agreements,[155] at present, the ICC exercises limited jurisdiction over U.S. service members for which the court has subject matter jurisdiction (genocide, crimes against humanity, war of aggression, and war crimes).[156] While the validity of Article 98 agreements is the subject of considerable debate, it is highly likely a U.S. court-martial would adjudicate the case of the U.S. commander.[157] Yet, questions remain as to what charges the commander may face in a court-martial.

B. How to Charge the U.S. Commander under a Theory of Command Responsibility?

15-6, articulates to commanders what they must do upon receiving a report of an alleged war crime and how they are to impartially ascertain the facts. *See* U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 Apr. 2016).

[154] *See The States Parties to the Rome Statute*, *supra* note 16 (listing 124 current signatories to the Rome Statute, of which the United States is not among).

[155] Each signatory to Article 98 agreements promise not to hand over each other's citizens to the ICC unless both parties consent. Rome Statute, *supra* note 16, art. 98.

[156] Lieutenant Colonel James T. Hill, Jus in Bello Futura Ignotus: The United States, The International Criminal Court, and The Uncertain Future of the Law of Armed Conflict, 223 MIL. L. REV. 672, 680-83 (2015) [hereinafter Hill].

[157] *Id*. (citing 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, 9:24AM), http:justsecurity.org/6702/president-certifies-armed-forces-mali-risk-international-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); 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); 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)).

1. Principal and Conspirator Liability

An examination of the UCMJ provides a number of potential charges for which an accuser may choose to prefer against the U.S. commander. Like the Rome Statute, the UCMJ has vicarious liability provisions that permit holding an individual responsible for the crimes of another.[158] Article 77 of the UCMJ establishes principal liability for non-perpetrators if they "(i) assist, encourage, advise, instigate, counsel, command or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and (ii) share in the criminal purpose or design" with the perpetrator.[159] Article 81 of the UCMJ establishes co-conspirator liability for persons entering into an agreement where one or more of the persons performs an overt act in furtherance of the conspiracy.[160]

When applying the two aforementioned articles to the case of the U.S. commander, it appears neither will suffice in securing a conviction. The commander certainly had a duty to act once he had actual knowledge of the allegations against his subordinates,[161] and, in fact, did so by ordering a number of investigations, convening courts-martial to try the wrongdoers, and ordering additional training. However, the evidence shows the commander's actions upon learning of the allegations, while possibly insufficient like Bemba's, were not actionable under Article 77, UCMJ. Clearly, the commander's actions do not meet the required elements of Article 77, UCMJ, in that his actions did not rise to the level of assisting, counseling or encouraging his subordinates to commit the

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[158] *See* UCMJ, *supra* note 23, art. 77, 81. Likewise, the Rome Statute's vicarious liability provisions are embodied in Article 25.3(a), (b), and (c). Rome Statute, *supra* note 16, art. 25.3.

[159] MCM, *supra* note 89, pt. IV, ¶1b(2)(b)(i)-(ii). The DoD Law of War Manual provides,

> In some cases, these theories of liability may be viewed as ways of attributing an offense that is committed by one person to another person. In other cases, these theories of liability may be viewed as distinct offenses; for example, a first offense is committed by one person and a second offense is committed by another person that is somehow related to the first offense.

LAW OF WAR MANUAL, *supra* note 10, para. 18.23.

[160] MCM, *supra* note 89, pt. IV, ¶ 5b(1)-(2).

[161] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3.

atrocities. Additionally, there is a lack of evidence that he shared in his soldiers' criminal design or purpose.

Similarly, Article 81, UCMJ, is an unsuitable charge to prosecute the U.S. commander. Specifically, Article 81(2), UCMJ, covers a conspiracy offense under the law of war resulting in the death of one or more victims.[162] In this case, Article 81(2), UCMJ, is inapplicable to the scenario because there is no evidence the commander entered into an agreement with his subordinates to commit law of war violations. Thus, the question becomes what charge or charges remain and are best suited to pursue criminal action against the U.S. commander.

2. Using Article 92, Dereliction of Duty, for Command Responsibility Offenses

While Articles 77 and 81 of the UCMJ appear unsuitable to the situation, another course of action may be using a dereliction of duty charge. Article 92, UCMJ, sets out the three elements for dereliction of duty: (a) that the accused had certain duties; (b) that the accused knew or reasonably should have known of the duties; and, (c) that the accused either willfully, or through neglect or culpable inefficiency, was derelict in the performance of those duties.[163] In 2015, Article 92b(3), UCMJ, was amended to account for more serious cases involving death or grievous bodily harm, and the following element was added: (d) that such dereliction of duty resulted in death or grievous bodily harm.[164] Essentially, the addition of this element provided an aggravating factor for cases where the result was more serious.

Consequently, the 2015 amendments increased the maximum punishment for dereliction of duty charges that result in death or grievous bodily harm.[165] For cases resulting in death or grievous bodily harm where the dereliction of duty is through neglect or culpable inefficiency, the maximum confinement sentence is 18 months.[166] For cases resulting in death or grievous bodily harm where the dereliction of duty is willful, the

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[162] MCM, *supra* note 89, pt. IV, ¶ 5b(2).
[163] *Id*. pt. IV, ¶ 16b(3).
[164] *Id*. art. 92 analysis, at A23.
[165] *Id*. The previous version of Article 92b(3) made no mention of cases where the dereliction of duty resulted in death or grievous bodily harm. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16b(3) (2012).
[166] MCM, *supra* note 89.

maximum confinement sentence is 2 years.[167] These changes resulted from a report, entitled, "Report of the Subcommittee on Military Justice in Combat Zones," issued in May 2013 by the Defense Legal Policy Board (DLPB).[168]

At first glance, these changes seem to remedy some of the failures embodied in the UCMJ to hold leaders responsible under a command responsibility theory. After all, the 2015 amendment for dereliction cases resulting in death or grievous bodily harm more than tripled the previous maximum term of confinement for dereliction of duty.[169] Furthermore, the discussion to Article 92 in the Manual for Courts-Martial states, "[I]f the dereliction of duty resulted in death, the accused may also be charged under Article 119 or Article 134 (negligent homicide), as applicable."[170] However, attempting to cobble together a number of punitive articles in the UCMJ in the hopes of pursuing a conviction under a command responsibility theory serves to highlight the inherent problems with the current criminal code.

At the heart of the concept of command responsibility is that offending commanders are liable for the very offenses committed by their subordinates even if they took no part in the commission of the actual

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[167] *Id*. pt. IV, ¶ 16e(3)(D).

[168] *Id.* art. 92 analysis, at A23 (2016). On 30 July 2012, the Secretary of Defense (SecDef) established this Subcommittee of the Defense Legal Policy Board (DLPB). DEF. LEGAL POLICY REVIEW BD., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES (Final Report, May 30, 2013), http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf. The SecDef charged the board to review and assess the application of military justice in combat zones in which service members were alleged to have committed offenses against civilians. *Id*. The committee found that leaders should be held accountable for failures to appropriately respond to civilian casualty incidents. *Id*. at 45. As it then stood, the current maximum punishment for dereliction of duty offenses failed to "provide a credible deterrence to such misconduct or to provide a sense of justice to the local population in cases where such dereliction of duty results in, or aggravates, civilian casualties." *Id*. In making their recommendation, the committee examined the Haditha cases and the role of the Marine battalion commander in failing to accurately and promptly report the events, and failing to investigate the allegations that Marines under his command were involved in unlawfully killing civilians. *Id*. at 128-29.

[169] MCM, *supra* note 89, pt. IV, ¶ 16e(3)(A)-(B) (providing for a maximum sentence of forfeiture of two-thirds pay per month for three months and confinement for three months for dereliction through neglect or culpable inefficiency; and providing for a maximum sentence of a bad-conduct discharge, forfeiture of all pay and allowance, and confinement for six months for cases of willful dereliction).

[170] *Id*. pt. IV, ¶ 16 Discussion.

offenses.[171] This was clearly the case where the ICC found, beyond a reasonable doubt, that Bemba was criminally responsible under Article 28(a) of the Rome Statute for the crimes committed by his subordinates even though he took no part in the rapes, murders, or pillaging.[172] Yet, a conviction under Article 92, UCMJ, is not akin to an authentic command responsibility verdict because the article does not impute the criminal acts of subordinates against the offending commander.[173] In fact, even if a commander is criminally responsible for being derelict in some command duty as it relates to his subordinates, that commander does not sustain a conviction as a principal for the actual war crimes.[174] Instead, the commander is simply liable for a violation of Article 92, UCMJ, and appropriately sentenced under the maximum punishment standards.[175]

Admittedly, an academic distinction exists between a conviction under an Article 92, UCMJ, dereliction of duty offense and one under a genuine command responsibility theory. In either case, the offender sustains a criminal conviction. However, a most glaring difference exists between a commander that was derelict for failing to investigate, prevent, and suppress war crimes and one that, for the purposes of the law, affirmatively raped and murdered civilians. Under an Article 92, UCMJ, conviction of a commander is simply a failure, whereas a commander with imputed command responsibility is a war criminal. Furthermore, as a practical matter, a noteworthy discrepancy exists in maximum punishments between a derelict commander and a commander who is a war criminal. The maximum confinement for a commander convicted of willfully derelict actions that result in civilian death is two years[176]—very different from the fate of General Yamashita or even Bemba.[177]

In the fictional case of the U.S. commander, it is arguable whether the commander even committed an offense actionable under Article 92, UCMJ. As the current U.S. command responsibility standard makes clear, commanders may be punished directly for their failures to take "necessary and reasonable measures" to ensure that their subordinates do not commit

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171 *See* SOLIS, *supra* note 6, at 381.
172 Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 741.
173 Hansen, *supra* note 12, at 396.
174 *Id*.
175 *Id*.
176 MCM, *supra* note 89, pt. IV, ¶ 16e(3)(D).
177 General Yamashita was executed and Bemba Gombo was sentenced to eighteen years confinement. In re Yamashita, 327 U.S. 1, 5 (1946); Sentence Decision, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 19, ¶ 97.

violations of the law of war.[178] Essentially, under this concept, commanders have an affirmative duty to act and must do everything that is "necessary and reasonable" within their power to avoid criminal liability.[179] Conversely, Article 92, UCMJ, takes a different approach and defines derelict action as either willful, negligent, or culpably inefficient.[180] Thus, a person may avoid criminal responsibility under Article 92, UCMJ, if they simply avoid taking willfully derelict action, but do slightly more than what is negligent or culpably inefficient.[181] In short, the affirmative duty of commanders to act comprehensively, as embodied in the theory of command responsibility, is a far higher standard than the one embodied in Article 92, UCMJ, which only requires minimum performance that rises above negligence.

When applying this analysis to the U.S. commander, it is possible to envision the commander's actions as being sufficient to withstand a dereliction of duty charge. Upon becoming aware of the allegations, the commander took action by ordering the matters investigated, reprimanding his subordinates, ordering retraining, and punishing through convening courts-martial. While these actions probably meet the standard of care required under Article 92, UCMJ, it is not so clear that they meet the higher threshold required under a theory of command responsibility. In considering the dichotomy between derelict performance and one that requires "necessary and reasonable" measures, it is possible to envision command actions that rise above negligence or culpable inefficiency but do little to prevent, repress, and deter war crimes.

As the foregoing indicates, charges under Article 92, UCMJ, are insufficient to adjudicate, categorically, commanders for all command responsibility failures. The punitive article does not fully incorporate the longstanding concept of command responsibility into the UCMJ, and the range of punishments prescribed for the offense are unacceptable for egregious war crime allegations.[182] For these reasons, the United States should consider remedying the limitations contained in the UCMJ to resolve command responsibility cases.

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[178] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See also* FM 27-10, *supra* note 10, para. 501.
[179] Hansen, *supra* note 12, at 396.
[180] MCM, *supra* note 89, pt. IV ¶ 16e(3)(c). *See also* Hansen, *supra* note 12, at 396.
[181] Hansen, *supra* note 12, at 396.
[182] *Id*. at 397.

V. Command Responsibility in the UCMJ

A. Benefits to Addressing Command Responsibility in the UCMJ

For a number of reasons, both practical and theoretical, the United States should consider making substantive changes to the UCMJ to account for command responsibility cases. Since *Yamashita* and the development of the modern concept of command responsibility, the United States has shown a willingness to try enemies for command failures and exact the most severe punishment on those liable.[183] As recently as 2009, the United States used the long-established legal standard for command responsibility for persons tried in the post-9/11 military commissions.[184] Contained in the Military Commissions Act of 2006 (and amended in 2009) is a punitive article that represents a mode of liability where, in military commissions, alien unprivileged enemy belligerents may face principal liability.[185] The particular article states:

> Any person is punishable under this chapter who—…(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.[186]

Altering the UCMJ to account for the same standard found in military commissions is a fair and reasonable course of action the United States should consider. In fact, the United States has proposed nearly the same standard for command responsibility as that found in the military commission's statute and the Rome Statute during the 1974-77 deliberations to the drafting of AP I to the 1949 Geneva Conventions.[187]

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[183] *See, e.g*., In re Yamashita, 327 U.S. 1, 14 (1946); U.S. v. von Leeb Case No. 12 (1948) "The High Command Case" *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 512 (1950); U.S. v. von List, Case No. 7, "The High Hostage Case" *reprinted in id.* at 759.; U.S. v. Araki, Majority Judgment, 48 (Int'l Mil. Trib. for the Far East (1946)) *reprinted in* NEIL BOISTER & ROBERT CRYER, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGMENTS 102 (2008).

[184] Military Commissions Act § 8, 10 U.S.C. § 950q (2009).

[185] *Id*.

[186] *Id*.

[187] DRAFT, ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ICRC OFFICIAL RECORDS, vol. 1, pt. 3, at 25; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed

Perception in the international community is also an important consideration the United States should acknowledge when analyzing what changes to consider regarding the doctrine of command responsibility and the UCMJ. Presently, it may appear that U.S. commanders have a greater degree of protection when conducting military operations than those of other nations.[188] The lack of a clear legal standard applicable to both U.S. commanders and coalition partners may adversely affect building international military partnerships and executing joint operations. Furthermore, as a world leader in conducting global military operations, incorporating the long standing, internationally accepted doctrine of command responsibility into U.S. domestic law, may influence the development of the rule of law and encourage military leaders to act accordingly. At a minimum, it would certainly give both critics and enemies of U.S. military operations pause when attempting to shape the narrative that U.S. military leaders, and U.S. national security policies, are unrestrained and freed from the boundaries of international law.[189]

While many nations with powerful, standing militaries have become signatories to the Rome Statute, including, for example, Australia, France, and the United Kingdom, [190] this article advocates only for the incorporation of the doctrine of command responsibility into U.S. domestic law. There is a delicate balance between subjecting U.S. military commanders to the same legal standard as that of other nations that either have become signatories to the Rome Statute or incorporated its standard into domestic law, and subjecting U.S. commanders to the jurisdiction of the ICC. While the ICC does provide a forum for international justice in

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Conflicts, Geneva, I/306 vol. III, at 328 (1974-1977); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 1013 (S. Pictet et. al. eds., 1958).

188 Smidt, *supra* note 12, at 211-12.

189 Hill, *supra* note 156, at 682 (citing Ruth Wedgewood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 198 (2007)); *see also* William G. Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT'L L. 431, 441 (2003). Eckhardt states:

> 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.

190 *The States Parties to the Rome Statute*, *supra* note 16.

the global fight to end impunity,[191] its cases and decisions may have wide-ranging repercussions that conflict with the United States' interpretation of the law of armed conflict (LOAC) or are adverse to U.S. national security interests. Because the ICC is still in its infancy as far as having a fully developed body of case law,[192] at present, it is difficult to fully articulate whether the ICC's LOAC jurisprudence does, in fact, conflict with the interests of the United States. Nevertheless, along these lines, one criticism of the ICC's Bemba decision highlights why the United States should favor a less altruistic motive for modifying the UCMJ as it relates to command responsibility.

There is considerable scholarship on the role of the ICC and whether the exercise of its primary function as the arbiter of international justice spills into, arguably, its less appropriate role as a leader in the development of the LOAC and CIL.[193] In the Bemba decision, the ICC found that all of Bemba's actions after becoming aware of the allegations against his MLC forces failed to prevent or repress the commission of war crimes by his forces.[194] In making this, and other determinations, the ICC raised a host of difficult questions. For example, did the ICC alter or modify the United States' understanding, and those of the international community at large, of what are "necessary and reasonable" command actions after receiving knowledge of war crimes allegations? [195] Does the United States' practice of ordering investigations, convening courts-martial, and holding subordinates accountable still comport with what is "necessary and reasonable" to prevent and repress the commission of war crimes? Is it permissible for an international judicial body to decide which internal investigations are authentic and fully developed and which are seemingly

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[191] INT'L CRIM. CT., *supra* note 16, at 3.

[192] Currently, the ICC's docket contains twenty-three cases at various stages of the proceedings with only four convictions and one acquittal. *Cases*, INT'L CRIM. CT., https://www.icc-cpi.int/Pages/cases.aspx (last visited Feb. 1, 2017).

[193] *See generally* Hill, *supra* note 156 (citing 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 and international tribunals on the development of the law of armed conflict)); Allison Danner, *When Courts Make Law: How the International Criminal Court Tribunals Recast the Laws of War*, 39 VAND. L. REV. 1, 23-33; 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'L L. 543, 558 (2010).

[194] Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶¶ 719-742.

[195] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See also*, FM 27-10, *supra* note 10, para. 501.

incomplete and self-serving?[196] Lastly, must commanders cooperate with non-governmental organizations and state authorities when receiving allegations of subordinate war crimes?[197] The answer to these questions are difficult and illustrate the challenges of the United States conducting military operations while comporting with judicially altered changes to the LOAC.

The United States's role as a leader in worldwide military operations positions it as an essential actor in the continued development and interpretation of the LOAC; while, at the same time, provides an opportunity to protect its military commanders from what it considers incorrect interpretations of international law. Thus, while this article advocates for changes to domestic law via the UCMJ, it does not advocate the United States becoming a party to Rome Statute. A measured and realistic approach to remedying the flaws in the UCMJ provides the most suitable course action.

B. Proposals Concerning Command Responsibility and the UCMJ

At least two scholars have proposed measures aimed at incorporating command responsibility into the UCMJ.[198] One proposal advocates for a wholesale approach while the other supports using the current form absent congressional amendment to the UCMJ.[199] The remainder of this section will analyze both proposals, while considering the concerns of other commentators.

1. Working with the Current System

In 2000, Michael Smidt wrote an article advocating for Congress to amend the UCMJ and adopt the *Yamashita* standard of command responsibility.[200] In particular, he called for expanding the scope of Article 77, UCMJ dealing with principal liability by providing a third basis

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[196] *See* Final Judgment, The Prosecutor v. Jean–Pierre Bemba Gombo, *supra* note 17, ¶ 728.
[197] *Id*. ¶¶ 728-729.
[198] S*ee generally* Hansen, *supra* note 12; Smidt, *supra* note 12.
[199] S*ee generally* Hansen, *supra* note 12 (wholesale approach); Smidt, *supra* note 12 (current form).
[200] Smidt, *supra* note 12, at 233.

of liability.[201] Smidt sought to incorporate language very similar to Article 28(a) of the Rome Statute. [202] The amendment he proposed to Article 77, UCMJ was as follows:

> (3) in the case of a military commander or a person effectively acting as a military commander, while on a military operation outside the territory of the United States, however the operation is characterized, where forces under his or her effective command and control as the case may be, as a result of his or her failure to exercise proper control over such forces, where
>
> (i) That military commander or person either knew or owing to the circumstances a[t] the time, should have known that the forces were committing or about to commit a crime under this chapter; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission; is a principal.[203]

This proposed amendment is also similar to the punitive article that covered principal liability in the military commission.[204] However, realizing the likelihood of Congress taking action to amend the UCMJ was remote, Smidt proposed an alternative solution that called for working within the existing construct of the UCMJ.[205] He proposed using Article 18, UCMJ, for charging Soldiers and commanders for violations of the law of war rather than the corresponding violations of the UCMJ.[206] Specifically, because Article 18, UCMJ, provides for charging law of war violations, Smidt suggested that the internationally recognized command responsibility standard in *Yamashita* be applied in domestic courts-martial, forestalling the need to amend the UCMJ.[207]

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[201] *Id*. at 217.
[202] *Id*.
[203] *Id.*
[204] Military Commissions Act § 8, 10 U.S.C. § 950q (2009).
[205] Smidt, *supra* note 12, at 219.
[206] *Id*.
[207] *Id*.

Smidt's proposal to amend Article 17, UCMJ, or in the alternative, use Article 18, UCMJ, for law of war charges stands in contrast with a more comprehensive proposal by a scholar using the Abu Ghraib atrocities as a backdrop.

2. Going for Broke

Victor Hansen also recognized the need to make changes to the UCMJ, especially after the Abu Ghraib abuses.[208] Hansen took a different approach than Smidt, proposing the amendment of Article 92, UCMJ, by using dereliction of duty to prosecute commanders rather than prosecuting them as a principal.[209] Hansen proposes that the article apply to persons effectively acting as a military commander and lays out a number of factors to consider when making a threshold determination of whether someone meets the requirements for prosecution.[210] In an attempt to ensure his command responsibility article does not impose criminal sanctions for any command action, he uses the 1996 War Crimes Act to delineate the scope of law of war violations prosecutable under this article.[211] Additionally, he proposes three levels of *mens rea* standards under the article: actual knowledge, recklessness, and gross negligence.[212] He also takes the position that the commander's failure must be the proximate cause of the subordinate's war crimes.[213] With causation satisfied, Hansen lays out a punishment scheme with varying ranges of punishment depending on the *mens rea* of the commander and type of failure.[214]

3. The Better Proposal

Both the proposals of Smidt and Hansen have merit and satisfy the objective to incorporate the doctrine of command responsibility into the UCMJ. However, the Smidt proposal is a more measured approach that will satisfy the need to ensure compliance with, and deter violations of,

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[208] S*ee generally* Hansen, *supra* note 12.
[209] *Id*.
[210] *Id*. at 402.
[211] *Id*. at 403.
[212] *Id*. at 403-08.
[213] *Id*. at 410.
[214] *Id*. at 411-13.

the law of war, without disrupting the well-established and historical development of the command responsibility doctrine.

While Smidt's recommendation provides for an immediate impact for prosecuting command responsibility actions under Article 18, UCMJ, in practice, whether military practitioners will employ such a charging strategy is an altogether different question. Smidt's course of action to prosecute command responsibility actions under the existing UCMJ construct requires an examination of Article 18, UCMJ, and the procedures for the employment of such a scheme.

The UCMJ does not expressly include prohibited conduct that may violate the laws of war.[215] It makes multiple references regarding violations of the laws of war without specifically articulating what, exactly, constitute such violations.[216] The UCMJ does, however, seem to reference and incorporate violations of the laws of war that may be triable in general courts-martial. Specifically, Article 18, UCMJ, provides relevant part:

> General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.[217]

In addition to providing for the incorporation of law of war violations triable in general courts-martial, this clause also appears to satisfy the juridical basis for criminal jurisdiction: subject matter and personal jurisdiction.

While the UCMJ does not codify express violations of the laws of war, it does provide a comprehensive list of predicate crimes that may form the basis for violations of the law of war. These crimes include, *inter alia*, murder,[218] rape,[219] and pillaging.[220] Consequently, it follows, that courts-martial may try U.S. forces for specific violations of the UCMJ as is usually the case or for general law of war violations incorporated by reference into the jurisdiction of general courts-martial.

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[215] *See generally* UCMJ, *supra* note 23.
[216] *Id*.
[217] UCMJ art. 18(a) (2012).
[218] UCMJ art. 118 (2012).
[219] UCMJ art. 120 (2012).
[220] UCMJ art. 103 (2012).

There appears at least two impediments to Smidt's proposal. First, defining the precise law of war violation at issue may prove difficult when using Article 18, UCMJ, but is not fatal to its application to cases tried under a command responsibility theory. In fact, command responsibility is a well-established norm of customary and conventional international law.[221] Furthermore, the concept of command responsibility is a well-entrenched part of U.S. military doctrine as evidenced by its reference in FM 27-10 and the DoD Law of War Manual.[222] As such, incorporating and properly defining command responsibility actions triable in general courts-martial affords U.S. military accused ample notice of the charged offenses. Additionally, it permits military practitioners to use well-known and accepted legal theory as a basis for prosecution instead of resurrecting a novel prosecution theory.

The second impediment to Smidt's proposal requires a revision of long-standing U.S. policy to try Soldiers for enumerated offenses under the UCMJ rather than for general law of war violations established in various treaties or custom. As discussed *supra*, this well-established policy is contained in FM 27-10, paragraph 507b.[223] In pertinent part, this section provides:

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.[224]

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[221] Smidt, *supra* note 12, at 201 (citing FM 27-10, *supra* note 10, para. 501); The Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945)). The United States still considers the *Yamashita* standard for command responsibility and its later adoption into the FM 27-10 as reflective of customary international law with the recent publication of the DoD Law of War Manual. *See* LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3. *See* discussion *supra* Section II.

[222] LAW OF WAR MANUAL, *supra* note 10, para. 18.23.3; FM 27-10, *supra* note 10, para. 501.

[223] *See* discussion *supra* Section II.C.

[224] FM 27-10, *supra* note 10, para. 507b (Change No. 1 1976).

While this policy does appear to favor charging violations of regular articles as opposed to law of war violations, it is rooted in policy, not statute, and would simply require an update to FM 27-10 and the DoD Law of War Manual.

Despite these two obstructions, as the foregoing illustrates, using Smidt's immediate proposal to try command responsibility cases under the UCMJ via Article 18 does provide a reasonable course of action. However, military courts and practitioners are likely to shy away from using Smidt's Article 18, UCMJ, proposal as to date it is untried.[225] Instead, amending Article 77, UCMJ, is the most agreeable of his proposals and the one most able to deal with the issues raised in this article and highlighted by the Bemba case.

Smidt's proposed Article 77, UCMJ, amendment tracks closely with the standard established in *Yamashita* and later codified in AP I, the Rome Statute and the Military Commissions Act of 2006. Furthermore, this amendment also comports with military policy as articulated in FM 27-10 and the DoD Law of War Manual. As previously outlined, the current form of the UCMJ is ill suited to adjudicate equitably cases like Bemba or that of the fictitious U.S. military commander. Simply amending the UCMJ and adding a definitive and clear charge for command responsibility provides both substantive and practical advantages over using Smidt's Article 18, UCMJ, recommendation.

VI. Conclusion

The time is ripe for the United States to make substantive changes to the UCMJ and incorporate the doctrine of command responsibility. On 23 December 2016, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2017.[226] Included in this law was the Military Justice Act of 2016, providing for an extensive overhaul of the military justice system, perhaps the most significant changes to the UCMJ since the Military Justice Act of 1983.[227] However, missing from this

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[225] A Westlaw search of Article 18, UCMJ, charges for law of war violations preferred against U.S. service members confirms this assertion.

[226] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

[227] *Id.*; *see* Zachary D. Spilman, *Top Ten Military Justice Stories of 2016-#1: The Military Justice Act of 2016*, NIMJ BLOG-CAAFLOG (Jan 2. 2017), http://www.caaflog.com/category/military-justice-legislation/.

legislation were any amendments to account for command responsibility actions.

Despite the many opportunities over the past seventy years to apply the same legal standard to its own leaders as its enemies, the U.S has yet to do so. The Bemba case illustrates that command responsibility cases remain relevant and actionable. As the most recent judicial body to consider a command responsibility case, the ICC's Bemba decision provides an excellent case study on the state of the doctrine and the measures commanders must take upon becoming aware of war crime allegations. Additionally, applying the current articles found in the UCMJ to the facts of both the Bemba case and the case involving the fictional U.S. commander demonstrates the inherent shortcomings of the U.S. military justice system. Amending the UCMJ to account for actions under a theory of command responsibility will alleviate some of these limitations and provide an independent basis to hold commanders accountable. More specifically, Smidt's proposed Article 77, UCMJ, formulation addresses the current inadequacies in the UCMJ and provides a mechanism to account for criminal command failures.[228]

Although this proposal may alarm some U.S. military leaders, it is consistent with the concept of command authority. United States law and doctrine vests military commanders with near plenary authority to achieve a wide-ranging set of missions. Essential in this concept of command authority is that commander's may share in the successes and achievements of their subordinates.[229] Yet, they may, in some instances, share in their failures because the responsibility of command also extends to maintaining control of subordinates and taking necessary and reasonable measures to punish and deter subordinate misconduct.[230] To the extent U.S. commanders view the concept of command responsibility as a burden, they should view it as a natural function of their command authority. After all, because U.S. commanders exercise such vast authority over their subordinates and command such lethality, it is only reasonable that the military justice system is equally equipped and possesses ample means to deter and punish command failures. In deciding to incorporate command responsibility into the UCMJ, the United States should heed the lessons of the Bemba case, and draw encouragement that

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[228] *See* discussion *supra* Section V.B.

[229] *See* AR 600-20, *supra* note 2, para. 2-1b ("Commanders are responsible for everything their command does or fails to do.").

[230] *Id*.

it has struck an equitable balance between the exercise of great power and command accountability.