# *YAMASHITA, MEDINA,* AND BEYOND: COMMAND RESPONSIBILITY IN CONTEMPORARY MILITARY OPERATIONS

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*The honor of a general consists . . . in keeping subalterns under his orders on the honest path, in maintaining good discipline. . . .*[2]

## I. Introduction

This article examines the customary international law[3] doctrine of command responsibility. Its origins and development are traced, as well as the United States practice in applying the doctrine. Ultimately, this article considers the application of the doctrine in the context of contemporary military operations. More specifically, the article looks at U.S. policy in terms of charging U.S. soldiers with war crimes—how U.S. domestic pol-

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2. LLOYD J. MATHEWS & DALE E. BROWN, THE CHALLENGE OF MILITARY LEADERSHIP 23 (1989) (quoting Napoleon to Marshal Berthier, June 8, 1811, CORRESPONDENCE DE NAPOLEON, Corres. No. 17782, vol. XXII, 215 (32 Vols.; Paris 1858-70)).

3. Because there is no supranational legislature with prescriptive jurisdictional power over the various independent national sovereigns that make up the international community, the law of nations is, to a large extent, created by custom. *See infra* note 181. Customary international law, "results from a general and constant practice of states followed by them from a sense of legal obligation . . . ." RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987).

The first step then in determining the normative aspect of a particular custom then, is to look to the actual practice of states in terms of their conduct in the international community. Second, if the custom is to rise to the level of law, binding on all states, a determination must be made that the state conduct involved is based on an apparent belief that compliance with the practice is required.

Evidence that a particular custom has become a shared international community expectation requiring compliance can be found in the practice of states, including policy pronouncements, general principles of law applied in domestic systems of law, international and domestic "judicial decisions . . . " applying international law, "and the teachings of the most highly qualified publicists of the various nations. . . ." The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1066 (1954).

icy may impact the implementing of the international standards of command responsibility in the domestic setting. The article recommends an amendment to the Uniform Code of Military Justice (UCMJ) to facilitate assimilating the international standard into domestic courts-martial practice. Finally, because an amendment is not likely in the foreseeable future, this article advocates the use of a relatively untapped but existing basis of jurisdiction as a modality of incorporating the international standard in the interim.

The primary anticipated benefits in adopting the international standard are threefold. First, and most importantly, because the international standard is arguably a higher standard than the one currently followed by domestic courts-martial applying the UCMJ, adopting the international standard should result in the commission of fewer war crimes and war crime-like acts. Second, the prophylactic qualities of the broader international standard in preventing war crimes should also serve to strengthen the legitimacy of operations that the United States participates in across the entire conflict spectrum because of the anticipated reduction in war crime-like acts. Finally, adopting the international standard will support the notion that the United States is serious about conforming to the law of nations.

## A. Proper Military Leadership

*Ten good soldiers wisely led, will beat a hundred without a head.*[4]

### *1. Combat Operations*

The key to success on the battlefield has always been, and will continue to be, the ability of one party to a conflict to destroy the other's will to fight. Destruction of the enemy's determination to win is often accomplished by massing overwhelming combat power against the adversary.[5] In most cases, destroying an opponent's physical capability to conduct aggressive warfare has the attendant collateral benefit of extinguishing the

4. ROBERT A. FITTON, LEADERSHIP: QUOTATIONS FROM THE MILITARY TRADITION 149 (1990) (quoting Euripides).

5. CARL VON CLAUSEWITZ, ON WAR 75, 77 (1984).

enemy's resolve to continue the fight.[6] Therefore, the best-equipped, largest force, with the most advanced training and tactics typically wins.

However, in history, the examples of poorly equipped, outnumbered units overcoming "superior forces" are legion. Where a "less powerful" force beats the "more formidable" one, it can often be traced to the leader inducing or influencing soldier discipline, attitude, motivation, and endurance. The thread that links successful military organizations from the time of the bow and arrow to the days of the Multiple Launch Rocket System (MLRS) is superior leadership and motivated soldiers.[7]

No matter how advanced military tactics and technology become, success on the battlefield will continue to be primarily dependent on the human dimension. Ultimately, one human being must convince another human being to take, or participate in, extraordinary acts to be victorious in warfare. A successful battlefield commander is one who can influence his subordinates, in a very difficult and unusual environment, to do as he or she asks no matter what the personal cost may be, no matter how uncomfortable the subordinates may be with the task involved. "The most essential dynamic of combat power is competent and confident officer and noncommissioned officer leadership."[8]

It is through effective military leadership that a soldier can be influenced to perform acts that transcend the norms of human nature. Only a successful and skilled motivator of troops can inspire a combatant to charge a machine gun position, contrary to the most powerful of human instincts, that of self-preservation, in order to acquire a small and seemingly insignificant piece of turf. Powerful and persuasive leaders are required to build and maintain the degree of commitment necessary to successfully execute an armed conflict.

Just as dynamic military commanders can induce their subordinates to accomplish heroic acts beyond the pale of traditional human limitations, they also, unfortunately, possess the power and means of ordering, encouraging, or acquiescing to, acts that are inhumane in the extreme. Through

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6. *See generally* THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS, app. A (Principles of Warfare) (1 Feb. 1995) [hereinafter JOINT PUB. 3-0]; U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, 2-0 through 2-24 (June 1993) [hereinafter FM 100-5].

7. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP (Aug. 1999) [hereinafter FM 22-100].

8. FM 100-5, *supra* note 6, at 2-11.

an abuse of legitimate military leadership and authority, a commander may condone, or even direct, conduct that goes far beyond even the relaxed standards of acceptable violence associated with warfare. Under the direction of persuasive leadership, soldiers have committed acts so atrocious as to exceed any possible rational application of military force.[9]

It is to the leader that a young soldier looks for guidance in terms of distinguishing appropriate and inappropriate uses of force during military operations.

> For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity . . . . You lose your sense of the definite, hence your sense of truth itself.[10]

In combat, where soldiers are routinely asked to participate in conduct that under normal conditions would be labeled as immoral or unlawful, often the leader becomes the soldiers' surrogate conscience.

Soldiers learn to rely on the commander's guidance as the soldier surrenders some of his own discretion, judgment, and inhibitions to play a role in the collective success of the unit and to further the higher cause in which they are engaged. The soldier learns, to a degree, to subordinate his instincts for survival and his ideas of right and wrong to his leader's orders. The soldier has a general obligation to obey a superior's orders and to presume that the orders received from the superior are lawful.[11]

Even the law supports the need for strict obedience on the part of subordinates. In some cases, adherence to an unlawful order that results in violating the law of war may form the basis for a defense in a subsequent

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9. *See generally* IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1998); ARYEH NEIER & ARYEN NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998); SU ZHIGENG, LEST WE FORGET: NANJING MASSACRE 1937 (1995).

10. TIM O'BRIEN, THE THINGS THEY CARRIED 88 (1990).

11. *See generally* NICO KEIJZER, THE MILITARY DUTY TO OBEY (1977). For a superb work on the duty to obey and the defense of superior orders, see MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR (1999).

war crimes trial if certain conditions are present.[12] The leader is the individual that establishes the command climate—the unit's collective sense of right and wrong.

*2. Contemporary Military Operations, Legitimacy of the Force, and the Operation*

In contemporary military operations, specifically Military Operations Other Than War (MOOTW),[13] members of the military do not ordinarily find themselves in high intensity combat.[14] Therefore the service member is seemingly less likely to operate in a scenario where the service member's moral compass is off its normal azimuth. Right and wrong are less ambiguous because the participants are less likely to be asked to apply destructive forces at levels routinely required to take lives and destroy property. The line between acceptable and unacceptable conduct is less blurred therefore, in low intensity conflicts. However, there are other cir-

12. *See generally* OSIEL, *supra* note 11.

13. Military Operations Other Than War (MOOTW) is a term used to denote "[o]perations that encompass the use of military capabilities across the range of military operations short of war." THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (23 Mar. 1994) (amended through 6 Apr. 1999).

"MOOTW focus on deterring war and promoting peace while war encompasses large-scale, sustained combat operations to achieve national objectives or to protect national interests." THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, exec. summary, vii (16 June 1995) [hereinafter JOINT PUB. 3-07]. The sixteen doctrinal types of MOOTW include: (1) arms control, (2) combatting terrorism, (3) Department of Defense (DOD) support to counterdrug operations, (4) enforcement of sanctions/maritime interdiction operations, (5) enforcing exclusion zones, (6) ensuring freedom of navigation and overflight, (7) humanitarian assistance, (8) military support to civil authorities (MSCA), (9) nation assistance/support to counterinsurgency, (10) noncombatant evacuation operations (NEO), (11) peace operations (PO), (12) protection of shipping, (13) recovery operations, (14) show of force operations, (15) strikes and raids, and (16) support to insurgencies. *Id.* ch. III.

14. Because MOOTW are by definition, operations short of war, MOOTW generally do not involve high intensity combat and the rules of engagement (ROE) are normally more restrictive than those typically promulgated in war. JOINT PUB. 3-07, *supra* note 13, at I-1. However, MOOTW, such as peace enforcement operations and raids and strikes, have characteristics of war and sometimes employ combat tactics and techniques involving significant uses of force. For example, in October of 1993, during humanitarian assistance operations in Somalia, a force of U.S. soldiers attempted to capture a Somali warlord. The operation resulted in a protracted combat operation in Mogadisu, resulting in the deaths of 18 U.S. service members and an estimated 500 Somalis. *See generally* MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

cumstances, some very significant, that impact on a participant's ability to choose correctly when faced with difficult issues in MOOTW.

Consider for example, the Canadian experience in Somalia. In December 1992, paratroopers from the prestigious Canadian Airborne Regiment began arriving in Somalia to participate in humanitarian relief efforts. Their mission was to secure an area around the central Somali town of Belet Huen. Once secure, humanitarian relief workers would be better able to distribute food to starving Somalis.[15]

In the beginning, these motivated professional soldiers performed their mission with enthusiasm. Although they were a combat unit ready for battle, the paratroopers truly wanted to help the Somali people. Over time, however, many lost their motivation, and discipline started to slip. Somalis began to throw rocks at the food convoys. The paratroopers were harassed by the local citizens even while they tried to repair roads and hospitals. However, the greatest cause for the loss of morale was the "incessant stream of desperate Somalis sneaking into the Canadian compound at night to steal food and anything else they could scrounge."[16]

The Canadians felt a deepening sense of frustration and despair. They were upset and felt that they were spending too much time routing out thieves rather than performing their mission.[17] Various members of the unit began to consider how they might deter the infiltrating thieves. One officer gave an order that soldiers who caught Somalis in the compound were to "abuse" them.[18] Another officer directed the men to shoot fleeing looters below the waist if they refused to stop after being ordered to do so.[19]

A team of soldiers, including a sniper, wearing night vision goggles, began setting traps using food as bait. When Somalis grabbed the food, they were ordered to halt. If they ran, they were shot. There was some evidence that perhaps a few Somalis had been shot at point blank range and killed after being brought to the ground. The Canadian officers felt the

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15. John Dermont et al., *Bitter to the End: The Somalia Inquiry Takes its Best Shot–and Ottawa Fires Back*, MACLEAN'S, July 14, 1997 (citing a Canadian Government "Somalia Commission" report).

16. *Id.*

17. *Id.*

18. L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 370 (1995).

19. *Id.*

rules of engagement were vague and believed the men were only doing their job.[20]

The most infamous incident linked to the Canadian paratroopers in Somalia involved the torture and murder of a Somali man caught stealing in the compound. He was beaten, burned with cigarettes, and tortured for three hours by two young enlisted soldiers before dying. Noncommissioned officers (NCO) in the area could hear the man's cries for help. One NCO told the tormentors not to kill the Somali.[21]

In disciplinary proceedings after the incident, the officer who gave the order to "abuse" Somalis contended that he merely meant for them to be "roughed up," not literally abused.[22] One of the two soldiers charged attempted to hang himself after the incident and was determined to be mentally incompetent to stand trial. The other soldier involved was convicted and sentenced to five years confinement. The NCO who instructed the two to not kill the Somali was convicted for failing to exercise proper control and received a nominal sentence. Although no commanders were prosecuted criminally for the acts of their subordinates, some received letters of reprimand.[23] However, because of the abuses in Somalia, as well as other prior incidents of poor discipline, a death sentence was extended to the unit itself. The Canadian government took the extreme measure of disbanding the Canadian Airborne Regiment.[24] In MOOTW, factors such as boredom, ungrateful host nation citizens, an ill-defined eneny, the use of terror

20. Dermont et al., *supra* note 15.

21. Green, *supra* note 18.

22. *Id.*

23. *Id.*; Dermont et al., *supra* note 15.

24. Dermont et al., *supra* note 15; Colin Nickerson, *Canada's Sterling Military Reputation Tarnished by Scandal*, FORT WORTH STAR-TELEGRAM, Nov. 9, 1997. There were also reported abuses by Belgian and Italian paratroopers as well. Pictures appeared in Belgian newspapers showing Belgian soldiers "roasting" a Somali over an open fire and of soldiers forcing Somalis to eat vomit. One Somali died in the hands of Belgian soldiers while confined in a metal container for two days in the blazing sun without water. Italian soldiers have been accused of starving, torturing, shocking Somalis with electricity and throwing Somalis on razor sharp barbed wire. They were also alleged to have tortured children and raped women. According to one Italian Paratrooper, their officers participated in the torture and ordered them to "not treat the Somalis like human beings." *More Evidence of Torture by Italian Troops in Somalia*, AGENCE FRANCE-PRESSE, June 13, 1997; Andrew Duffy, *Now it's Belgian Soldiers: Paratroopers Charged for Holding Somali Over Fire*, OTTAWA CITIZEN, Apr. 12, 1997, at A1; *Soldiers Face Charges of Torture on UN Mission*, IRISH TIMES, June 23, 1997; Robert Fox, *Belgian Troops Admit to "Roasting" Somali Boy*, DAILEY TELEGRAPH LONDON, June 24, 1997.

tactics by the opposition, and vauge missions and exit strategies may all contribute to a soldier's moral disorientation.

Although the lines between acceptable and unacceptable conduct may be more blurred in combat operations typically present in international armed conflict, the legitimacy of the operation itself is usually less questionable in international armed conflict than in MOOTW.[25] It is foreseeable that improper conduct on the part of soldiers in a fight against world domination by an evil power would be less likely to cause hometown support for the operation itself to wane than would questionable conduct in a humanitarian peacekeeping operation.[26] It is easier to understand the need for military intervention in response to an aggressive military invasion of

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25. The traditional and doctrinally recognized Principles of War, the factors that lead to a successful conclusion in high intensity conflict, are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. JOINT PUB. 3-0, *supra* note 6, app. A.

The Principles for MOOTW however include: objective, unity of effort, security, restraint, perseverance, and legitimacy. *Id.* at V-2. Therefore, although legitimacy is important in any military operation, the principle has been highlighted by doctrine in MOOTW.

> In MOOTW, legitimacy is a condition based on the perception by a specific audience of the legality, morality, or rightness of a set of actions. This audience may be the U.S. public, foreign nations, the populations in the area of responsibility/joint operations area (AOR/JOA), of the participating forces. If an operation is perceived as legitimate, there is a strong impulse to support the action.

JOINT PUB. 3-07, *supra* note 13, at II-5. Certainly this passage is referring generally to the legitimacy of the operation itself rather than the idea of maintaining legitimacy through the proper conduct of the soldiers involved. The *Jus ad Bellum* rather than the *Jus in Bello* of the operation is the focus. However, the publication goes on to say:

> Legitimacy may depend on adherence to objectives agreed to by the international community, ensuring the action is appropriate to the situation and fairness in dealing with various factions. It may be reinforced by restraint in the use of force, the type of forces employed, and the *disciplined conduct of the forces involved.*

*Id.* (emphasis added). For an interesting view on the importance of morality in foreign relations, see John Norton Moore, *Morality and the Rule of Law in the Foreign Policy of the Democracies,* Andrew R. Cecil Lectures on Moral Values in a Free Society, University of Texas (Nov. 14, 1999) *reprinted in* CENTER FOR NATIONAL SECURITY LAW, NATIONAL SECURITY LAW, SUPPLEMENTARY READINGS, UNIVERSITY OF VIRGINIA, NATIONAL SECURITY LAW SUMMER INSTITUTE (Summer 1999).

26. JOINT PUB. 3-07, *supra* note 13, at II-5.

a long time ally by a tyrannical regime versus the need for a military presence in keeping warring factions apart in a civil war where the parties have been fighting for years.

Where the legitimacy of the operation itself is less concrete, the proper conduct of the participants becomes even more important. Support for a questionable military operation may dwindle to unacceptably low levels if the conduct of the participating soldiers is perceived as being inhumane or criminal. Inhumane conduct by military forces is always distasteful, but when the basis of the operation is humanitarian intervention, intervening forces are expected to maintain the "moral high ground" and operate in ways entirely consistent with the purported basis for the use of force.

This suggests then, especially where armies from democratic nations are involved, that a reduction in war crimes and war crime-like acts should result in an increase in support for the operation and the forces involved. It is entirely predictable, however, that where soldiers are deployed from democratically-based political systems, if they fail to conduct themselves in a highly professional manner, support for these operations may evaporate. No matter how legitimate the cause of the operation may have been upon initial deployment of the forces, there is a link between the conduct of the forces in the operation and the perceived continued legitimacy of the action itself.

### B. Armed Mobs v. Legitimate Military Forces

The hallmark of any legitimate military organization is proper leadership. It is precisely that quality that distinguishes lawful military forces from armed mobs. To receive the full protection and benefits of the law of war, an armed military force participating in armed conflict of an international character, must be "commanded by a person responsible for his subordinates."[27] Similarly, even in internal armed conflicts, if insurgents are to receive any degree of international protection, they must be commanded by leaders responsible for their conduct.[28]

Therefore, if a group of armed individuals in an armed conflict hopes to receive any sort of international legal protection or status, there is a quid pro quo. The organization must be led by a person responsible for the activities of subordinates. Although admittedly, this is not the only requirement,[29] it is the criterion most closely related to suppressing war

crimes and human rights violations. Authoritative and responsible leadership is the characteristic that often sets the military apart from many other organizations. When military leadership works well, it creates a unity not always equally present in many civilian organizations. For some civilian business consultants, in today's highly competitive commercial marketplace, the military has become a study in proper management procedures.[30] However, the authoritative power of a military leader carries with it tremendous potential for abuse of that power.

## C. The Responsibility of Command

*Now when the troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general. None of these disasters can be attributed to natural causes.*[31]

Command and leadership are not necessarily the same.[32] The former is a legal status, an authoritative position recognized under the law. The latter is the skills and techniques necessary to influence soldiers to submit to the orders issued by those in authority or those holding the lawful status of command. The responsibility for the success or failure of a military mission falls squarely on the commander's shoulders. But, the commander's responsibility extends to more than just mission success.

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27. Annex to the Convention, Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GPW]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 43, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The United States is not a party to Protocol I. However, nations are, including the United States, principal allies. In today's multinational and coalition operational environment, the Protocols should not be ignored by United States planners.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609 [hereinafter Protocol II]; COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean S. Pictet et al. eds., 1958).

29. GPW, *supra* note 27, art. 4; Protocol I, *supra* note 27, art. 1.

30. *See generally* JAMES DUNNIGAN & KANIEL MASTERSON, THE WAY OF THE WARRIOR, BUSINESS TACTICS AND TECHNIQUES FROM HISTORY'S TWELVE GREATEST GENERALS (1997).

31. SUN TZU, THE ART OF WAR 125 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (500 BC).

32. AUBREY S. NEWMAN, WHAT ARE GENERALS MADE OF? 41 (1987).

From the provision of supplies, to the good order and discipline of a unit, from the cleanliness of the barracks to training the force, the commander is ultimately responsible. It is U.S. Army doctrine that commanders are "responsible for everything their command does or fails to do."[33] Although commanders can delegate authority to subordinate leaders to accomplish a mission or task, the commander can never delegate the responsibility that comes with command.[34] Command responsibility, according to U.S. Army doctrine, "is the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit. He is responsible for the health, welfare, morale, and discipline of personnel. . . ."[35]

## D. The Role of Commander in the Prevention of War Crimes

*In the soldier, the natural tendency for unbridled action and outbursts of violence must be subordinated to demands of a higher kind: obedience, order, rule, and method.*[36]

If the purpose of the laws of war is to prevent unnecessary suffering,[37] the commander is in the best position to prevent violations of these humanitarian goals. For example, according to some, the primary cause of the My Lai Massacre was the "tremendous lack of leadership at the ground

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33. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-1b (30 Mar. 1988); W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 73, 74 (1995).

34. FM 22-100, *supra* note 7, para. 6-100-103.

35. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, 1-1 (May 1997).

36. CLAUSEWITZ, *supra* note 5, at 187.

37. Mark S. Martins, *"War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years after Nuremberg—And Beyond*, 149 MIL. L. REV. 145, 176 n.141 (1995) (quoting Hague IV, *supra* note 27, pmbl.). The Convention states that the parties were:

> Animated by their desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as should mitigate their severity as far as possible; . . . .

*Id.*

level."[38] A soldier can be influenced to perform noble and heroic feats of courage despite natural inclinations to avoid such activity. However, warriors can just as easily be prodded into taking part in atrocities contrary to those same societal or human norms. Correct leadership may be the difference between heroic and evil conduct on the part of soldiers during war.[39]

The military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with this significant lawful control over the troops is the commander's stewardship over a unit's tremendously awesome destructive capabilities. Mankind must, therefore, rely on commanders to use their authority to control both a military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants, including the wounded and sick, civilians, and prisoners of war, as well as the destruction of civilian property lacking in military value.[40]

Certainly, a disciplined army is capable of committing war crimes on the largest scale imaginable when directed to do so by those in command. However, generally speaking, professional armies operating under a recognizable and responsible chain of command commit fewer war crimes than unorganized or poorly trained forces.[41] For example, much of the fighting in the former Yugoslavia and Rwanda was done by small paramilitary organizations. There are an estimated 88,000 suspects in Rwanda in connection with violence against the Tutsi minority in 1994.[42]

In affirming Japanese General Tomoyuki Yamashita's death sentence, General Douglas MacArthur wrote: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international

38. Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 169 (1993).

39. FM 100-5, *supra* note 6, at 2-3, 4.

40. *See generally In Re Yamashita*, 327 U.S. 1 (1946).

41. Martins, *supra* note 37, at 177-78 n.146.

42. Frederik Harhoff, *Consonance or Rivalry? Calibrating The Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571 n.1 (citing Elisabeth Neuffer, *Amid Tribal Struggles, Crimes Go Unpunished; War Tribunal Stalls Over Mass Killings*, BOSTON GLOBE, Dec. 8, 1996, at A1).

society." Humanity has a right to expect military commanders to do all they can to prevent atrocities by their soldiers.[43]

The victims of war are some of the most vulnerable of all human beings. With little to no ability to resist the potential evil uncontrolled soldiers are capable of, humanity must place its complete trust and faith in a commander's determination and willingness to supervise his subordinates and prevent atrocities. Commanders are "society's last line of defense" against war crimes.[44]

## E. Command and Criminal Responsibility

While there is no doubt that the commander is responsible for the activities of the unit, the question becomes when, if ever, can a commander be criminally responsible for crimes committed by subordinates? The customary international law doctrine of command responsibility involves holding commanders criminally liable for war crimes committed by subordinates. If certain conditions are met, a commander is charged as a principal to a crime even though the commander did not directly participate in the commission of the actual offense.

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43. Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, February 6, 1946, *reprinted in* LEON FRIEDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 1598-99 (1972); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRADGEDY frontispiece (1970); A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 235 (1949).

44. Timothy Wu & Young-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 290 (1997). Even the soldiers involved in the actual commission of war crimes may be the unrecognized victims of a commander's failure to fulfill his duty as a leader. One legal expert in this area has suggested that:

> [t]he most important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants . . . . Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of like than unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives.

TELFORD TAYLOR, WAR CRIMES, WAR MORALITY AND THE MILITARY PROFESSION 337-38 (Malham M. Walkin ed., 2d rev. ed. 1986).

## II. The Customary International Law Doctrine of Command Responsibility

*The cornerstone of military professionalism is professional conduct on the battlefield.*[45]

In combat, a commander is responsible for preventing and repressing war crimes and taking appropriate remedial actions, including, if warranted, punishing those responsible for them.[46] In describing General Yamashita's failure as a leader, General MacArthur wrote: "This officer, of proven field merit and entrusted with a high command involving authority adequate to his responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, and to mankind; he has failed utterly his soldier faith."[47]

While the responsibility of a commander is all encompassing, the commander cannot be liable for every crime committed by subordinates.[48] It would be manifestly unfair to punish a commander for crimes that he had no ability to prevent.[49] Under the customary international law doctrine of command responsibility, a commander may be criminally responsible for the war crimes committed by his subordinates only if certain prerequisites are present.[50]

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45. William G. Eckhardt, *Command Responsibility: A Plea for A Workable Standard*, 97 MIL. L. REV. 1 (1982).

46. William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L. J. 605, 661 (1972); *see* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 4.1-4.3 (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77]; CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, para. 5a(1)-(3) (27 Aug. 1999).

47. FRIEDMAN, *supra* note 43 (Order of General MacArthur).

48. *See* O'Brien, *supra* note 46, at 661; Eckhardt, *supra* note 45, at 4; Parks, *supra* note 33, at 76; Wu & Kang, *supra* note 44, at 290.

49. *Id.* In a case commonly referred to as the *German High Command Case*, the military tribunal opined:

> Modern war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates. . . . He has a right to assume that details entrusted to responsible subordinates will be legally executed. . . . Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination.

UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (1948) [hereinafter German High Command Case].

50. *See generally In re* Yamashita, 327 U.S. 1 (1946); William H. Parks, *Command*

Even if the commander takes no direct part in crimes committed by subordinates, the commander will, by operation of law, be considered a principal if the commander's action or inaction in response to the criminal activity is so derelict as to rise to the level of criminal negligence or acquiescence.[51] "Criminality does not attach to every individual in this chain of command from that fact alone. . . . That can occur only where the act is directly traceable to him or where his failure to supervise his subordinates constitutes criminal negligence . . . ."[52]

Certainly a military leader can always be relieved of command or charged with the separate crime of dereliction of duty for not fulfilling command responsibility.[53] However, where the commander deviates significantly from customary command practices and war crimes are committed by subordinates as a direct result, the commander may be guilty of the underlying offenses just as if he participated in them himself.

## A. Command Responsibility Prior to World War II

*[A] community, or its rulers may be held responsible for the crime of a subject if they knew it and did not prevent it when they could and should prevent it.*[54]

Many are under the impression that the doctrine of command responsibility originated in World War II. This, however, is not the case.[55] International recognition of the concept "occurred as early as 1474 with the trial

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50. (continued) *Responsibility For War Crimes*, 62 MIL L. REV. 1 (1973); Addicott & Hudson, *supra* note 38, at n.66.

51. UNITED NATIONS SECURITY COUNCIL, LETTER, 24 MAY 1994, FROM THE SECRETARY GENERAL TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/1994/674, at 17 (1994).

52. German High Command Case, *supra* note 49.

53. UCMJ art. 92 (LEXIS 2000).

54. HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (C.E.I.P. ed., Kelsy trans., 1925).

55. In 1439, Charles VII of France issued an Ordinance at Orleans creating command responsibility for a failure to investigate and take action in response to atrocities committed by subordinates. He wrote:

> The king orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according these Ordinances. If he fails to do so or covers up the misdeed or delays taking

of Peter Von Hagenbach."[56] Early in United States military practice, the doctrine of holding commanders responsible for the criminal acts of their subordinates has been applied as well.

During counterinsurgency operations in the Philippines in the early 1900s, Brigadier General Jacob H. Smith, U.S. Army, was tried and convicted at a court-martial for inciting, ordering, and permitting subordinates to commit "war crimes." The insurgents had routinely tortured, murdered, and mutilated captured American prisoners. General Smith told Major Littleton Waller, United States Marine Corps, "I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please

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55. (continued)

> action, or 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 and shall be punished in the same way as the offender would have.

Green, *supra* note 18, at 321 (quoting ORDONNANCES DES ROIS DE FRANCE DE LA TROISIEME RACE (Louis Guillaume de Vilevault & Louis G.O.F. de Brequigny eds., 1782)); *quoted in* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 149 n.40 (1993).

56. *See generally* Parks, *supra* note 50 (providing an excellent discussion on the historical development of command responsibility). Hagenbach was tried by an international tribunal of twenty-eight judges from states within the Holy Roman Empire. The accused was charged with murder, rape, perjury, and other crimes against "the laws of God and man." Today these crimes could be classified as crimes against humanity. After being convicted, Hagenbach was stripped of his knighthood and executed for failing in his duty to prevent the listed crimes. Parks, *supra* note 50, at 4 (citing Waldamer Solf, *A Response To Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43 (1972)).

Parks also gives several other examples of early command responsibility cases in U.S. military history. Actions were taken against U.S. Army commanders in domestic courts for failing to supervise their troops in the War of 1812, the Black Hawk War of 1832, the War with Mexico in 1846, the Modoc Indian campaign in Northern California. A young Captain Abraham Lincoln was convicted and sentenced to carry a wooden sword for two days during the Black Hawk War of 1832 for failing to control his men. It seems the troopers opened the officers' supply of whiskey and freely helped themselves while others straggled on a march. *See* Parks, *supra* note 50, at 6 (citing C. SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 30 (1961)). *See also* FRIEDMAN, *supra* note 43, at 783. The author explains that Captain Henry Wirz, a Swiss born physician and Confederate commander of the infamous Andersonville Confederate Prisoner of War Camp, was convicted and ordered to hang by a military commission. Captain Wirz violated the Lieber Code by ordering and permitting the torture, maltreatment, and death of Union prisoners of war in his custody.

me. The interior of Samar must be made into a howling wilderness."[57] In affirming General Smith's conviction, President Theodore Roosevelt stated:

> The findings and sentence are approved . . . . The very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates. . . . Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong.[58]

The first attempt to codify the customary concept of command responsibility in international law appears in the Fourth Hague Convention of 1907.[59] In addition to requiring that belligerents be commanded by a person responsible for his subordinates, a belligerent party in violation of the treaty was to pay compensation for all improper acts committed by members of its armed forces.[60]

At the end of World War I, the Allies established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission concluded: "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[61] Although the Japanese and American delegations expressed concerns with some of the findings and recommendations of the Commission,[62] Article 227 of the Treaty of Versailles contemplated arraigning and trying the German Emperor William II of Hohenzollern.[63]

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57. Green, *supra* note 18, at 326 (citing 7 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 187 (1906)).

58. S. Doc. 213, 57th Cong. 2nd Session, at 5.

59. Hague IV, *supra* note 27, art 3.

60. *Id.*

61. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW, PAMPHLET NO. 32, *reprinted in Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 117 (1920).

62. Green, *supra* note 18, at 323.

63. Treaty of Versailles, June 28, 1919, art. 227, 225 Consol. T.S. 189, 285 [herein-

Article 228 of the Treaty of Versailles required the German authorities to surrender Germans accused of violations of the laws and customs or war.[64] However, no one was ever tried in accordance with the treaty.[65] Very few war crimes trials were held in connection with World War I. None of the Leipzig Trials, as they came to be known, involved the doctrine of command responsibility.[66]

In the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Article 26 recognized that the commander had "the duty . . . to provide for the details of execution of the foregoing articles."[67] Other than the Hague Conventions of 1907 and the Geneva Conventions of 1929, the world entered World War II with very little treaty law on the doctrine of command responsibility. The concept was generally defined by domestic law and by the traditions of "military professionals tried and tested on the many battlefields of the human experience."[68]

## B. Post-World War II War Crimes Trials

Following World War II, there was a virtual explosion of war crimes trials, both domestic and international, in Europe and in the Far East.[69]

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63. (continued) after Treaty of Versailles]. At the outset of the War, the Kaiser stated:

> My soul is torn but everything must be put to fire and sword: men women and children and old men must be slaughtered and not a tree or house left standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years. In spite of my repugnance, I have therefore been obliged to choose the former system.

HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 18 n.75 (1993).

64. Treaty of Versailles, *supra* note 63, art. 228.

65. Green, *supra* note 18, at 324.

66. *Id.* at 325.

67. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Geneva, art. 26 (12 July 1929).

68. Eckhardt, *supra* note 45, at 3; Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, n.13 (1996).

69. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 21 (1992); Mathew Lippmann, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Human-*

These prosecutions represented the first time in history that the international community possessed the determination and ability to punish those accused of the atrocities of war. Perhaps this was because there was a perception that Nazi Germany and Imperial Japan were terribly evil organizations and there was a tremendous need for specific and general deterrence against the potential for future misconduct of this magnitude.[70]

Even before the United States entered the War, reports began to surface regarding the barbaric acts of the Japanese and German armies. The Japanese rape of Nanking in 1937 and the German genocidal practices shocked the conscience of the civilized world.[71] The United States and the international community issued warnings during the War to both the Axis Powers in Europe and Japan that they intended to prosecute those responsible for war crimes after the War was over.[72] Representatives of states victimized by the Nazis issued the St. James Declaration in January 1942, which placed the Germans on notice that they intended to prosecute violators through "channels of justice."[73]

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69. (continued) *itarian Law of War*, 15 DICK. J. INT'L L. 1 (1996). For example, some 5700 Japanese were tried for war crimes and approximately 920 were executed. RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIALS 6 (1971).

70. TAYLOR, *supra* note 69; ROBERT H. JACKSON, THE CASE AGAINST NAZI WAR CRIMINALS 3 (1946). In his opening statement before the Nuremberg Tribunal, Justice Robert H. Jackson said:

> The privilege of opening the first trial in history for crimes against the peace of the world impose a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.

TRIALS OF THE MAJOR WAR CRIMINALS, 2 INTERNATIONAL MILITARY TRIBUNAL NUREMBERG 98-99 (1947).

71. Parks, *supra* note 50, at 14.

72. *Id.* at 15 (citing 89 CONG. REC. 1773 (Mar. 9, 1943)).

73. FRIEDMAN, *supra* note 43, at 778; UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 51, 52 (1948); THE UNITED NATIONS SECRETARIAT, HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION 8-12, U.N. Doc. A/CN.4/7Rev. 1 (1949).

The atrocities continued after the United States entered the War in Asia as well. The Allies began receiving reports of atrocities committed by the Imperial Japanese Army, such as the infamous Bataan Death March, the Japanese abuse of Filipino civilians, and Japan's refusal to allow the U.S. government to send food and supplies to American and Filipino prisoners. On 29 January 1944, Secretary of State Cordell Hull and British Foreign Secretary Anthony Eden sent messages over Japanese radio, warning Japanese leaders and citizens that individuals would be held accountable for these acts.[74] Upon his return to the Philippines in October of 1944, about the same time General Yamashita assumed command over the Japanese forces in the Philippines, General Douglas MacArthur communicated to the Japanese that he would hold them responsible for the mistreatment of prisoners of war (POW) and civilians. This message was recorded in the Japanese Ministries.[75]

Up until the post-World War II war crimes trials, the doctrine of command responsibility in international law was limited to the brief pronouncements in treaty law relating to the requirement that responsible commanders lead lawful belligerents.[76] However, on 8 August 1945, the Allies signed an agreement to establish an International Military Tribunal at Nuremberg to try war criminals. The agreement, known as the London Charter, expressly provided: "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment."[77]

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74. 203 JUDGMENT OF THE INTERNATIONAL JAPANESE WAR CRIMES TRIALS IN THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,748 (1948). Secretary Hull stated:

"According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those unthinkable atrocities on the Americans and Filipinos." *Id.* Several Allies sent numerous messages to the Japanese Government protesting the illegal treatment of prisoners of war and civilians. *Id.* at 49,738-71.

75. *Id.* at 49,749; FRIEDMAN, *supra* note 43, at 1118.

76. W.J. Fenrick, *Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 112-13 (1995).

77. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 7, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288 (London Charter; sometimes referred to as the Nuremberg Charter) [hereinafter London Charter].

Not only did the charter open the door to prosecute individuals for war crimes,[78] but it also cleared the way to prosecute senior military and civilian officials that were, "Leaders, organizers, instigators, and accomplices participating in the formation or execution of a common plan or conspiring to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plans."[79]

Similar regulations were promulgated in every allied theater of operations in Asia for the prosecution of war crimes. For example, the statutes in the Pacific and China theaters mirrored each other and looked remarkably similar to the London Charter. Jurisdiction existed over, "leaders, organizers, instigators, accessories, and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."[80] Generals Yamashita and Homma were tried pursuant to this regulation.[81]

Neither of the above-cited statutes, on their faces, authorized the tribunals to prosecute commanders who failed to prevent the commission of atrocities.[82] Based on the plain language of the two statutes, prosecution of leaders was only permissible under the regulations where the commanders actively participated as conspirators, principals, or accomplices. That is, a commander had to share in the design or purpose of the subordinates involved. Criminality then, for a mere failure to effectively command, was not specifically present in the statutes themselves.

In addition to the Nuremberg and Asian Tribunals, other alleged war criminals were prosecuted after the war pursuant to Law No. 10 of the Allied Control Council. This statute permitted the prosecution of any leader that was a principal, accessory, aider or abettor, or any leader that, "took a consenting part therein. . . ."[83] The "consenting" language is

78. *Id.* art. 6; Martins, *supra* note 37, at 152.

79. London Charter, *supra* note 77, art. 6.

80. Parks, *supra* note 50, at 17 (quoting United States Armed Forces, Pacific, Regulations Governing the Trial of War Criminals (24 Sept. 1945); United States Armed Forces China, Regulations (21 Jan. 1946)).

81. *Id.*

82. Fenrick, *supra* note 76, at 112.

83. Parks, *supra* note 50, at 18 (citing TRIALS OF WAR CRIMINALS BEFORE NUERMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, art. II (2) (1946-1949)).

slightly broader than the conspiracy requirement in the London Charter. In conspiracy, the parties share a common mens rea; they have the same intent. Consent suggests that the accused need not share the same intent as the perpetrator, but carries connotations of tacit approval, and would certainly seem to require actual knowledge on the part of the commander.

Perhaps the World War II trial regulation that most closely resembles the current customary international law doctrine of command responsibility is Article 4 of the French Ordinance of 28 August 1944.[84] Persons in command over those that committed war crimes in France, Algeria, and then existing French colonies in Africa, were subject to prosecution if they "tolerated the criminal acts of their subordinates."[85] Here, the accused was not required to conspire, directly participate, or even consent to the crimes. Consent, as a standard, suggests actual knowledge, agreement, and an affirmative grant of permission. Toleration on the other hand, may exist even where one is personally opposed to the conduct but takes no affirmative action to prevent the behavior. However, toleration requires actual knowledge

It was during the war crimes trials themselves that the doctrine of command responsibility developed.[86] This was the basis for the defense allegation in the case against General Yamashita that prosecution based on a command responsibility theory was tantamount to ex post facto law.[87]

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84. *Id.* at 16-19. Parks lists several ordinances from World War II. One such ordinance is Article 4 of the French Ordinance of August 28, 1944. The ordinance reads in part, "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have tolerated the criminal acts of their subordinates." UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 87 (1948) [UNITED NATIONS WAR CRIMES COMMISSION].

85. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 87.

86. Wu & Kang, *supra* note 44, at 274; Parks, *supra* note 33, at 74.

87. In its request for clemency to General MacArthur, the defense in *Yamashita* alleged that:

> This is the first time in modern history that a commanding officer has been held criminally liable for acts committed by his troops. It is the first time in modern history that any man has been held criminally liable for acts, which according to the conclusion of the Commission therefore by its findings created a new crime. The accused could not have known, nor could a sage have predicted, that at some time in the future a Military Commission would decree acts which involved no criminal intent or gross negligence to be a crime, and its is unjust, therefore, that the punishment for that crime should be the supreme penalty.

*1. The Trial of Tomoyuki Yamashita*

The most controversial post-World War II war crimes trial[88] was the case of Japanese General Tomoyuki Yamashita.[89] On 7 December 1945, General Yamashita was sentenced to hang by a military commission made up of non-attorney general officers.[90] This was the first time a military commander had been found guilty of war crimes committed by his soldiers because of his failure to adequately supervise them.[91] In *Yamashita*, there was no doubt that Japanese soldiers in the Philippines had committed horrific atrocities.[92] However, there was no direct evidence that the general had ordered their commission or even knew of their commission.[93]

On 9 October 1944, General Yamashita[94] took command of the Japanese 14th Area Army. He was responsible for the defense of the Philippines against an anticipated United States and British invasion.[95] Eleven days later, on 22 October 1944, the United States invaded Leyte.[96] Yamashita continued to serve as the commander of Japanese Forces in the Philippines and as the military governor until his surrender on 3 September

87. (continued) RICHARD L. LAEL, THE YAMASHITA PRECEDENT, WAR CRIMES AND COMMAND RESPONSIBILITY 97 (1982) (quoting Defense Clemency Petition, Y119-3, Book 34, at 2, Washington National Records Center, Suitland, MD); *see also In re* Yamashita, 327 U.S. 1, 43 (1946) (Rutledge, J., dissenting).

88. Parks, *supra* note 50, at 22. Parks lists various reasons including: (a) the opinion was ill worded and *sua sponte* by a lay court; (b) one of the defense counsel involved wrote a critical book of the trial; and (c) it was one of the first war crimes trials and was reviewed by the Supreme Court. There were also very spirited dissents by Justices Murphy and Rutledge of the Supreme Court. *See Yamashita*, 327 U.S. at 41-81 (Murphy and Rutledge, J.J, dissenting).

89. *United States of America v. Tomoyuki Yamashita*, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945 [hereinafter *Yamashita* Commission].

90. Parks, *supra* note 50, at 30.

91. LAEL, *supra* note 87, at xi; REEL, *supra* note 43, at 8.

92. REEL, *supra* note 43, at 4; Parks, *supra* note 50, at 24.

93. Fenrick, *supra* note 76, at 113.

94. General Yamashita was a military professional. He was born in 1885 and had become a lieutenant general in 1937 after serving for thirty-one years in the Japanese Army. About the time the Japanese attacked Pearl Harbor, Yamashita was leading the 25th Army on an invasion of Malaya. Yamashita, despite being critically low on supplies and ammunition, was able to secure the surrender of a British force over twice the size of his own. He became known as the "Tiger of Malaya." *See* LAEL, *supra* note 87, at 6, 7.

95. *Id.*; Parks, *supra* note 50, at 22; Lippman, *supra* note 68, at 71; Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

96. Landrum, *supra* note 95, at 293 (citing LAEL, *supra* note 87, at 8).

1945.[97] The fight for the Philippines had been costly for both sides. Tens of thousands of American and Japanese soldiers were killed.[98] Between thirty and forty thousand Filipino civilians were slain by Japanese soldiers in the struggle for Manila and southern Luzon.[99]

During the time General Yamashita was in command, his soldiers abused civilians, internees, and prisoners of war on an indescribably large scale.[100] General Yamashita claimed that as a result of the success of American forces in disrupting his command and control, he had no knowl-

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97. Parks, *supra* note 33, at 22; Landrum, *supra* note 95, at 295.

98. LAEL, *supra* note 87, at 37.

99. *Id.*

100. The crimes committed by troops under Yamashita's command were divided into three categories:

> (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war;
> (2) Torture, rape, murder, and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives;
> (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the accused was in command of Japanese troops in the Philippines.

UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 4.

> Sixteen thousand unarmed non-combatant civilians were killed in Batangas Province, Luzon Island, alone between November 1944 and April 1945. Individuals were shot, bayoneted and buried alive. Three hundred Filipinos were forced to leap into a deep well into which heavy weights were dropped. Those who survived were shot. Three to four hundred civilians were bayoneted, shot and immolated in another incident. Prisoners of war were mistreated and were compelled to catch and consume cats, pigeons and rats. Over fifteen hundred Americans were crowded into the cramped cargo hold of a Japanese steamship. They were starved and driven to dementia, wildly attacking one another and sucking their victims' blood.

Lippmann, *supra* note 69, at 72 (citing General Headquarters United States Army Forces, Pacific Office of The Theater Judge Advocate, Review of the Record of Trial by a Military Commission of Tomoyki Yamashita, General, Imperial Japanese Army, *reprinted in* COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 60, 69 (1959)). In Manila:

edge of the crimes committed by his soldiers.[101] However, the similarities of the crimes in various areas of the Philippines manifested a pattern, which in turn suggested a common plan.[102] Yamashita's headquarters were located in or adjacent to two prisoner of war camps where a number of violations occurred.[103] Yamashita personally ordered the summary execution of 2000 Filipinos in Manila suspected of being guerrillas.[104] He also gave various orders relating to destroying segments of the population that were pro-American.[105]

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100. (continued)

> Eight thousand residents were killed and over seven thousand were mistreated, maimed and wounded without cause of trial. Hundreds of females were beaten and raped, their breasts and genitals abused and mutilated. The military Commission concluded that the Filipino people, including thousands of women and children, were tortured, starved, beaten, bayoneted, clubbed, hanged, burned alive and subjected to mass executions rarely rivaled in history, more than 30,000 deaths being revealed by the record. Prisoners of war and civilian internees suffered systematic starvation, torture, withholding of medical and hospital facilities and execution in disregard of the rules of international law. . . . [There] were systematic. . . [executions] with indescribable bestiality of little girls and boys only months or even days old . . . .

*Id.* at 72-73.

101. Lippman, *supra* note 69, at 72; Landrum, *supra* note 95, at 296; Green, *supra* note 18, at 336; Parks, *supra* note 50, at 24; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 23-29.

102. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 30, 34-35.

103. Parks, *supra* note 50, at n.89. Parks points out:

> General Yamashita's headquarters were at Fort McKinley until December 23, 1944 where four hundred disabled American prisoners of war were held from October 31, 1944 until January 15, 1945. The prisoners were crowded into one building, furnished no beds or covers and kept within the enclosure of a fence extending thirty feet beyond each side of the building. Their two meals a day consisted of one canteen cup of boiled rice, mixed with greens; once a week the four hundred men were given twenty-five to thirty pounds of rotten meat, filled with maggots. Occasionally they would go a day or two without water and at times were reduced to eating grass and sticks they dug in the yard. These conditions within walking distance of General Yamashita's headquarters . . . .

*Id.*

104. *Id.* at 27; Landrum, *supra* note 95, at 297.

105. Parks, *supra* note 50, at 27.

In sentencing General Yamashita to death, the Military Commission opined:

> The Prosecution presented evidence to show that the crimes were so extensive and wide-spread, both as to time and area, that they must have been willfully permitted by the Accused, or secretly ordered by the Accused . . . The Accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army . . . It is absurd, however to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops . . . .
>
> . . . .
>
> The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their Allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.[106]

The United States Supreme Court affirmed the decision of the military commission.[107] In addition to affirming the validity of the military commission, the Court affirmed that commanders

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106. FRIEDMAN, *supra* note 43, at 1596 (quoting *Yamashita* Commission, *supra* note 89; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 84, at 34-35).

107. *In re* Yamashita, 327 U.S. 1 (1946). The fact that the Supreme Court reviewed the application of the doctrine of command responsibility as applied by the military commission in the trial of General Yamashita, gives great precedential value to both the Court gives great precedential value to both the Court decision and the trial conducted by the commission. Although the *Yamashita* trial is controversial, it is the only command responsibility case to have been reviewed by the Supreme Court. It also stands for the proposition that military commissions are competent to try soldiers in war for command responsibility based violations.

> have a duty to control their soldiers and prevent war crimes.[108] Commanders in charge of forces involved in occupation, are further required to take affirmative steps to protect civilians and prisoners of war.[109]

From *Yamashita*, it is clear that some degree of knowledge is required. However, the commission's decision is not absolutely clear in terms of the *mens rea* required for a conviction based on command responsibility. One conclusion that might be drawn from the opinion, is that the commission, considering the circumstantial evidence, concluded that the accused had actual knowledge of the crimes, and was actually involved in the planning and even secretly ordered them.[110] Another possible interpretation of the decision is that the accused "must have known" of the activity but did nothing to stop it.[111] Although there are some that argue that Yamashita was held strictly liable,[112] the evidence indicates otherwise.[113]

### *2. Command Responsibility in War Crimes Trials in Europe*

There were several war crimes trials in addition to *Yamashita* following World War II that dealt with the issue of command responsibility.[114] Two such examples will be considered. *United States v. Wilhelm von Leeb (High Command Case),* and *United States v. Wilhelm List (Hostage Case),* are two of the more important trials dealing with command responsibility. Some writers suggest that these two cases are of greater importance than Yamashita because these decisions were rendered by professional jurists

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108. *Id.* at 14-15. The court wrote: "[W]e conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the Commission had authority to try and decide the issue which it raised." *Id.*

109. *Id.* at 16.

110. Landrum, *supra* note 95, at 296-98.

111. Wu & Kang, *supra* note 44, at 275.

112. REEL, *supra* note 43; *see also* Parks, *supra* note 33, at 74. Although Parks strenuously disagrees that Yamashita was held to a strict liability standard, he addresses the arguments made by those that assert that General Yamashita was strictly liable.

113. Parks, *supra* note 33, at 74.

114. For example, distinguished jurists from eleven countries sat on the International Tribunal for the Far East in Tokyo. Twenty-eight of the former leaders of Japan were charged with various war crimes, many related to command responsibility. Some have suggested that the opinions from these trials are more carefully worded than *Yamashita*. There were a number of trials in Europe involving lesser commanders as well. *See generally* Parks, *supra* note 50, at 64-73; Lippmann, *supra* note 69, at 85-86.

and long enough after the cessation of hostilities to give the judges adequate time to reflect on the issues.[115]

In the *High Command Case*, thirteen high ranking German officials were charged with crimes against peace, war crimes, crimes against humanity and conspiracy to commit those crimes.[116] In discussing command responsibility, the court stated:

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[117]

The language in the opinion implies that the commander must have some knowledge of the crimes committed by subordinates to be guilty of

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115. Parks, *supra* note 50, at 64; Wu & Kang, *supra* note 44, at 275.

116. Fenrick, *supra* note 76, at 113 n.31; Parks, *supra* note 50, at 38-39; Green, *supra* note 18, at 333; German High Command Case, *supra* note 49, at 73-74. With regard to passing on illegal orders, the Tribunal wrote:

> Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers–not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law.

*Id.*

117. German High Command Case, *supra* note 49, at 73-74. The Tribunal also considered the duties of a commander in managing occupied territory:

> Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Conven

them. It is hard to imagine having a "personal dereliction" or being able to "acquiesce" without some knowledge. However, the "wanton, immoral disregard" language suggests guilt can be established where there is a "willful blindness" on the part of the commander.[118]

The second Nuremberg trial with command responsibility implications was the *Hostage Case*.[119] Like *Yamashita* and the *High Command Case*, there was little doubt that the underlying offenses had occurred.[120] The accuseds, all high-ranking German officers, were charged with being principals and accessories to murder and the deportation of individuals from Greece, Yugoslavia, Norway, and Albania.[121]

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117. (continued)

> tion, a military commander of an occupied territory is *per se* responsible within the area of his occupation . . . We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander *must have knowledge of these offenses and acquiesce* or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.

*Id.* at 76-77 (emphasis added).

118. *See generally* German High Command Case, *supra* note 49, at 73-77; Wu & Kang, *supra* note 44, at 285 (citing United States v. Jewell, 532 F.2d 697 (9th Cir. 1976)).

119. UNITED NATIONS WAR CRIMES COMMISSION, VIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1948); XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, 757 (1950) [hereinafter Hostage Case].

120. Parks, *supra* note 50, at 63.

121. *Id.*; Hostage Case, *supra* note 119, at 1259-60. With regard to command responsibility and the knowledge required, the Tribunal wrote:

> We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention . . . . We desire to point out that the German Wehrmacht was a well equipped, well trained and well disciplined army. . . . The evidence shows . . . that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening . . . Any army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime . . . .

The *Hostage Case* stands for the proposition that knowledge may be presumed where reports of criminal activity are generated for the relevant commander and received by the commander's headquarters.[122] This suggests that knowledge of crimes committed by subordinates may be constructive; and therefore, somewhat similar to the *Yamashita* "knew or should have known" standard. Possession, then, of reports by the commander's staff may create a constructive or presumptive basis of the awareness required for prosecution.

## C. The Indo-China War

### *1. Command Responsibility Prior to the Indo-China War*

The decisions of the post-World War II war crimes trials were based largely on customary rather than treaty-based international law.[123] Command responsibility had not been codified prior to World War II. Even the post-World War II, 1949 Geneva Conventions say nothing directly about command responsibility. As the Indo-China War broke out in the late 1940s and early 1950s, there was no treaty-based standard for command responsibility.

The war crimes doctrine of command responsibility did not, however, go unnoticed, and had, in the United States, been reduced to policy. Perhaps in response to the post-World War II trials, the United States Army,

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121. (continued) *Id.* General List, one of the accuseds, asserted that he was gone during the time of many of these reports came in. The Tribunal responded:

> Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made to their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf. . . . The reports made to . . . List . . . charge him with notice of the unlawful killing of thousands of innocent people. . . . His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.

*Id.* at 1271-72.

122. *Id.* This is the standard adopted in Protocol I, *supra* note 27, art. 86(2).

123. Green, *supra* note 18, at 341.

in 1956, published *Field Manual 27-10, The Law of Land Warfare.*[124] Paragraph 501, "Responsibility for Acts of Subordinates," incorporates the doctrine of command responsibility. It reads:

> 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.[125]

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124. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501 (July 1956) [hereinafter FM 27-10].

125. *Id.* Although the manual has been in publication since 1956, with Change No. 1 in 1976, it is still current Army doctrine. Note the sentence discussing massacres does so in the context of occupation or prisoners of war. Virtually all of the command responsibility cases following World War II dealt with occupation or cases involving the custody of prisoners of war. Although, for example, the treatment of civilians by U.S. Army forces in My Lai in Vietnam could be characterized as a massacre of civilians, it did not occur during an occupation and may therefore be outside the scope of this paragraph.

This apparent limitation to situations involving prisoners of war or occupation may be based on the definition of "grave breach" of one of the Geneva Conventions. As correctly noted in paragraph 502 of *FM 27-10,* to have a grave breach, the victim must be a protected person under one of the four Geneva Conventions. *Id.* para. 179 (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWSS]; GPW, *supra* note 27, art. 130; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]). Civilians are "protected persons" if they are in the "hands of a Party to the conflict or Occupying Power of which they are not nationals. . . . Nationals of a neutral State . . . . and nationals of a co-belligerent State shall not be regarded as protected persons. . . ." GC, *supra*, art. 4. Certainly the slaughter of innocent Vietnamese at My Lai was a war crime, but not a grave breach as defined above. The Vietnamese were civilians belonging to a co-belligerent, and thus not "protected." *Id.*

The field manual informs its readers that commanders may be guilty of war crimes if they order their commission or if they fail to act under certain circumstances where they "knew or should have known" that troops under their command were committing violations of the law of war. Therefore, *FM 27-10* appears to have adopted the *Yamashita* standard as it is generally understood.[126] However, *FM 27-10* is not a penal code and does not in and of itself create any basis for criminal liability in domestic courts-martial.[127] It is a statement as to the status of the law of war, the purpose of which is to inform operators and attorneys in the field.[128] By informing soldiers of the law, the intent is to prevent violations thereof. Therefore, the "knew or should have known" standard enunciated in *FM 27-10* might more accurately be viewed along the lines of a statement as to what the U.S. Army believes the status of the customary international law doctrine of command responsibility to be, rather than a basis for prosecution in United States domestic courts.[129]

### *2. My Lai and Captain Ernest Medina*

Over twenty years after the World War II war crimes trials, the United States suddenly found itself in the difficult position of having to apply these principles in the judicial and non-judicial activities that followed in the wake of the My Lai Massacre in Vietnam.[130] However, for reasons that will be explored, the *Yamashita* "knew or should have known" standard of

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125. (continued) Perhaps, therefore, the drafters of *FM 27-10* were trying to limit holding commanders liable for crimes committed by subordinates to cases where the underlying war crimes committed by the subordinates were grave breaches of the Geneva Conventions.

126. Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 16 (1972); Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUT-CAM. L.J. 59, 71 (1973).

127. FM 27-10, *supra* note 124, para. 1, states:

> 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 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.

128. *Id.*

129. *Id.*

command responsibility was not applied in the U.S. Army court-martial of Captain Ernest Medina.

In the afternoon of 15 March 1968, Lieutenant Colonel Frank A. Barker, U.S. Army, commander of Task Force Barker, a battalion sized element of the 11th Infantry Brigade, Americal Division, brought his three company commanders and his staff together for a briefing.[131] The brigade commander, Colonel Oran K. Henderson, was present as Lieutenant Colonel Barker gave the final orders. Colonel Henderson told the men that they were to close with the enemy rapidly and aggressively. They were encouraged by the brigade commander to eliminate the Viet Cong 48th Local Force Battalion, known to be operating in their area, "once and for all."[132] The brigade commander left and the commanders and staff were then briefed by the task force intelligence officer and the operations officer.

Task Force Barker's three infantry companies were to conduct an assault on the 48th Local Force Battalion believed to be in the area of a village known as My Lai in the Quang Ngai Province of the Republic of Vietnam.[133] The Quang Ngai Province has been described as being beautiful situated on the South China Sea with its deep blue waters, palm trees, and white sandy beaches.[134] Despite this beauty, the Province had been a center of revolt and rebellion for many years. Ho Chi Minh regarded the capital, Quang Ngai City, as an area of strong support for the Viet Minh.[135] Members of the National Liberation Front (NLF) were infiltrated back into the Quang Ngai Province from North Vietnam after many of these forces had moved north after the Geneva Accords of 1954.[136]

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130. Landrum, *supra* note 95, at 299; *see generally* Eckhardt, *supra* note 45, at 12-13; Addicot & Hudson, *supra* note 37, at 156-60; MARY MCCARTHY, MEDINA (1972).

131. LT. GEN. W.R. PEERS (USA RET.), THE MY LAI INQUIRY 24, 165 (1979). Lieutenant General Peers headed the "Peers Commission," the official Army investigation into the incident and the actions or lack thereof that followed. *See generally* U.S. DEP'T OF ARMY, REPORT OF THE DEPARTMENT OF ARMY, REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (Mar. 14, 1970) (copy maintained at The Judge Advocate General's School, U.S. Army, Charlottesville, Va.). The Peers Commission report consists of four volumes and contains over 20,000 pages of interviews and other documents. It is over six feet thick.

132. PEERS, *supra* note 130, at 166.

133. *Id.*

134. *Id.* at 37.

135. *Id.*

136. *Id.*

The tactics used during the Strategic Hamlet Program[137] in the early 1960s had unexpectedly served to further alienate the people of Quang Ngai from their government. Many of the people living in the province were forcibly removed from their homes and the homes were destroyed. Many of the techniques used to attempt to rid the area of the NLF ironically caused many in the area to be more sympathetic to the Communist cause.[138]

During the operation, Alpha Company was to set up a blocking position the night of 15 March, north of the village of My Lai. Charlie Company, commanded by Ernest Medina was to land on the west side of the village. They were to attack the enemy which they expected to find in and around the hamlet. An artillery preparation of the area was to occur before they went in. Bravo Company would be placed south of the village and would move north, eventually linking up with Charlie Company. The China Sea to the east was a natural obstacle preventing an enemy escape in that direction. An aero scout team from B Company, 123rd Aviation Battalion was to screen Charlie and Bravo Companies' southern flank and a group of U.S. Navy Swift boats was to screen the waters off My Lai.[139]

The commanders and staff present at Lieutenant Colonel Barker's briefing were told that the civilians in the area were either Viet Cong or sympathetic to the Viet Cong. They were also told that by the time the assault was to take place, the civilians in the hamlet would be off to market in the area of Quang Ngai City. Although there is some dispute on the exact orders given by the Task Force Commander, there is evidence that the Commander ordered the subordinate commanders to burn the village, kill the livestock, and destroy the crops and foodstuffs.[140] The group was told by the intelligence officer that there were approximately two hundred to two hundred and fifty members of the 48th Local Force Battalion somewhere in the vicinity of My Lai and they were expected to meet strong resistance.[141]

The company commanders then returned to their units to brief their men regarding the operation. Captain Medina recounted much of the information he had received at the task force headquarters. He told his men they would be outnumbered two to one and that there would be no

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137. *Id.*
138. *Id.*
139. *Id.* at 167.
140. *Id.*
141. *Id.*

civilians in town. Although it is not clear, the "preponderance of evidence indicated that Medina told his men they were to burn the houses, kill the livestock, and destroy the crops and foodstuffs."[142] He went on to remind them that they had lost several men to mines and booby traps in the area, that this was a chance for the men to get even, and he repeated Colonel Henderson's guidance to be aggressive and close with the enemy rapidly.[143] A memorial service for Staff Sergeant Cox, a very popular NCO in the company, took place either just before Captain Medina's briefing, or a day or so earlier. He had been killed by a land mine.[144]

On 16 March 1968, the artillery commenced firing in and around the landing zone (LZ) to be used by Charlie Company. The artillery preparation began at 7:24 a.m. and lasted about five minutes. Civilians in the area began taking cover in their homes or next to rice-paddy dikes. Charlie Company's 1st Platoon was commanded by First Lieutenant William J. Calley, Jr.[145] The 1st Platoon was to be the first unit inserted into the LZ. Just before the arrival of the 1st Platoon and after the artillery fire had ceased, helicopter gunships attacked the area around the LZ. Although they were told the LZ would be "hot," the men did not receive any enemy fire.[146]

Captain Medina arrived in one of the first lifts and set up his headquarters in the area of the LZ. At about 7:50 a.m., the three platoons of Charlie Company began moving east toward the village of My Lai. The 1st Platoon was not at full strength. It consisted of two squads and had a total of about twenty-five men. As they moved toward the village, the slaughter began. Even though they were not taking any enemy fire, the members of 1st Platoon began shooting and bayoneting numerous fleeing Vietnamese, throwing hand grenades in homes, and killing livestock. They began rounding up groups of civilians, mostly old men, women and children, and moving them to a southeastern part of town. One group consisted of about twenty to twenty-five Vietnamese. Another group of approximately seventy noncombatants was placed in a ditch. Soon, approximately fifty or so more were moved into the ditch with the original seventy. The group of twenty to twenty-five was shot down by the men

142. *Id.* at 169.

143. *Id.* at 170.

144. *Id.*

145. *Id. See generally* RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY (1971) (providing more detail on Lieutenant Calley's participation and subsequent court-martial).

146. PEERS, *supra* note 130, at 172. One helicopter did report they were receiving fire from the area of the LZ.

guarding them. The men rounded up another ten or so civilians and moved them to the ditch. Lieutenant Calley arrived at the ditch at about 9:00 a.m. and at about 9:15 the seventy-five to one hundred and fifty civilians in the ditch were killed by the soldiers after being told to do so by Lieutenant Calley.[147]

Shortly thereafter, 2nd Platoon, led by Lieutenant Steven K. Brooks linked up with the 1st Platoon in the village of My Lai. As the platoons moved through the town, many more fleeing civilians were killed, maybe as many as fifty to one hundred. There were at least two rapes committed by members of 2nd Platoon.[148]

During this time, Captain Medina was located at his headquarters at the LZ, approximately 150 meters from the village. For reasons that are still unclear, Captain Medina suddenly ordered 2nd Platoon, and only 2nd Platoon, to "stop the killing" or words to that effect.[149] First Platoon continued to fire on the civilians. At about 10:30 a.m., Lieutenant Barker's helicopter was used to evacuate an American soldier who had intentionally shot himself in the foot. The pilots that brought the wounded soldier back to camp and reported to the operations officer that they had seen piles of bodies. The operations officer returned to the scene with the helicopter. Before the helicopter arrived back at the scene, the task force commander gave an order to "stop the killing" or "stop the shooting." This was passed on to Captain Medina.[150]

Captain Medina moved into the hamlet about 11:00 a.m. His platoon leaders provided him with casualty reports. Captain Medina was now located about 100 yards from the ditch filled with dead noncombatants; however, he claims not to have seen the ditch or its ghastly contents. Captain Medina radioed the enemy casualty reports back to the task force headquarters. He did not indicate that those killed were civilians. Charlie Company left My Lai at about 1:30 p.m. The company rounded up and segregated young men, but there is "no conclusive evidence that any additional burnings or killings took place."[151] Captain Medina reported that his unit killed approximately ninety Viet Cong. This number is virtually identical to the total numbers reported during the operations by the subor-

147. *Id.* at 172-75.
148. *Id.* at 175.
149. *Id.*
150. *Id.* at 178.
151. *Id.*

dinate units in the operation.[152] Of these ninety reported killed, only about three could have been considered enemy killed in action according to official U.S. Army investigators.[153]

Based on witness reports and evidence collected by investigators, the noncombatant old men, women, and children residents of My Lai killed has been estimated to be as low as 150 and perhaps as high as 400, maybe more. These figures do not include others killed by 2nd Platoon prior to entering My Lai and non-residents of My Lai that may have been present and killed as well.[154] Based on their criminal actions in My Lai that day, criminal charges pursuant to the UCMJ were preferred against thirteen men, and charges were preferred against another twelve for actions related to the cover-up that followed.[155] However, there was only one conviction, that of Lieutenant Calley.[156]

Lieutenant General Peers, the head of the official Department of the Army investigation, after the official investigation wrote:

> The My Lai incident was a black mark in the annals of American military history. In analyzing the entire episode, we found that

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152. *Id.* at 179.

153. *Id.* at 180.

154. *Id.* at 180, 295.

155. *Id.* at 221, 222, 227. It is possible that others may have been charged. However, some participants in the operation had been killed in action after the incident, and others had been discharged from the military. *See generally id.*; WAR CRIMES ACT OF 1996: REPORT ON H.R. 3680, COMMITTEE ON THE JUDICIARY, 104th Cong. 2nd Sess. (July 24, 1996), H.R. 104-698, 104 HR 698, sec. IIC [hereinafter JUDICIARY COMMITTEE REPORT].

156. PEERS, *supra* note 130, at 227. Lieutenant General Peers was often asked if he thought that Lieutenant Calley was a "scapegoat." He writes:

> On the one hand, I think it most unfortunate that, of the twenty-five men who were charged with committing war crimes or related acts, he was the only one tried by a court martial and found guilty. On the other hand, I think he was fortunate to get out of it with his life. He was in command of his platoon and was fully aware of what they were doing. Above and beyond that, he personally participated in the killing of noncombatants: he was convicted of killing at least twenty-two civilians but his platoon may have killed as many as 150 to 200 innocent women, children and old men. So I don't consider him a scapegoat. On the contrary, I think the publicity given him by the news media and the notoriety he has gained are all wrong. He is certainly no hero as far as I am concerned.

*Id.* at 227-28.

> the principal breakdown was in leadership. Failures occurred at every level within the chain of command, from individual non-commissioned-officer squad leaders to the command group of the division. It was an illegal operation in violation of military regulations and of human rights, starting with the planning, continuing through the brutal, destructive acts of many of the men who were involved. . . . The pain caused by the My Lai affair will not soon be forgotten.
>
> . . . .
>
> My Lai was a gruesome tragedy, a massacre of the first order. Some of the soldiers participating in the operations did not become involved in the killing, raping, and destruction of property, and should not be considered in the same light as those who committed the atrocities. Similarly, a few men were outraged and tried to report the incident through proper channels, but their efforts were stifled by lack of attention, erroneous interpretation, and improper leadership. These men are to be commended.[157]

*3. The Trial of Captain Ernest Medina*

At his subsequent court-martial, Captain Medina was charged with five criminal offenses. Based on his own personal participation, he was charged with the premeditated murder of a female adult, the premeditated murder of a small child, and two counts of aggravated assault.[158] He was also charged, however, as a principle to the premeditated murder of an unknown number, but not less than one hundred, of unidentified Vietnamese nationals allegedly murdered by his men.[159] With regard to the deaths caused by Captain Medina's men, the prosecution argued that Medina knew exactly what was going on and that Medina had the power to stop the killing simply by making a radio call.[160]

At his trial, Captain Media admitted to shooting the adult female but claimed it was in self-defense. The judge granted a motion for a finding of not guilty regarding the charge of murdering the small child.[161] Although

157. *Id.* at xi-xii.
158. United States v. Medina, C.M. 427162 (1971).
159. *Id.*
160. *Id.*
161. *Id.*

his reasons are not clearly explained in the record,[162] the judge also reduced the murder of the noncombatants charge to manslaughter under Article 119(b), UCMJ.

This was an opportunity for the court to apply the *Yamashita* "knew or should have known" standard previously enunciated in *FM 27-10*. However, the court elected to apply a more narrow, actual knowledge theory of personal criminal responsibility for Captain Medina.[163] The most relevant portions of the instructions given to the military panel were as follows:

> I now call your attention to the Specification of the additional Charge, both as modified to allege the offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice.
>
> . . . .
>
> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to inure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus, mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.

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162. *Id.*; Clark, *supra* note 125, at 67; Howard, *supra* note 125, at 8 (the author of this article was the military judge in the *Medina* court-martial).

163. Eckhardt, *supra* note 45.

. . . .

> Considering the theories of the two parties and the general statements of legal principles pertaining to military law, and customs and the law of war, you are now advised that the following is an exposition of the elements of the offense of involuntary manslaughter, an offense alleged to be in violation of Article 119 of the Uniform Code of Military Justice.
>
> In order to find the accused guilty of this offense, you must be satisfied by legal and competent evidence beyond a reasonable doubt, of the following four elements of that offense:
>
> (1) That an unknown number of unidentified Vietnamese persons, not less than 100, are dead;
> (2) That their deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing noncombatants, in or around My Lai (4), Quang Ngai Provence, Republic of Vietnam, on or about 16 March 1968;
> (3) That this omission constituted culpable negligence; and
> (4) That the killing of the unknown number of unidentified Vietnamese persons, not less than 100, by subordinates of the accused and under his command, was unlawful.
>
> You are again advised that the killing of a human being is unlawful when done without legal justification.[164]

In keeping with United States policy,[165] Captain Medina was not charged with violations of the law of war, but rather, was charged with violations of the UCMJ. Therefore, the judge determined that the appropriate standard of personal culpability for Captain Medina, as a result of the

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164. United States v. Medina, C.M. 427162 (1971), *reprinted in* Howard, *supra* note 125, at 8-12. The prosecutor in *Medina* opined that Judge Howard's summary of the facts quoted in the instructions were both "accurate and concise." Eckhardt, *supra* note 45, at n.49.

165. FM 27-10, *supra* note 124, para. 507. The paragraph reads in part:

> 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

atrocities committed by the soldiers under his command, was Article 77, Principals, UCMJ.[166] Article 77 reads:

> Any person punishable under this chapter who—
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter;
> is a principal.[167]

Words such as aids, abets, counsels, commands, procures, and causes all reflect positive personal participation. These words also imply an actual knowledge requirement. Based on this provision, a commander can only be liable for murders committed by his subordinates when he has actual knowledge of the crimes and takes an active part in their commission. There is, however, nothing specific in Article 77, UCMJ, that establishes criminal liability for a failure to act; an act of omission.

However, in the *discussion* to Article 77, UCMJ, in the *Manual for Courts-Martial* applicable during the *Medina* court-martial, there was a

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165. (continued)

> 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.* The *Manual for Courts-Martial* further explains that "[o]rdinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(2), discussion [hereinafter MCM].

166. Howard, *supra* note 125, at 15.

167. *Id*. The relevant edition of the UCMJ during the *Medina* court-martial was the 1969 MANUAL FOR COURTS-MARTIAL, UNITED STATES app.2 (1969) [hereinafter 1969 MANUAL]. However, Article 77 itself has not changed since the *Medina* trial. The phrase, "this chapter," in UCMJ, Article 77 is referring to chapter 47 of Title 10, Armed Forces, of the United States Code. The punitive articles of the UCMJ, including Article 77, Principals; Article 118, Murder; which Captain Medina was originally charged with, and Article 119(b), Manslaughter; the charge that actually went to the jury are all codified in the United States Code, Chapter 47 of Title 10. *See* 10 U.S.C. §§ 877-934. Article 77 is actually very similar to the statutes used in the World War II tribunals for determining who could be personally responsible for criminal activity. As has been discussed, the "knew or should have known" standard came into being despite the World War II statutes that on their face seem to require actual knowledge. *See generally* discussion *supra* notes 79-85 and accompanying text.

passage that explained that there were certain individuals who, under certain conditions, had an affirmative duty to act if they witnessed a crime. Where there was an affirmative duty to act, failure to do so could have created culpability. The *Manual* explained:

> To constitute one an aider and abettor under this article, and hence as a principal, mere presence at the scene is not enough nor is mere failure to prevent the commission of an offense; there must be an intent to aid or encourage the persons who commit the crime. The aid and abettor must share the criminal intent of purpose of the perpetrator. . . .
>
> While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal.
>
> One who counsels, commands, or procures another to commit an offense subsequently perpetrated in consequence of that counsel, or procuring is a principal whether he is present or absent at the commission of the offense . . . .[168]

The current version of the *Manual for Courts-Martial* is essentially the same. The discussion of UCMJ, Article 77, Principals, reads:

> (b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:
>
> (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.
>
> One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime . . . In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a nonin-

168. 1969 MANUAL, *supra* note 166, at 28-4, 28-5.

> terference is intended to and does operate as an aid or encouragement to the actual perpetrator.
>
> (3) Presence.
> (a) *Not Necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal . . .
> (b) *Not Sufficient.* Mere presence at the scene of a crime does not make one a principal. . . .[169]

In general, both versions require actual knowledge on the part of the principal and an affirmative act in furtherance of the underlying criminal activity. However, both versions of the discussion point out that some individuals have a lawful duty to act in the face of criminal activity. For some, inaction is tantamount to an affirmative act.

Based on the passage above, an argument can be made that a commander has an affirmative duty to act to prevent criminal activity perpetrated by subordinates. It would seem based on military custom, a commander has a duty to control subordinates and prevent crime. However, according to the discussion, criminal culpability for failure to prevent a crime can only exist where the failure to act is intended to encourage the subordinates. Mere failure to act is not, by itself, grounds for criminal liability.

To be criminally responsible for an omission, a failure to act to prevent war crimes by subordinates, there are three requisite criteria. First, to be held criminally responsible for failing to take action to prevent another from committing a crime, a person must first have a legal duty to intercede.[170] Second, accepting for the sake of analysis that a commander does have a lawful obligation to prevent crimes committed by subordinates, the failure to act must be tantamount to encouragement and intended to act as such.[171] Finally, the aid or encouragement intended actually does aid or encourage the wrongdoer.[172] This means that the commander must intend to encourage the subordinate and the subordinate must believe the commander is providing aid or encouragement.

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169. UCMJ art. 77 (LEXIS 2000).
170. *Id.*
171. *Id.*
172. *Id.*

This seems to be the rationale relied on by Judge Howard in issuing the jury instructions in *Medina* and in refusing to apply the *Yamashita* "knew or should have known" standard.[173] In his article explaining the standard he applied in the *Medina* court-martial, Judge Howard concluded:

> [I]f the commander gains actual knowledge and does nothing, then he may become a principal in the eyes of the law in that by his inaction he manifests an aiding and encouraging support to his troops, thereby indicating that he joins in their activity and wishes the end product to come about.[174]

One critic of the *Medina* court-martial argues that the judge's instruction regarding Article 77 and the unlawful killings was too stringent.[175] In his article on the trial, Professor Clark first explains that a conviction for murder under Article 118, UCMJ, can be had where a person unlawfully kills another when the accused "is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life. . . ." He goes on to assert that where a commander *knows* his troops are unlawfully killing noncombatants, and if the commander chooses to do nothing, the omission, the failure to attempt to prevent further violations, is a wanton disregard for human life.[176] Even Professor Clark admits then, that the prosecutor would still have to establish actual knowledge, which is consistent with Judge Howard's instruction in the case.

During the trial, the judge reduced the original charge of murder with regard to the noncombatants killed by Captain Medina's men to manslaughter, Article 119(b), UCMJ. Conviction pursuant to this article can occur where:

> (b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—
> (1) by culpable negligence; or
> (2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person; is guilty of involun-

173. Howard, *supra* note 125, at 17-21.
174. *Id.* at 22.
175. *See generally* Clark, *supra* note 125.
176. *Id.* at 74.

> tary manslaughter and shall be punished as a court-martial may direct.[177]

Professor Clark goes on to explain that because the judge had reduced the charge to manslaughter, the standard relied on by the judge was too restrictive.[178] A conviction for manslaughter is permissible where there is an unlawful killing based on a culpably negligent omission. Therefore, according to Professor Clark, where an incompetent commander did not know but should have known that his soldiers were unlawfully killing noncombatants, a conviction for manslaughter may be appropriate if the commander failed to take action to prevent the deaths. However, if the intent is to hold commanders liable as principals for the crimes committed by their subordinates, in this case premeditated murder, a conviction for manslaughter would not accomplish that goal.

While there was some question as to what standard should apply[179] and although there are certainly those critical of the judge's interpretation of the law and instructions to the jury,[180] Captain Medina was acquitted of all charges at the trial level.[181] Therefore, *Medina* is of little precedential value. However, this case continues to be examined by scholars in determining the correct standard for command responsibility in domestic courts-martial settings.

Finally, even if the *Yamashita* standard had been applied in the *Medina* trial, Captain Medina would likely have been acquitted. A panel may well have concluded that there was insufficient evidence to establish that Captain Medina "knew or should have known" of the atrocities at My Lai. The "should have known" standard is primarily linked to time. Where reports are received over time or where large numbers of crimes are committed by large numbers of subordinates, creating a basis of constructive notice, it is reasonable to say that the commander should have known.

In *Yamashita*, the atrocities were widespread and systematic, occurring over several months. The crimes in My Lai, on the other hand, although certainly horrendous, all took place at one location within a matter of hours. Because all the crimes occurred in one place and time, it would be difficult to conclude that he should have known. Medina either

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177. UCMJ art. 119(b) (LEXIS 2000).
178. *See generally* Clark, *supra* note 125.
179. *See generally* Eckhardt, *supra* note 45.
180. *See generally* Clark, *supra* note 125.

knew or he did not know, and the panel concluded that he did not. A "should have known" instruction would not likely have altered the result. Put another way, the *Medina* panel may have convicted Yamashita even with the *Medina* instruction because there was overwhelming circumstantial evidence that Yamashita knew exactly what was happening.

## III. *Yamashita* as the Internationally Recognized Norm of Command Responsibility

The *Yamashita* "knew or should have known" test for command responsibility is the one currently recognized by the international community. as customary international law.[182] In addition to *Yamashita* and the other post-World War II international tribunal decisions, post-World War

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181. United States v. Medina, C.M. 427162 (1971).

182. The *Restatement (Third) of the Foreign Relations Law of the United States* explains that there are essentially three sources of international law:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law;
> (b) by international agreement; or
> (c) by derivation from general principles common to the major legal systems of the world.
> (2) Customary international law results from a general and constant practice of states followed by them from a sense of legal obligation . . . .

RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987). Perhaps the definitive guide for determining what constitutes international law is Article 38 of the Statute for the International Court of Justice, which states:

> 1. The Court, whose function is to decide in accordance with international law, such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilian nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of . the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) [herinafter ICJ Statute].

II treaties and the statutes for the modern international criminal tribunals all rely *on Yamashita.*

Even the U.S. Army, as far back as 1956, adopted the *Yamashita* standard of command responsibility as a matter of policy.[183] Although *Field Manual 27-10* does not create criminal liability, it does inform service members of the U.S. Army interpretation of the law of war.[184] Certainly then, including the *Yamashita* standard in the field manual can be seen as recognition by the U.S. Army that the *Yamashita* standard reflects customary international law.[185]

## A. Protocols to the 1949 Geneva Conventions

### *1. Protocol I*

Since the *Medina* trial, there has been virtually no change to the domestic doctrine of command responsibility. *Field Manual 27-10* is still doctrine and the military courts have not been required to decide cases relating to command responsibility.[186] The first international attempt to

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182. (continued) United States federal courts have determined the status of customary international law following a similar set of factors. In *Filartiga v. Pena-Irala*, the United States Court of Appeals wrote:

> The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."
>
> . . . .
>
> *The Paquete Habana* reaffirmed that where there is no treaty, and no controlling or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations; and as evidence of these works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well aquatinted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but trustworthy of evidence of what the law really is.

Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980) (citations omitted).

183. FM 27-10, *supra* note 124, para. 501.

184. *Id.* para. 1.

185. *Id.*; ICJ Statute, *supra* note 181.

186. Eckhardt, *supra* note 45, at 16.

codify command responsibility appears in the 1977 Additional Protocol I to the 1949 Geneva Conventions (Protocol I).[187]

Article 86 of Protocol I requires that parties to a conflict "repress grave breaches, and take measures necessary to suppress all other breaches of the conventions or of this Protocol which result from a failure to act when under a duty to do so."[188] Paragraph 2 of Article 86 codifies a standard very similar to the Yamashita standard.[189] 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.[190]

Protocol I requires either actual knowledge or the possession of information that should have enabled a commander to know. Therefore, analysis of the actions of a commander under Protocol I is both subjective and objective. First, there would have to be a subjective determination that the commander actually knew or had information; for example, reports received by his headquarters. Second, the "should have enabled them to conclude" language is objective in that a trier of fact would have to consider whether a reasonable commander, in the same situation as the accused, should have known of the subordinate misconduct as a result of the information available to the commander. Finally, if the mens rea

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187. Protocol I, *supra* note 27, art. 86.

188. *Id.* art. 86(1).

189. *Id.* art. 86(2); Parks, *supra* note 33, at 76.

190. Protocol I, *supra* note 27, art. 86(2). The "had information" requirement is reflective of the standard applied in the *Hostage Case*. *See* discussion *supra* note 121. In analyzing this provision, the Official Commentary states:

> This provision, which should be read in conjunction with paragraph 1 and Article 87 (*Duty of Commanders*), which lays down the duties of commanders, raises a number of difficult questions. The strongest objection which could be raised against this provision perhaps consists in the difficulty of establishing intent (*mens rea*) in case of a failure to act, particularly in the case of negligence. For that matter, this last point gave rise to some controversy during the discussions in the Diplomatic Conference, particularly due to the fact that the Conventions do not con-

aspects are met, the commander must take "all feasible measures" to prevent or suppress criminal acts of subordinates.

Article 87 of Protocol I addresses the "duty of commanders."[191] Commanders are obligated under this provision to prevent, suppress, and report violations of the Conventions and Protocol I.[192] Commanders also have the affirmative duty to instruct their subordinates on the law of war.[193] Paragraph 3 of Article 87 requires:

> The High contracting Parties and Parties to the conflict, shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, and where appropriate, to initiate disciplinary or penal action against violators thereof.[194]

Somewhat complicating matters, the French version of Article 86(2) replaces "information which should have enabled them to conclude" with "information enabling them to conclude."[195] The French version comes

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190. (continued)

> tain any provision qualifying negligent conduct as criminal. However, one delegate, referring to the concept expressly reflected in the English version (which was not included in the French text, curiously enough, namely, information which "should have" enabled them to conclude that a subordinate was committing or was going to commit a breach, remarked that this was undoubtedly a case of responsibility incurred by negligence, and that it was important to make this clear. However, this does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place. . . .

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 1011, 1012 (S. Pictet et al. eds., 1958) [hereinafter OFFICIAL COMMENTARY PROTOCOLS] (citations omitted).

191. Protocol I, *supra* note 27, art. 87.
192. *Id.* art. 87(1).
193. *Id.* art. 87(2).
194. *Id.* art. 87(3).
195. The Official Commentary explains:

> In the first place, it should be noted that there is a significant discrepancy between the English version, "information which should have enabled them to conclude," and the French version, "des informations leur per

closer to requiring actual knowledge. It creates a standard that is more subjective in nature rather than the more objective English version. The focus is on the information received rather than the interpretation of that information by the relevant commander. Dropping the word "should" arguably means that actual knowledge, or a mens rea very close to actual knowledge is required, in the French version.

The commentary to Protocol I provides some additional insight regarding the drafters' intent:

> In the case of the "High Command Trial" the Tribunal found that the responsibility of a superior was involved "where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." In the *Yamashita* case, the Tribunal declared: "where murder and rape and vicious revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. . . ."[196]

The standard ultimately selected in Article 86 was only agreed to after much debate. The International Committee of the Red Cross proposed that a commander should be held liable for the violations of their subordinates if "they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach."[197] Not only was this proposal rejected, so was the version submitted by the United States, which read, "if they knew

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195. (continued)

> mettant de conclue," which means "information enabling them to conclude." In such a case the rule is to adopt the meaning which best reconciles the divergent texts, having regard to the object and purpose of the treaty, and therefore the French version should be given priority since it covers both cases. . .

OFFICIAL COMMENTARY PROTOCOLS, *supra* note, at 1013-14.

196. *Id.* at 1014.

197. DRAFT, ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ICRC OFFICIAL RECORDS, vol. 1, pt. 3, at 25.

or should reasonably have known in the circumstances at the time."[198] Knowledge is and will continue to be the primary issue in command responsibility cases.[199]

*2. Protocol II*

While Protocol I codifies command responsibility in international armed conflicts, Protocol II, which relates to non-international armed conflict,[200] is completely silent on the issue.[201] The drafters may have recognized the difficulty in determining chains of command in irregular forces. There may have been a reluctance to even recognize the concept of command in insurgent forces because to do so arguably grants some legitimacy to the insurgents and represents a step toward some sort of status for such a group. In terms of the government forces, in an internal armed conflict, criminal culpability decisions may have been intended to be left to the state. The traditional reluctance of the international community to involve itself in internal armed conflict stems from the notion that international law flows from the "fundamental concept of sovereign equality."[202] Unless collective security issues are involved, the United Nations, for example, is prohibited from intervening in matters that are essentially domestic.[203]

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198. *Id.*; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, I/306 vol. III, at 328 (1974-77); OFFICIAL COMMENTARY PROTOCOL, *supra* note 184, at 1013.

199. Eckhardt, *supra* note 45, at 18.

200. Protocol II, *supra* note 28, art. 1(1):

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

201. *Id.*

202. Duncan B. Hollis, *Accountability In Chechnya—Addressing Internal Matters With Legal and Political International Norms*, 36 B.C. L. REV. 793, 794 (1995).

203. U.N. CHARTER art. 2, para. 7.

B. Modern International Criminal Tribunals

Not since the post-World War II war crimes trials did the international community have an opportunity to apply the doctrine of command responsibility at the international level until the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The establishment of these two tribunals gave the United Nations an opportunity to determine what it believed the status of customary international law. There is no question; the intent of the United Nations Security Council (Security Council) was to create, by statute, international criminal tribunals that would apply the customary international law standard of command responsibility.

The Secretary General of the United Nations wanted to ensure that, "[t]he international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[204] As will be seen, *Yamashita* is the rule in both tribunals, even though the Security Council apparently viewed the conflict in the former Yugoslavia as being of an international character and the armed conflict in Rwanda as being purely internal in nature.[205] Although these tribunals and their statutes have no legal binding authority outside their respective geographical locations, the reliance on the *Yamashita* standard in the statutes

204. Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant toParagraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159, 1170 (1993) [hereinafter Report]. The Statute itself is at 32 I.L.M. 1192 (1993), unanimously adopted by the UNSC at its 3217th meeting, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute].

205. Evidence of this can be found in the commentary and the statutes creating the two tribunals themselves. The Tribunal for the former Yugoslavia has jurisdiction to hear cases involving grave breaches of the Geneva Conventions while the Tribunal in Rwanda does not. The Tribunal for the former Yugoslavia has the authority to prosecute individuals for violations of the laws and customs of war, whereas the tribunal in Rwanda has no such authority. Further, the Rwandan Statute permits holding individuals responsible for violations of Common Article 3 of the Geneva Conventions, conflicts not of an international nature, where there is no such language in the Yugoslav statute. This suggests that the Security Council was of the opinion that the conflict in the former Yugoslavia was, during at least part of the conflict, an international armed conflict while the conflict in Rwanda was purely internal. The absence of certain categories of crimes in the Rwanda statute also suggests that the Security Council likely questioned the legality of the tribunals to prosecute individuals for grave breaches and violations of the laws and customs of war in purely civil

of these modern international criminal tribunals is powerful evidence that the standard has risen to the level of customary international law.[206]

*1. The International Criminal Tribunal for the Former Yugoslavia*

As a result of the atrocities in the former Yugoslavia, the United Nations Security Council, relying on Chapter VII of the United Nations Charter as authority, created the International Criminal Tribunal for the Former Yugoslavia.[207] The Security Council felt that there was a nexus between the maintenance of peace in the former Yugoslavia and the restoration of justice.[208] A statute was drafted giving the court both substantive and personal jurisdiction over certain individuals and particular types of criminal activity.[209]

The statute for the tribunal in the former Yugoslavia included a provision for holding commanders criminally responsible for the acts of their subordinates. Article 7(3) of the Statute reads:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[210]

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205. (continued) war like settings. *See generally* Report, *supra* note 203, at 1192. The Statute for the Rwanda Criminal Tribunal is printed in Security Council Resolution 955 Establishing the International Tribunal for Rwanda (1994), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/955 (1994) *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

206. ICJ Statute, *supra* note 181, arts. 38, 59; Landrum, *supra* note 95, at 75; Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaign of the First Commander of the Modern Era Comply with Current Law of War Standards?*, EMORY INT'L L. REV. 459, 484-85 (1995); Lung-Chu Chen, *Panel II, Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, 564 (1995); R. Peter Masterton, *The Persian Gulf War Crimes Trials*, ARMY LAW., June 1991, at 7, 16.

207. UNSC Res. 808 (Feb. 22, 1993); UNSC Res. 827 (May 25, 1993).

208. UNSC Res. 808 (Feb. 22, 1993); UNSC Res. 827 (May 25, 1993).

209. ICTY Statute, *supra* note 203.

210. *Id.* art. 7(3). The difficulty in defining "commander" or "superior" for the purposes of criminal responsibility is exacerbated in conflicts short of war or where paramilitary forces are involved. In the case of *Prosecutor v. Zejnil Delali*, IT-96-21-T (16 Nov. 1998) (*Celebici Case*) (Celebici was the name of the town where the offenses took place),

Codifying the *Yamashita* "knew or should have known" standard in Article 7(3) establishes that the United Nations believed it to be the generally accepted rule for holding commanders responsible for the acts of subordinates during international armed conflicts.[211]

*2. International Criminal Tribunal for Rwanda*

Following its handling of the crises in the former Yugoslavia, the United Nations Security Council next turned its sights on the humanitarian

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210. (continued) the International Criminal Tribunal for the Former Yugoslavia took up the issue of command responsibility in cases involving individuals other than actual military commanders. As pointed out above, Article 7(3) of the Yugoslav Tribunal Statute, establishes liability for "superiors" that "knew or should have known" their "subordinates" were involved in criminal activity and do nothing to stop them. *See* discussion *supra* note 198. The Statute does not limit the doctrine to military commanders, but includes civilian superiors as well.

One of the issues in *Celebici* was who is a "superior." Is superior a *de jure* status or can it be *de facto* based on effective control? The court examined the history of the doctrine of command responsibility and noted that generally it was applied only to actual commanders. *Celebici*, IT-96-21-T, paras. 366, 367, 373, 385, 389 (citing United States v. Wilhelm von Leeb et al., vol. XI, TWC, 462, 513-514 [High Command Case]); United States v. Wilhelm List et al., vol. XI, TWC, 1230, 1286, 1288 [Hostage Case]); United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5012. However, there have been some cases where both civilian leaders and military staff officers were held accountable under a command responsibility standard during the post World War II war crimes trials. *Celebic*, IT-96-21-T, paras. 368-378 (citing Trial of Lieutenant General Akira Muto, Tokyo Trial Official Transcript, 49,820-1); United States v. Oswald Pohl et al., vol. V, TWC 958; United States v. Koki Hirota, Tokyo Trial Official Transcript, 49,791. The Tribunal concluded:

> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having *material ability to prevent and punish the commission of these offenses.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.

*Celebici*, IT-96-21-T, para. 378 (citing ILC Draft Code Report of the International Law Commission on the work of its Draft Code of Crimes against Peace and Security of Mankind, 49th Sess. 6 May-26 July 1996, GAOR, 51st Sess. Supp. No. 10 UN Doc. A/51/10).

211. ICTY Statute, *supra* note 203, art. 7(3).

catastrophe in Rwanda. Although the strife in Rwanda was internal, the United Nations Security Council viewed the genocide and massive human rights violations as a threat to international peace and security.[212] After receiving a request from the Rwandan government, the United Nations Security Council established an international criminal tribunal for the prosecution of persons responsible for "Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible."[213]

Like its Yugoslavian sibling, the Rwandan court was also authorized by the United Nations Security Council to hold individuals liable on a theory of command responsibility. The International Criminal Tribunal for Rwanda (ICTR) Statute reads:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[214]

The treatment of command responsibility was virtually identical in both the ICTY Statute and the ICTR Statute which suggests that the customary international law standard for holding commanders liable in internal armed conflicts is now the same as that for international armed conflicts. Both statutes were created by the United Nations Security Council and both tribunals, the only international tribunals since World War II and the only currently sitting international criminal tribunal, codify the *Yamashita* standard.

### C. The International Criminal Court

Although the International Criminal Court (ICC) is still in the planning stages, the proposed statute sheds further light on the status of the doctrine in the international community. In terms of criminal jurisdiction, the ICC will hear cases involving genocide, crimes against humanity, war

212. ICTR Statute, *supra* note 204.
213. *Id.*
214. *Id.* art. 6(3).

crimes, and the crime of aggression.[215] The crime of aggression has yet to be defined. Within the category of crimes known as war crimes, some violations may only be prosecuted during conflicts of an international nature, while others may be brought against perpetrators in either international or internal armed conflicts.[216] Neither genocide nor crimes against humanity will require the existence of an armed conflict.[217]

The statute includes a provision regarding command and superior responsibility.[218] The ICC statutory scheme for holding commanders and other superiors responsible for the acts of their subordinates appears in Article 28 of the statute. It reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (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 military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (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 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

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215. Rome Statute of the International Criminal Court, as corrected by the proc'es-verbaux of 10 November 1998 and 12 July 1999, UN DOC. A/CONF. 183/2/Add.1 (1998) [hereinafter ICC Statute]. As of 14 March 2000, 95 countries have signed the treaty and 7 nations have ratified it. *See* Rome Statute of the International Criminal Court, *Ratification Status (14 Mar. 2000)* (visited Mar. 14, 2000) <http://www.un.org/law/icc/statute/status.htm>.

216. ICC Statute, *supra* note 214, art. 8.

217. *Id.* arts. 6, 7. For crimes against humanity however, the abuses must be widespread and systematic or ICC jurisdiction will not attach.

218. *Id.* art. 28.

> 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.[219]

Other than the fact that the drafters of the ICC Statute clearly intended to establish the *Yamashita* "knew or should have known' standard of command responsibility, one of the most interesting aspects of the ICC Statute is that it created a separate and arguably stricter standard for holding non-military superiors liable under a theory of superior responsibility.[220] For civilian superiors, the "knew or should have known" standard gives way to the "knew or consciously disregarded information which clearly indicated" test of liability for the criminal acts of subordinates.[221]

## IV. Applying the *Yamashita* Standard in Domestic Courts-Martial

Assuming that Judge Howard applied the correct standard in the case of *United States v. Medina*,[222] the United States should take steps necessary to assimilate or incorporate the international standard into domestic law. This article now examines possible methods available to incorporate the *Yamashita* standard into domestic courts-martial.

The international standard should be incorporated so that it does not appear that our commanders have a greater degree of immunity in military

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219. *Id.* art. 28.

220. *Id*. There is no distinction, in terms of a standard, to be drawn between military commanders and civilian supervisors in the International Criminal Tribunal for the Former Yugoslavia. ICTY Statute, *supra* note 203, art. 7(3).

221. ICTY Statute, *supra* note 203, art. 7(3).

222. United States v. Medina, C.M. 427162 (1971). Because this was a trial court case that resulted in an acquital, it can hardly be seen as binding precedent in United States court-martial practice.

operations than those from the rest of the world. If we are to hold ourselves out as an armed force that supports the rule of law, the internationally accepted "knew or should have known" standard of command responsibility should be followed domestically. But most importantly, the international standard, because it is based on a "knew or should have known" basis rather than the domestic "actual knowledge" test, is more likely to prevent war crimes because it places a greater burden on commanders to pay attention to the acts of subordinates, an affirmative duty to stay informed. Moreover, adopting the *Yamashita* standard will bring the United States courts-martial practice in line with the customary international law of war.

International law, both conventional and customary, is, generally, incorporated into United States domestic law. When the United States was barely a quarter century old, Chief Justice Marshall wrote that United States courts "are bound by the law of nations, which is part of the law of the land."[223] The U.S. Constitution explains:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[224]

Although this constitutional provision, the Supremacy Clause, on its face, appears to only require the incorporation of treaties, agreements signed by the President and consented to by the Senate,[225] into United States law, customary international law is also generally considered to be the law of the land.[226] In 1865, the Attorney General of the United States opined:

> That the law of nations constitutes a part of the laws of the land must be admitted. . . . 'The law of nations, although not specifically adopted by the Constitution, is essentially part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of

223. The Nereide, 13 U.S. (9 Cranch) 388 (1815).

224. U.S. CONST. VI, cl. 2.

225. *Id.* art. II, § 2, cl. 2.

226. *See generally* Lewis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). Professor Henkin asserts:

> indifference.' The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as part of the law of the land. . . .
>
> That the law of nations constitutes a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.[227]

Further support for the proposition that the Framers intended to incorporate customary international law into domestic law can be found in Article I, Section 8, clause 10 of the Constitution itself. In this provision, Congress is given the power "[t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations . . ."[228] Of significance is the Framer's choice of the word "define." Congress was not granted the power to make or declare the law of nations, but only the power to define it.[229] This suggests that the law of nations was already in existence at the time the Constitution was drafted, and that the community of nations, not Congress, creates the law of nations. Moreover,

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226. (continued)

> Much is made also of the fact that, unlike treaties, customary law is not mentioned expressly in the Supremacy Clause or in the constitutional listing of U.S. law in article III. I do not consider that omission significant for our purposes. The Supremacy Clause was addressed to the states, and was designed to assure federal supremacy. The federal law whose binding quality was mentioned in the Supremacy Clause included the Constitution and the laws and treaties made under the authority of the United States—acts taken under the authority of the new United States Government, authority which had to be impressed on the states and state courts. The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established. It was "supreme" over federal as well as state laws, and binding on federal as well as state courts. There was no fear that the states would flout it, and therefore no need to stress its supremacy.

*Id.* at 1565-66.

227. 11 Op. Att'y Gen. 297, 299 (1865) (citation omitted). In this opinion, the Attorney General of the United States opined that a military commission could be used to try persons charged with the offense of having assassinated President Abraham Lincoln.

228. *Id.*; U.S. CONST. art. I, § 8, cl. 10.

229. 11 Op. Att'y Gen. 297, 299 (1865).

giving Congress the power to define the law of nations presupposes an obligation to comply with the law. If there were no obligation to comply with the law, there would be no purpose in trying to define it.

In one of the most significant cases regarding the application of international law in United States courts, the Supreme Court pointed out:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .[230]

This passage makes clear that customary international law is the law of the land; and, at least where there is not a treaty or statute to the contrary, U.S. courts must apply the applicable customary international law.

Although some disagree,[231] as a general proposition, customary international law is generally thought to be domestically inferior to statutory law and will not be enforced in U.S. courts where there is a statute contrary

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230. The Paquete Habana, 175 U.S. 677, 700 (1900). Echoing the language of *The Paquete Habana*, The Restatement of the Foreign Relations Law of the United States includes a section that states:

> (1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States.
> (2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United states and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of federal courts.
> (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1987).

231. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986); Jordan Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy Custom*, 28 VA. J. INT'L L. (1988); Jordan Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990).

to the international rule.[232] Therefore, because there is a statute on point describing the standard to be applied in a domestic court-martial, Article 77 will reign supreme over the customary international standard in a court-martial. This does not, however, change the fact that the "knew or should have known" standard is international law. Should one of our commanders ever be tried before an international tribunal, the *Yamashita* rather than the Medina standard would be applied.[233]

Therefore, if U.S. courts-martial practice is to conform to international law, it appears that Congress must amend Article 77 of the UCMJ to mirror the international standard. Congress would need to expand the culpability of commanders where their subordinates are committing violations of the law. A proposed amendment is provided in the next section of the article.

However, in the event that Congress fails to amend Article 77, there is another option already available in the UCMJ. This option would call for the United States, despite current policy,[234] to consider trying persons for violations of the law of war pursuant to Article 18 of the UCMJ rather than the equivalent punitive articles of the UCMJ.

### A. Amending Article 77 of the UCMJ

The Constitution specifically gives Congress legislative authority "[t]o make Rules for the Government and Regulation of the land and naval forces."[235] Congress did so in the UCMJ. The UCMJ is effectively a reprint of Chapter 47 of Title 10, United State Code (U.S.C.).[236] Article 77 of the UCMJ is codified in the United States Code at 10 U.S.C. § 877. Therefore, like any other statute, an amendment to Article 77 would have to be generated by Congress.

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232. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); Jack M. Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

233. FM 27-10, *supra* note 124, para. 511. This provision warns readers that "[t]he fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." *Id.*

234. FM 27-10, *supra* note 124, para. 507(b). MCM, *supra* note 164, R.C.M. § 307.

235. U.S. CONST. art. 1, § 8, cl. 14.

236. *Compare* 10 U.S.C. §§ 801-946 *with* UCMJ arts. 1-146.

Perhaps the best way to resolve the perceived *Medina/Yamashita* domestic/international disconnect would be for Congress to amend Article 77, UCMJ, to comport with the international standard. Among others, one significant advantage in following the amendment approach would be that the international standard for command responsibility would be clearly codified as domestic law. Such an amendment would allow the United States to continue its preference and policy of trying service members alleged to have committed violations of the law of war in domestic courts by applying the domestic punitive articles of the UCMJ,[237] while providing a basis to prosecute commanders similar to that of an international tribunal. If Article 77 were amended to match *Yamashita*, that standard would trigger culpability when the underlying violations are violations of the UCMJ rather than just the law of war.

Amending Article 77 to reflect the international standard should be relatively simple in terms of selecting the proper verbiage. What could be more difficult, however, is determining whether the expanded standard should apply only in cases where there is an allegation of a violation of the law of war, or whether a change to Article 77 should apply to all violations of the UCMJ. Because, however, there is no specific charge in the UCMJ that specifically covers law of war violations, limiting the coverage of Article 77 to violations of the law of war may in effect cancel the value of such an amendment out. In the event that an expanded basis of command responsibility were added to Article 77 which covered only law of war violations, a specific punitive Article criminalizing law of war violations would also have to be added. Currently, violations of the law of war must either be charged as a violation of a punitive article of the UCMJ, and therefore subject to Article 77, or as a violation of Article 18, which is not subject to Article 77 limitations.

Interestingly, the standard for command responsibility in the ICC Statute[238] is virtually identical to the standard of command responsibility

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237. FM 27-10, *supra* note 124, para. 507(b). It is perhaps beneficial from a policy standpoint for the military to try those that violate the law of war as common criminals rather than war criminals which may trigger a host of international legal requirements based on United States treaty obligations; for example, the Geneva Conventions requirement to prosecute or extradite those that commit Grave Breaches of the Conventions. GWS, *supra* note 124, art. 49; GWSS, *supra* note 124, art. 50; GPW, *supra* note 27, art. 129; GC, *supra* note 124, art. 146. Moreover, asserting that domestic jurisdiction exists to cover alleged violations of the law of war may prevent jurisdiction from being asserted by another country or an international tribunal.

238. ICC Statute, *supra* note 214, art. 28.

proposed by the United States for the 1977 Protocol I to the 1949 Geneva Conventions.[239] Therefore, incorporating something very similar to the ICC Statute's standard into Article 77 is a seemingly reasonable tack to follow. Article 77 should therefore be amended to include a third basis of culpability similar to:

> (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, or effective authority 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 as 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.

Such an amendment should be limited to situations where the commander is deployed overseas on a military operation, however these operations might be characterized. Or, the amendment could include language that would trigger the amendment only during times of war, or international armed conflict, or perhaps during an arguably broader category, "armed conflict."[240]

As a final option, the amendment could be drafted in such a way as to create command responsibility at all times and in all circumstances where

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239. *See supra* notes 196-197 and accompanying text.

240. Such a limitation could be very difficult in terms of defining what an armed conflict would be for the purposes of such a statute. For example, DOD DIR. 5100.77, *supra* note 46, para. 5.1, 5.3 requires, "The heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." CJCS INST. 5801.01A, *supra* note 45, para. 5A states: "The Armed Forces of the United States will comply with the law of war during all armed conflicts however such conflicts are characterized and unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations . . . ."

a commander "knows or should have known" of the criminal activities of subordinates, whether overseas or not, irrespective of the presence of a conflict.

Limiting the expansion of liability to overseas operations, regardless of how the operations are characterized, is the best construct. First, there would be no requirement to define what constitutes an armed conflict, and commanders would not wonder what standard to apply in an overseas operation. Second, the traditional domestic concept of principal would apply in all situations except those where international law may be triggered. Third, holding a commander to a higher level of supervision overseas on an operation balances the international humanitarian concerns with due process protections for the commander. Fourth, and perhaps most importantly, the law of war does not apply in all operations. Many MOOTW do not rise to the level of armed conflict and, therefore, the law of war is not triggered in such operations.

There are, however, some drawbacks in relying on a possible amendment to Article 77 to solve the problem. First, Congress may never amend the statute. The legislative branch may not feel that such a change is important, or even if it does, may elect not to amend the article. There may be some resistance in the Department of Defense to the idea of expanding liability for commanders, especially if such an expansion covers all underlying UCMJ offenses in all circumstances, peacetime in garrison, as well as wartime overseas.

Another option would be to fashion an actual but separate crime for criminal responsibility where the penalties are the same as for the underlying offenses committed by subordinates rather than amending the scope of the definition of principal.[241] This would have an advantage in that, depending on how it was drafted, liability could be limited to specific underlying violations, such as murder and other crimes against persons, in

240. (continued) Although both of these policies require that the law of war be applied in all armed conflicts, neither policy attempts to define "armed conflict." Further, these policies do not create criminal liability in and of themselves. Even Common Article 3 of the Geneva Convention of 1949 specifically deals with armed conflicts of a non-international nature. However, the article does not define the term "armed conflict." Where common crime ends and internal armed conflicts begin is not clear looking solely to Common Article 3. *See* GWS, *supra* note 124, art. 3; GWSS, *supra* note 124, art. 3; GPW, *supra* note 27, art. 3; GC, *supra* note 124, art. 3.

241. Wu & Kang, *supra* note 44, at 288-89.

very limited circumstances such as during international or internal armed conflict or in MOOTW overseas.

B. Charging Violations of the Law of War Pursuant to Article 18 of the UCMJ

Because Article 77 of the UCMJ has not to date been amended, and may never be amended, another alternative should be considered in the interim. By charging soldiers that commit war crimes and their commanders that allow them to do so with violations of the law of war pursuant to Article 18, UCMJ, rather than their parallel violations of the punitive articles of the UCMJ, a court could ignore the limitations of Article 77 altogether. If war crimes were charged for what they are, violations of the law of war, the internationally recognized standard for command responsibility, commonly referred to as the *Yamashita* standard, could be applied in a domestic courts-martial, obviating the need to amend Article 77.

> Article 18 of the UCMJ, Jurisdiction of General Courts-Martial, provides:
>
> > Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. 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. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.[242]

242. UCMJ art. 18 (LEXIS 2000).

The first sentence of Article 18 grants jurisdiction to general courts-martial over individuals "subject to this chapter" for violations made "punishable by this chapter." The chapter referred to in this sentence is Chapter 47 of Title 10 of the United States Code, the UCMJ.[243] Therefore, for the purposes of the first sentence, general courts-martial have jurisdiction over cases involving persons "subject to the code," the UCMJ, who allegedly violate one of the punitive articles of the code. Article 2 of the UCMJ, lists those that are subject to the personal jurisdiction of a general courts-martial.[244] Articles 77 through 134 make up the punitive articles, or offenses, "made punishable by this chapter."[245]

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243. Sections 801 through 946 of Title 10 are reprinted as Articles 1 through 146 of the UCMJ and reprinted in the *Manual for Courts-Martial*.

244. UCMJ art. 2. The issue of personal jurisdiction over civilians si beyond the scope of this paper. This paper focuses on substantive criminal jurisdiction for uniformed commanders. Members of the uniformed armed forces are clearly within the jurisdiction of such a court, as are uniformed mbembers of the enemy captured as prisoners of war. *Id.* With regard to United States civilians who are subject to UCMJ jurisdiction in certain cases, the U.S. Supreme Court has decided a series of cases, based on constitutional grounds, which suggest a civilian cannot be tried by a courts-martial for violations of domestic law during conflicts short of war. *See generally* McElroy v. Guagliardo, Wilson v. Bohlender, 361 U.S. 281 (1960); Grisham v. Hagen, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 345 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

In 1970, the U.S. Court of Military Appeals, now referred to as the Court of Appeals for the Armed Forces, examined the issue of courts-martial jurisdiction over civilians based on the language of the UCMJ itself. United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The court noted: "The concept of military jurisdiction over specified classes of civilians in time of peace and war was continued in the enactment of Article 2(10) and (11) of the Uniform Code of Military Justice." *Id.* The court explained that Article 2(10) jurisdiction over civilians existed according to the statute "in time of war." *Id.* The court concluded that "in time of war" means "a war formally declared by Congress." *Id.* at 365. The court further explained:

> We do not presume to express an opinion on whether Congress may constitutionally provide for court-martial jurisdiction over civilians in time of a declared war when these civilians are accompanying the armed forces in the field. Our holding is limited—for a civilian to be triable by court-martial in "time of war," Article 2(10) means a war formally declared by Congress.

*Id.* This case however does not decide whether a civilian could be tried in a court-martial for violations of the law of war rather than the punitive articles in conflicts short of declared war. The limitations of Article 2(10) only apply when the jurisdiction of the court is based on the punitive articles of the UCMJ. *See generally supra* notes 241, *infra* notes 249-263 accompanying text. When the court-martial jurisdiction is based on the law of war jurisdiction, the jurisdiction of the court is identical to military tribunals that have the authority to

The second sentence of Article 18, however, creates an entirely separate and distinct basis for general court-martial jurisdiction from the punitive articles of the UCMJ. Not only does a general court-martial have the authority to try persons subject to the code for violations of the code, it *also* has the authority to try persons subject to the jurisdiction of a military tribunal for violations of the law of war.[246] The use of the word *also* clearly indicates that the law of war is an altogether separate substantive theory of court-martial jurisdiction. This means that both Article 2, Persons subject to this chapter, UCMJ, and Article 77, Principal, are irrelevant when a court-martial is trying someone for a violation of the law of war because they are limitations related to the punitive articles of the UCMJ. The personal and substantive jurisdiction for law of war violations, according to Article 18, is determined by the law of war.

Rules for Courts-Martial 201(f), Jurisdiction in General, further explains:

(f) Types of courts-martial.
(1) *General courts-martial.*
(A) *Cases under the code.*
(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the code for any offense made punishable under the code . . . .
(B) *Cases under the law of war.*
(i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:
(a) The law or war; or
(b) The law of the territory occupied as an incident of war . . . .[247]

The two bases of jurisdiction are clearly separated out in this provision. Moreover then, if, hypothetically, a court were hearing a case involving alleged violations of the law of war, the international "law of war"

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244. (continued) try civilians. Of course, the constitutionality of trying U.S. citizens at court-martial is another issue altogether. It appears that U.S. citizens may not be tried in courts-martial during peacetime for violations of domestic law. *Averette*, 41 C.M.R. at 363; *Kinsella*, 361 U.S. at 234; *McElroy*, 361 U.S. at 281; *Wilson*, 361 U.S. at 281; *Grisham*, 361 U.S. at 278; *Reid*, 345 U.S. at 1; *Toth*, 350 U.S. at 11.

245. UCMJ art. 77-134.

246. UCMJ art. 18.

247. MCM, *supra* note 164, R.C.M. art. 201(f).

standard, the *Yamashita* "knew or should have known" test should be applied. The domestic *Medina* standard based on Article 77, a punitive article of the UCMJ, the "chapter" referred to in the first sentence of Article 18, could be ignored when jurisdiction is based on the law of war jurisdiction in the second sentence of Article 18.

Further evidence that violations of the law of war are a completely different jurisdictional basis from the punitive articles appears in the discussion to Rule of Court Martial 307(c)(2), Preferral of Charges.[248] The discussion provides a sample specification as to how a violation of the law of war might be drafted pursuant to Article 18. The discussion then goes on to remind the military practitioner that where a "person subject to the code" is to be charged, there is a preference for using a "violation of the code rather than a violation of the law of war."[249]

This option, exercising Article 18 authority, has two significant advantages. The first is that courts-martial have jurisdiction over virtually anyone, including those not members of the U.S. Armed Forces, for violations of the law of war.[250] Second, it is international law that determines what the law of war is and the violations thereof, commanders of soldiers involved in the commission of violations of the law of war would be subject to criminal liability standards established by conventional and customary international law. [251] Applying the law of war in war crimes trials makes more sense than trying to fit the law of war "square peg" into the "round hole" of the domestic criminal regime and punitive articles. Because *Yamashita* is a law of war theory of command responsibility, it should then replace the domestic Article 77, UCMJ, standard when a court is proceeding according to its law of war jurisdiction.

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248. *Id.* R.C.M. 307(c)(2), discussion.

249. *Id.*

250. The issue of trying civilians charged with war crimes in a court-martial or military commission is beyond the scope of this paper. *See generally* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, WAKE FOREST L. REV. 509 (1994); Mark S. Martins, *Comment: National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. 659 (1996) (discussing the issues involved).

251. MCM, *supra* note 164, pt. 1, pmbl., art. 1. "The sources of military jurisdiction include the Constitution and International law. International law includes the law of war." *Id.*

*1. The Law of War Jurisdiction of Military Tribunals and Courts-Martial*

In exercising its authority "[t]o make Rules for the Government and Regulation of the land and naval forces,"[252] and its power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"[253] Congress has given the authority to courts-martial and military commissions, and tribunals, to hear cases alleging violations of the law of war.[254]

By operation of Article 18, UCMJ, a court-martial may try an individual charged with a war crime where jurisdiction over the person would exist before a military tribunal alleging a violation of the law of war. Congress has granted the authority to certain commanders to convene "military commissions, provost courts, and other military tribunals" for violations of "statute" or the "law of war."[255] Military tribunals have been used under many different circumstances to try individuals for alleged violations of the law of war. Civilians, as well as uniformed members of the armed forces, have been forced to answer for violations of the laws of nations before such tribunals.[256] "Indeed it was for this very purpose of trying

252. U.S. CONST. art I, § 8, cl. 14.

253. *Id.* art. I, § 8, cl. 10.

254. UCMJ arts. 18, 21.

255. UCMJ art. 21. Commanders competent to convene general courts-martial are also authorized to convene military commission or tribunals. *In re* Yamashita, 327 U.S. 1, 16 (1946). Article 22, UCMJ, explains who has the authority to convene a general court-martial. Included are the President, the Secretary of Defense, the service secretaries, and commanders generally at the flag level. UCMJ art. 22.

256. *See generally* Everett & Silliman, *supra* note 249. The authors point out several examples of where military tribunals have been used historically. Military tribunals were used extensively following World War II in Germany and Asia. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of Major War Criminals of the European Azis, the London Charter, *supra* note 77, *reprinted in* 41 AM. J. INT'L L. 172, 331-33 n.13 (1947); ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987). Some othercases cited by the authors include: *Yamashita*, 327 U.S. at 1; Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (native born American citizen civilian convicted by a military commission for the murder of her U.S. Air Force husband in occupied Germany); Johnson v. Eisentrager, 339 U.S. 763 (1950); Duncan v. Kahanamoku, 327 U.S. 304, 312-14 (1945); *Ex Parte* Quirin, 317 U.S. 1 (1942) (the trial of German saboteurs, one of whom claimed to be an American citizen).

civilians for war crimes that military commissions first came into use."[257]

The Supreme Court, in *Johnson v. Eisentrager,* a case involving a military commission, pointed out:

The jurisdiction of military authorities during and following hostilities, to punish those guilty of offenses against the laws of war is long-established. This court has characterized as "well established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." And we have held in the *Quirin* and *Yamashita* cases . . . that the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.[258]

In this passage, the Supreme Court supports the notion that the personal jurisdiction of a military commission or tribunal is limited only to the substantive limits of the law of war. "Having violated the law of war in an area where it obviously applies, offenders are subject to trial by military tribunals wherever they may be apprehended."[259]

The focus of this article is holding United States service members facing a court-martial, not civilians, to the international law standard of command responsibility. One thing is clear: courts-martial have jurisdiction over the uniformed members of armed forces.[260] Equally obvious is that general courts-martial also have the authority to hear allegations of violations of the law of war against U.S. service members.[261]

*2. What Constitutes a Violation of the Law of War?*

*The many honorable gentleman who hold commissions in the army of the United States, and have been deputed to conduct war according to the laws of war, would keenly feel it as an insult to their profession of arms for any one to say that they could not or*

257. *Quirin*, 317 U.S. at at 24 (citing WINTHROP, MILITARY LAW AND PRECEDENTS 831-41 (1920)).

258. *Johnson*, 339 U.S. at 786 (quoting *Duncan*, 327 U.S. at 312-14 (citing *Quirin*, 317 U.S. at 1; *Yamashita*, 327 U.S. at 1)).

259. *Quirin*, 317 U.S. at 25.

260. UCMJ art. 2(a)(1).

261. Martins, *supra* note 249, at 40 (citing UCMJ art. 18).

> *would not punish a fellow soldier who was guilty of wanton cruelty to a prisoner or perfidy towards the bearers of a flag of truce*.[262]

If the second jurisdictional prong of Article 18, UCMJ, requires that an accused be charged with a violation of the law of war, then defining the law of war becomes of critical importance. This can be a very arduous task. If international law in general is difficult to discern, the law of war is even more difficult to define with precision.[263]

"The so called law of war is a species of international law analogous to common law."[264] As a former U.S. Attorney General once noted:

> But the laws of war constitute much the greater part of the law of nations. Like other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. No one has ever glanced at the many treatises that have been published in different ages of the world by great, good, and learned men, can fail to know that the laws of war constitute a part of the law of nations, and that those laws have been prescribed with tolerable accuracy.[265]

Nearly eight years later, the Supreme Court reiterated this point in *Yamashita* when it wrote: "Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment."[266] Perhaps the difficulty in defining violations of the law of war explains why Congress has with great specificity

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262. 11 Op. Att'y Gen. 297, 304 (1865).

263. The law of war is oftentimes referred to in recent times as international humanitarian law. The ICRC defined the law of war as:

> [T]he expression of international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

OFFICIAL COMMENTARY PROTOCOLS, *supra* note 186, at xxvii.

264. *Quirin*, 317 U.S. at 12.

265. 11 Op. Att'y Gen. 297, 299-300 (1865).

266. *In re* Yamashita, 327 U.S. 1, 30 (1946).

defined crimes for which military members may be charged within the punitive articles of the UCMJ,[267] but has elected to refrain from providing any specificity as to the definition of the law of war.[268]

The Supreme Court in *Ex parte Quirin* explained that Congress has been intentionally vague in defining offenses triable under the law of war. The Court wrote:

> Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Congress has the choice of crystallizing in permanent from and in minute detail every offense against the law of war, or of adopting the system of common law applied by the military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.[269]

And in *Yamashita*, the Court similarly explained:

> We further note that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law or war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts . . . .[270]

There is therefore no one source that one can turn to determine what the law of war actually is. Like any other body of international law:

> The law of war is derived from two principal sources:

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267. UCMJ arts. 77-134 (LEXIS 2000).

268. *Id.* arts. 18, 21. Congress has the specific constitutional authority to define the law of nations. U.S. CONST. art. I, § 8, cl. 10.

269. *Quirin*, 317 U.S. at at 29 (citations omitted).

270. *Yamashita*, 327 U.S. at 12, 13.

> a. *Lawmaking Treaties (or Conventions),* such as the Hague and Geneva Conventions.
> b. *Custom.* Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. . . .[271]

Further, the *Manual* continues, "Evidence of customary law of war, arising from the general consent of States, may be found in judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States . . . ."[272]

The *Restatement (Third) of the Foreign Relations Law of the United States* explains: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."[273] According to the Department of the Army, under international law, violations that may be tried before a war crimes tribunal include crimes against peace, crimes against humanity, and war crimes.[274] "The term 'war crime' is the technical term for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[275] Grave Breaches of the Geneva Conventions of 1949, as well as certain other types of war crimes are violations of the law of war.[276]

To determine the current status of the punitive provisions of the law of war, considering the jurisdiction of the modern international tribunals is helpful. During the establishment of the International Criminal Tribunal for the former Yugoslavia, the drafters were forced to define the current status of crimes under the law of war. The Secretary General of the United Nations opined that the "part of conventional international humanitarian law which has beyond doubt become part of international customary law" is the law of war contained in the Geneva Conventions for the Protection

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271. FM 27-10, *supra* note 124, para. 4.

272. *Id.* para. 6.

273. RESTATEMENT THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987).

274. FM 27-10, *supra* note 124, para. 498.

275. *Id.* para. 499.

276. *Id.* paras. 502, 504.

277. ICTY Statute, *supra* note 203, commentary, para. 34, 32 I.L.M. at 1170. The Charter referred to by the Secretary General is commonly referred to as the London Charter.

of War Victims of August 12, 1949, the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land annexed Regulations of October 18, 1907, the convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, and the Charter of the International Military Tribunal of August 8, 1945.[277]

The Yugoslav Tribunal Statute includes grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity as the categories of crime for which defendants before the Tribunal may be tried.[278] In Rwanda, because of its internal nature, the United Nations Security Council limited the jurisdiction of the Tribunal to hearing cases alleging genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.[279] Based on these two statutes then, genocide, crimes against humanity, grave breaches of the Geneva Conventions, violations of the law and customs of war, violations of Article 3 Common to the Geneva Conventions, and violations of Protocol II Additional to the Geneva Conventions, are all substantive jurisdictional bases for law of war centered prosecutions. Finally, although it is not yet in force, the ICC Statute provides additional evidence as to what offenses constitute violations

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277. (continued) *See* London Charter, *supra* note 77. The London Charter defined the crimes that would be heard by the Nuremberg Tribunal, which included: Crimes Against Peace; Crimes Against Humanity, which was "murder, extermination, enslavement, deportation, before or after the war, or persecution on political, racial or religious grounds"; and War Crimes, which included "murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *Id.* art. 6, at 286-88. Although not mentioned by the Secretary General, and although the United States is not a party to either treaty, many provisions of the 1977 Additional Protocols I and II to the Geneva Conventions of 1949 have risen to the level of customary international law and therefore part of the law of war. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 62-70, 75-78 (1989).

278. ICTY Statute, *supra* note 203, arts. 2-5. Of course, like the London Charter, each of the categories of crime is further defined in the statute.

279. ICTR Statute, *supra* note 204, arts. 2-4. The Violations of Article 3 common to the Geneva Convention basis for prosecution will be discussed *infra* notes 303-343 and accompanying text.

of the law of war. The ICC will have jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[280]

If the second basis of jurisdiction listed in Article 18 of the UCMJ is to be used, an accused must be charged with a violation of one of the above listed crimes rather than one of the punitive articles of the UCMJ.[281] What about command responsibility? Is it part of the law of war? Is it a theory of culpability, or is it also a separate criminal offense under the law of war as well? The Supreme Court asked the same question in *In re Yamashita:*

> The question then is whether the 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 the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[282]

The defense in *Yamashita* urged the Court to conclude that the government had failed to state an offense in the law of war because it was his subordinates that had committed the atrocities, not the accused.[283] The Court decided that the law of war specifically includes a responsibility for commanders to control their troops. Failure to do so is, according to the Court, an offense under the law of war. In response to the defense argument that command responsibility does not state an offense, the court explained: "But this overlooks the fact that the gist of the charge is an unlawful breach of duty by the petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified."[284]

In reaching its decision, the Court determined:

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280. ICC Statute, *supra* note 214, art. 5. Of significant interest is that war crimes are defined in Article 8. The article further allows for some offenses to be charged in both international and internal armed conflicts, while permitting some offenses to be charged only in international conflicts. *Id.* art. 8.

281. UCMJ art. 18 (LEXIS 2000).

282. *In re* Yamashita, 327 U.S. 1, 14-15 (1946).

283. *Id.*

284. *Id.*

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[285]

After running down a list of the treaties covering the law of war at the time of the decision, the court then concluded:

> These provisions plainly imposed on petitioner, who at the time specified was the military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.[286]

Assuming then that command responsibility is firmly rooted in the law of war, both as a substantive charge and as a theory of culpability, the next question to consider is when does the law of war apply? For a court-martial to have jurisdiction to try a commander pursuant to the law of war for violations committed by his subordinates, the law of war must first be triggered. In other words, if a soldier were to murder a civilian at a time and place where the law of war is not applicable, the soldier could be charged with murder based on the laws of the sovereign that has territorial jurisdiction, or, at a court-martial pursuant to Article 118, UCMJ, Murder, but not with a violation of the law of war.[287]

For the full body of the law of war to apply, there must be an armed conflict of an international character.[288] That is to say, that the warring fac-

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285. *Id.* at 16.

286. *Id.*

287. UCMJ art. 18 (LEXIS 2000).

288. With the exception of Article 3, common to the Geneva Conventions of 1949, the Conventions only apply to "cases of declared war or any any armed conflict

tions must be states. It must be state against state, not non-state against non-state or even non-state against state. Therefore, if the law of war is the basis relied on for court-martial jurisdiction, the jurisdiction may be more limited in the MOOTW context where there is normally no state against state conflict. The extent of the court-martial jurisdiction then may be completely dependent on the nature or character of the operation involved. In MOOTW then, which is often short of armed conflict, the law of war will not generally provide a basis for law of war jurisdiction, rendering Article 18, UCMJ, virtually irrelevant. Thus, the need for an amendment to Article 77, UCMJ is crucial.

In analyzing the status of the law of war domestically, perhaps the most important recent legal development in the United States related to individual criminal responsibility for violations of the law of war is the War Crimes Act of 1996.[289] The statute reads in part:

> (a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or

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288. (concluded) which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Only states can be parties to the Conventions, therefore, armed conflict for the purposes of triggering the Convention means war between states. GWS, *supra* note 124, art. 2. GWS, *supra* note 124, art 2; GPW, *supra* note 27, art. 2; GC, *supra* note 124, art. 2 (Article 2 is Common to the Geneva Conventions of 1949). Hague Convention No. III Relative to the Opening of Hostilities, (Oct. 18, 1907) art. 3, 36 Stat. 2259; T.I.A.S. 538. Article 3 of Hague III says, "Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention." Hague IV, *supra* note 27, art. 2, states, "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Protocol I explains that the treaty applies to situations referred to by Common Article 2 of the Geneva Conventions, and armed conflicts of an internal nature but where they involve fights against racist regimes, colonial domination, or alien occupation. Protocol I, *supra* note 27, art. 1(3), (4). Protocol II applies during armed conflicts short of international armed conflict but where the conflict is more than riots or "isolated and sporadic acts of violence." Typically this involves fights between some sort of insurgent group and a nation's armed forces. Protocol II, *supra* note 28, art. 1. The United States is neither a party to Protocol I nor to Protocol II.

289. 18 U.S.C. § 2441. Although, in terms of international law, Congress got it right when it passed the War Crimes Act of 1996, the House Committee on the Judiciary Report on the legislation incorrectly reported certain jurisdictional aspects of the UCMJ with regard to law of war violations at courts-martial. Under Section II(C) of the report, the Committee accurately lays out the history of military commissions and correctly notes that there has been very little use of military commissions. JUDICIARY COMMITTEE REPORT, *supra*

> imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . . .
> (c) Definition. As used in this section the term "war crime" means 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;
>
> (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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289. (continued) note 155, sec. IIC. It also correctly reports that courts-martial have jurisdiction over military members for violations of the law of war. *Id.* The report is not completely accurate, however, with regard to courts-martial jurisdiction where it states:

> Their limitation, however, is that they apply to very circumscribed groups of people: generally members of the United States armed forces serving with or accompanying armed forces in the field, and enemy prisoners of war. . . . The most famous example of a court-martial for war crimes is probably that of William Calley, who was prosecuted by court-martial for his part in the My Lai massacre during the Vietnam War. . . . A member of the U.S. armed forces who commits a war crime is only subject to court-martial for so long as he or she remains in the military.

*Id.*

The problem with this statement is that it mingles the two separate and distinct jurisdictional bases for court-martial jurisdiction into one standard and misconstrues the relevant jurisdictional facts regarding the *Calley* court-martial. UCMJ art. 18; United States v. Calley, 46 C.M.R. 1131 (C.M.A. 1973). The alleged jurisdictional limitations cited in the report do not apply when a court-martial is trying individuals for law of war violations as opposed to violations of the punitive articles of the UCMJ. While it is true, courts-martial jurisdiction for prosecutions based on violations of the punitive articles is limited by Article 2, and such jurisdiction ceases when a soldier leaves the service, these limitations are not present when an action is based on Article 18, UCMJ, law of war jurisdiction. UCMJ art. 2; *see supra* note 243 and accompanying text.

Lieutenant Calley was not charged with "war crimes"; he was not charged with violating the law of war. Although he was charged with acts that could have been charged as war crimes, such as crimes against humanity, violations of the laws and customs of war, or the Hague Regulations, he was instead charged and convicted for the domestic crimes of premeditated murder, and assault with the intent to commit murder. As the trial court explained: "Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ." *Calley*, 46 C.M.R. at 1138.

> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (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.[290]

The War Crimes Act of 1996 is the best current legal pronouncement of the status of war crimes under U.S. domestic law. However, because it controls federal civilian courts, it is not necessarily controlling in the courts-martial arena.

## V. Conclusion

The most important factor in the reduction of war crimes is an assertive and proactive command structure that aggressively seeks to prevent its subordinates from committing atrocities. Recognizing this fact, the international community seeks to hold commanders personally liable for the crimes committed by subordinates if the commander "knows or should know" that the subordinates are involved in criminal conduct and the commander fails to take action to stop the more junior troops. The doctrine of command responsibility serves as a deterrent to the commission of war crimes by forcing commanders to internalize some of the cost for directing or acquiescing to atrocities committed by their troops. The commensurate anticipated reduction in war crime-like atrocities should also result in greater legitimacy of the operations participated in by U.S. forces.

In the United States domestic court-martial practice however, the international standard of command responsibility has not been applied to violations of the UCMJ. To conform to the international standard, the UCMJ should be amended to create a basis of culpability for commanders equal to the international *Yamashita* standard. Until Congress amends the UCMJ, military practitioners should consider charging those who violate the law of war with violations of the law of war pursuant to Article 18,

290. 18 U.S.C. § 2441.

UCMJ rather than the punitive articles of the UCMJ. The *Yamashita* standard should apply when a court is relying on its law of war jurisdiction because *Yamashita* is the law of war standard.