CRIMINAL LIABILITY FOR THE ACTIONS OF SUBORDINATES—THE DOCTRINE OF COMMAND RESPONSIBILITY AND ITS ANALOGUES IN UNITED STATES LAW

INTRODUCTION

The establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) has brought renewed attention to the prosecution of war crimes and crimes against humanity. The commission of these international crimes on a large scale inevitably involves some form of hierarchical organization; a question thus arises as to which agent in the chain of authority is to be assigned the most blame for the atrocities that ultimately result. One reaction to this multiplicity of potential defendants would be to prosecute those who are furthest up the chain of authority, but such a prosecution must surmount a number of theoretical and doctrinal conundrums, as the superior in question is once removed from the illegal actions of his subordinates. The further away a superior is from the actual "smoking gun," however, the more difficult he is to prosecute. There would be little cause for hesitation if the superior or commander actually ordered or actively supervised the violation in question.[1] But where such evidence is lacking, and the superior may often have simply known about the crimes but failed to prevent them, the customary international law doctrine of command responsibility may nevertheless hold superiors liable for their dereliction with respect to the duties that accompany their position. This Recent Development examines this doctrine. Due to the relative paucity of precedent in this area, however, the doctrine remains somewhat unsettled, and it is not always clear when or how a superior should be responsible for the actions of his subordinates.

Several cases currently before the International Tribunals involve command responsibility issues. The pre-trial proceedings[2] against Radovan Karadzic and Ratko Mladic, respectively the political leader and the military commander of the Bosnian Serbs, are the most recent examples where these issues have been raised. They were indicted, *inter*

1. Commentators are in agreement that a superior bears "direct responsibility for . . . orders which may be unlawful." M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 368 (1992).

2. In the event the prosecutor of the International Criminal Tribunal has been unable to effect personal service of an indictment to a particular defendant, Rule 61 of the procedural rules of the Tribunal allows for the convening of a Trial Chamber and a hearing in open court. The prosecutor may submit the evidence upon which the indictment was initially founded, and also call upon witnesses. The Trial Chamber then determines whether there are reasonable grounds for believing that the accused committed any or all of the crimes charged against him, and may issue an international arrest warrant based on its deliberations. *See Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, Rule 61, U.N. Doc IT/32/Rev.3 (1995).

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alia, for failing to prevent the commission of genocide by subordinates.[3] The Trial Chamber of the Yugoslav Tribunal has recently confirmed the indictments and stated that there are reasonable grounds for believing that Karadzic and Mladic committed the offenses with which they are charged.[4] The Rwanda Tribunal, meanwhile, has issued more than twenty indictments against a variety of civilian and military leaders for their role in organizing the mass killings conducted between April and May 1994.[5] The first trial is scheduled to recommence in January 1997[6] against Jean-Paul Akayesu, who has been accused of overseeing the torture and murder of nearly 2000 Tutsis as the mayor of the village of Taba.[7]

This Recent Development discusses some of the principles and policy considerations behind command responsibility and makes some prescriptive suggestions about what an appropriate doctrine of command responsibility should look like. In attempting to tease out some of the analytical complications of command responsibilities, analogies will be made to the Responsible Corporate Officer (RCO) doctrine and accomplice liability in United States law. The suggestion is neither that United States law has any authority on an International Criminal Tribunal nor even that command responsibility should mirror these aspects of United States criminal law. Rather, the examination of alternative approaches to the same basic problem of holding someone derivatively liable for the actions of another may facilitate a deeper understanding of command responsibility. Part I is a brief descriptive overview of the doctrine of command responsibility doctrine in international law. Part II considers the question of the appropriate mens rea standard for command responsibility. Finally, Part III discusses the nature and scope of the superior's duty to prevent the commission of crimes by subordinates.

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3. Richard J. Goldstone, Indictment, The International Criminal Tribunal for the Former Yugoslavia, The Prosecutor of the Tribunal Against Radovan Karadzic and Ratko Mladic ¶ 32 (24 July 1995), gopher://gopher.igc.apc.org:7030/00/cases/karadzic/950724-karadzic-indictment (last checked Nov. 24, 1996) [hereinafter Indictment].

4. Prosecutor v. Karadzic, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Cases No. IT-95-5-R61, IT-95-18-R61, at 51 (11 July 1996).

5. *See Rwanda. Punishing the Guilty, Maybe*, ECONOMIST, Oct. 12, 1996, at 48.

6. *See* Genocide Trial of Rwandan Postponed, WASH. POST, Nov. 1, 1996, at A34. The Rwanda Tribunal has suffered from numerous difficulties, both administrative and political. *See, e.g.*, Barbara Crossette, *U.N. Investigates Rwanda War Crimes Tribunal Officials*, N.Y. TIMES, Oct. 30, 1996, at A3.

7. *See generally* Louise Tunbridge, *Rwanda War Crimes Tribunal Takes One Halting Step Toward Justice*, CHRISTIAN SCI. MONITOR, Sept. 30, 1996, at 6.

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I. THE DOCTRINE OF COMMAND RESPONSIBILITY

The modern doctrine of command responsibility is one of the products of the developments in the law of armed conflict associated with the Nuremberg and Tokyo trials at the end of World War II.[8] In certain cases, there was no evidence that superior officers had ordered the widespread commission of atrocities by soldiers or other subordinates nor that the superior had shared his subordinates' intent to commit the particular atrocities. There was a need, therefore, for a legal doctrine through which superiors could be held liable for the same substantive crimes as their subordinates.

Perhaps the most frequently cited World War II command responsibility case is the Trial of General Tomoyuki Yamashita.[9] As United States troops advanced on the Philippines during the spring of 1945, the retreating Japanese troops under Yamashita's command committed numerous brutal atrocities against the native Filipino population and American prisoners of war.[10] There was no evidence that General Yamashita had personally ordered the various acts or that he was explicitly aware of what had happened.[11] The prosecution urged the United States military commission to find: first, that Yamashita had a duty to control his troops that he failed to fulfill; and second, that the proper mens rea standard was that of criminal negligence.[12] The defense maintained that Yamashita was so isolated from his troops that it was impossible for him either to have known what was happening or to have exercised effective control.[13]

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8. There is evidence, however, that doctrines similar to command responsibility have existed at the national level for centuries. *See* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320–28 (1995) (noting that policies resembling command responsibility existed as early as 1439). The first significant attempted international application of the doctrine of command responsibility in the 20th century was the indictment of Kaiser Wilhelm II by a commission established by the conference at Versailles. "The ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates . . . ." L.C. Green, *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT'L L. 167, 190 (1989) (quoting COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT, Mar. 19, 1919, 14 AM. J. INT'L L. 95 (1920)).

9. UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948) [hereinafter Yamashita].

10. *See id.* at 4–6.

11. *See id.* at 18–23.

12. *See id.* at 32–33. The prosecution cited numerous general principles of law and United States law. For example, the prosecution justified the existence of guilt by omission from the principle that "under laws generally, any man who, having the control of the operation of a dangerous instrumentality, fails to exercise that degree of care which under the circumstances should be exercised to protect third persons, is responsible for the consequences of his dereliction of duty." *Id.* at 32. With respect to mens rea, the prosecution noted an analogy to manslaughter. *Id.* at 33.

13. *Id.* at 23–29.

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The commission found Yamashita guilty,[14] noting that the crimes were so "extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[15] The commission further held that where "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 . . . ."[16] This decision indicated that a commander could be held responsible if he must have known that subordinates were committing violations, yet failed to take appropriate measures to prevent the violations.[17]

At Nuremberg, the German High Command Trial[18] addressed command responsibility in greater depth. In that trial fourteen German officers were charged with atrocities committed in the European war.[19] Pertinent to this discussion is the case of General Wilhelm von Leeb, who was accused, *inter alia*, of implementing Hitler's Commissar Order and Barbarossa Order, which respectively called for the murder of Russian political officers and the mistreatment of Russian civilians.[20]

14. The United States Supreme Court affirmed this conviction in *In re* Yamashita, 327 U.S. 1 (1946). The Court pointed out that although this decision was without precedent, there were a number of international conventions that supported it, although none of them explicitly enumerated a doctrine of imputed command responsibility. *Id.* at 13–18. These include the Fourth Hague Convention of 1907 and the Tenth Hague Convention.

15. Yamashita, *supra* note 9, at 34.

16. *Id.* at 35.

17. There was a great deal of controversy surrounding the Yamashita case and this interpretation of the command responsibility norms of Yamashita is not uncontested. Defense counsel argued in the case that Yamashita was being unfairly held to a standard of strict liability: "The Accused is charged not with having done something or having failed to do something, but solely having been someone. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command." RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 82 (1982) (quoting *Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki*, AG 000.5 (9-24-45) JA at 86–87 (transcript of the proceedings)). On the habeas corpus petition before the United States Supreme Court, Justice Murphy in his dissent appeared to agree with this assessment: "[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him . . . . [T]he established principles of international law afford not the slightest precedent for such a charge." *Yamashita*, 327 U.S. at 28 (Justice Murphy, dissenting). Major Parks in an influential article examined the Yamashita case and rejected the notion that a strict liability standard had been applied. *See* William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22–38 (1973). Parks also maintained that Justice Murphy's objection was not to the "standard of responsibility," but to the procedure of Yamashita's trial and the factual determinations of the commission. *See id.* at 35–36. Generally speaking, much of the criticism of the Yamashita trial is related to the constitution of the commission that tried General Yamashita and the procedural details of the trial. *See generally* A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949); LAEL, *supra* at 137–42.

18. UNITED NATIONS WAR CRIMES COMMISSION, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948) [hereinafter German High Command Trial].

19. *Id.* at 2–5.

20. *See id.* at 23–32.

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The defense claimed that von Leeb was completely unaware of the atrocities committed and that he had done everything within his power to oppose Hitler's illegal orders short of an outright refusal to obey. The tribunal rejected the prosecution's argument that a superior is "*per se* responsible within the area of his occupation . . . ."[21] Acquitting Von Leeb of some of the charges against him,[22] the tribunal held that "[c]riminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part."[23]

The first international treaty to codify the doctrine of command responsibility is Protocol I Additional to the Geneva Conventions of 1949. Protocol I, art. 86, states that:

> 1. The High Contracting Parties and the Parties to the Conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
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> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information that 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.[24]

Similar language is found in the statutes of the Yugoslav and Rwanda Tribunals. Article 7(3) of the Yugoslav Statute and article 6(3) of Rwanda Statute are substantively identical:

21. *Id.* at 76.

22. *See* Parks, *supra* note 17, at 44–47 (providing summary of verdict in the Von Leeb case).

23. German High Command Trial, *supra* note 18, at 76.

24. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3, 42–43, *reprinted in* 16 I.L.M. 1391, 1428–29 [hereinafter Protocol I]. The ICRC Commentary on the protocols that there is a significant difference between the French and English versions of article 87(2). Specifically, the French version refers to "*des informations leur permettant de conclure*," ("information enabling them to conclude") rather than "information that should have enabled them to conclude." The commentary suggests that the French version may, in fact, be controlling. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1013–14 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC Commentary].

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> The fact that any [such] acts . . . w[ere] 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.[25]

At the International Tribunal for the Former Yugoslavia, the case against Radovan Karadzic and Ratko Mladic makes frequent reference to the doctrine of command responsibility. In the indictment Karadzic is identified as the "president of the Bosnian Serb administration" with powers that included "commanding the army of the Bosnian Serb administration . . . and having the authority to appoint, promote and discharge officers of the army."[26] Mladic is described as "the commander of the army of the Bosnian Serb Administration".[27] The indictment contains sixteen separate charges, related variously to the deportation and detention of Muslims and Bosnian Croats, shelling of civilian gatherings, destruction of holy sites, the sniping campaign in Sarajevo, and the use of U.N. peacekeepers as human shields.[28] The charges include genocide, crimes against humanity, grave breaches of the Geneva Convention, and violations of the laws or customs of war. Every charge alleges command responsibility[29] in addition to direct responsibility, but the charge of genocide relies solely on the failure to take measures to prevent or repress the actions of subordinates:

> RADOVAN KARADZIC and RATKO MLADIC knew or had reason to know that subordinates . . . were about to kill or cause serious physical or mental harm to Bosnian Muslims and Bosnian Croats with the intent to destroy them, in whole or in part, as national, ethnic or religious groups or had done so and failed to take necessary and reasonable measures to prevent such acts or to

25. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/807 (1994), *reprinted in* 32 I.L.M. 1163 (1994) [hereinafter Yugoslavia Statute]; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1604 (1994) [hereinafter Rwanda Statute].

26. Indictment, *supra* note 3, ¶¶ 3–4.

27. *Id.* ¶¶ 8–9.

28. *Id.* ¶¶ 17–48. The charges are set forth in three parts: Counts 1–9 charge genocide, crimes against humanity and crimes that were perpetrated against the civilian population and against places of worship throughout the territory of the Republic of Bosnia and Herzegovina. Counts 10–12 are related to the sniping campaign against civilians in Sarajevo, and counts 13–16 are related to the taking of U.N. peacekeepers as hostages.

29. Command Responsibility norms from article 7(3) are usually cited in conjunction with the more straightforward "planned, ordered, instigated or otherwise aided and abetted" norms of article 7(1). This suggests that the Prosecutor's office of the International Tribunals generally regards the command responsibility principles in article 7(3) as an extension of the "aiding and abetting" principles in article 7(1). *See* Yugoslavia Statute, *supra* note 25, art. 7(1).

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punish the perpetrators thereof.

. . .

By these . . . omissions, [they] committed . . . GENOCIDE.[30]

From this examination of the command responsibility doctrine's origins, codification and most recent application, it is apparent that the doctrine now operates under agreed-upon principles. First, a superior can be liable for an omission—that is, for failing to act when it is his duty to control a subordinate. Second, a superior is only liable if he knew or should have known that the subordinate committed or was about to commit a violation of humanitarian law.

While it is apparent that situations exist where there is a prosecutorial need for the command responsibility doctrine, the deeper question is when (if at all) it is fair or appropriate to hold the superior liable for the crimes of a subordinate. In this respect, there are two conceptual problems that must be addressed by any satisfactory analysis: first, how can the superior be held liable for the acts of another person, especially when he does not share the same mens rea? Second, when can it be fair to hold a superior liable in the absence of any affirmative action on his part? These questions and others will be addressed in the following sections.

II. THE MENS REA OF COMMAND RESPONSIBILITY: ANALOGIZING TO RESPONSIBLE CORPORATE OFFICER DOCTRINE AND ACCOMPLICE LIABILITY

Any adequate account of command responsibility must first confront the question of to what extent the superior should share the moral blameworthiness of the subordinate. This imprecise formulation raises two important doctrinal questions—what the applicable mens rea requirement is, and to which acts or omissions should the mens rea requirement apply. There are at least two different material elements to the superior's offense: the conduct element, which is his culpable omission, and the result element, which is the underlying offense committed by the subordinate. An exhaustive analysis of the structure of the doctrine of command responsibility would have to specify what the appropriate mens rea requirement is as to each of these different elements.

The basic issue that must be addressed here is what mens rea the superior must hold with respect to the unambiguously blameworthy actions of the subordinate in order to be held liable. In formulating an answer to this question, comparisons and analogies will be made to

30. Indictment, *supra* note 3, ¶¶ 32–33.

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Responsible Corporate Officer (RCO) doctrine and accomplice liability under United States law. This analysis does not suggest that United States criminal law has any kind of binding precedential authority on international criminal law. Rather, the aim is to clarify the mens rea requirements under the doctrine of command responsibility and make some prescriptive recommendations based on United States attempts to deal with structurally analogous problems. All three doctrines deal with the problem of *derivative* liability. The guilt of the superior-accomplice is premised on the commission of a crime by a subordinate-principal. This is not to suggest that derivative liability is necessarily vicarious, in the sense of following solely from the relationship between the two parties. This discussion of mens rea tries to determine, by balancing several competing factors, the situations in which the secondary actor is responsible for the principal actor's violation of the law. There is, however, considerable ambiguity as to what constitutes the exact mens rea standard. This problem is further compounded by the fact that it is often difficult to determine which standard a court is applying in holding the secondary actor liable. What does seem to be clear is that there are various doctrinal avenues for holding secondary actors accountable to some degree, and that there is plenty of scope for the exploration of alternative prosecutorial devices.

A. Strict Liability

The threshold determination is whether there is or should be a mens rea requirement at all. Command responsibility has been characterized by some scholars as an illegitimate kind of vicarious or strict liability offense, particularly in the context of the *Yamashita* trial.[31] This kind of imputation of liability would be much less problematic if the underlying offense allegedly committed by the subordinate were itself a strict liability offense. This is the case with respect to prosecutions in the United States under the Food, Drug, and Cosmetic Act (FDCA)[32] that apply RCO doctrine. The RCO doctrine was initially developed by the Supreme Court in the context of strict liability public welfare offenses.[33] The seminal case in this area is *United States v. Dotterweich*,[34] in which the president of a pharmaceutical company was convicted for shipping adulterated and misbranded drugs in interstate commerce.[35]

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31. *See supra* text accompanying note 17.

32. 21 U.S.C. §§ 301–393 (1994).

33. *See, e.g.*, Ronald. M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1056–57 (1992).

34. 320 U.S. 277 (1943).

35. *See id.* at 284.

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Justice Frankfurter explicitly argued that the legislation in question "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[36]

An analogy between command responsibility and strict liability RCO doctrine is, however, necessarily incomplete. There is an argument to be made that if protecting the public from mislabeled drugs is a sufficiently important concern to justify strict liability, the same rationale should apply *a fortiori* to genocide and crimes against humanity.[37] There is a sense in which the defendant in *Dotterweich* had brought about the situation that led to the offense. He voluntarily imposed risks on an unsuspecting public through an enterprise from which he was deriving profits.[38] Arguably, the indicted superior in a command responsibility case has similarly assumed the risks attendant to his position, such that it would be fair to hold him liable for the consequences of his acts and omissions irrespective of mens rea.[39]

There are, however, several considerations that blunt the plausibility of this argument. First, in this area of international criminal law, the underlying purpose is more appropriately characterized as punishment for gross moral wrongdoing, rather than regulation through the establishment of proper incentive structures where the moral quality of the relevant act may be neutral. The doctrine of command responsibility is not primarily directed at regulatory violations that "result in no direct or immediate injury to person or property but merely create the danger or probability of it."[40] The types of concerns that motivate the designation of strict liability crimes seem less applicable here than with respect to RCO doctrine, as the moral disapproval attached to the commission of genocide is of a different nature from that attached to

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36. *Id.* at 281 (citing United States v. Balint, 258 U.S. 250, 252 (1922)).

37. *See infra* text accompanying notes 89–91.

38. *Cf.* United States v. Park, 421 U.S. 658, 672 (1975):

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

39. However, there is a sense in which the superior has not assumed the risks in the same way that a corporate officer has, because he is not involved in an intrinsically profit-making enterprise. The *raison d'être* of organizations such as the army, the civil service and the government is not primarily financial gain, although agents of these organizations do receive compensation for their work. Therefore, if the moral force of the assumption of risk argument is that agents must bear responsibility for activities that they initiate for personal gain, then it is attenuated with respect to command responsibility.

40. Morissette v. United States, 342 U.S. 246, 255–56 (1952).

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a violation of the FDCA. The imposition of a tort-like obligation based on concepts such as assumption of risk and the cheapest cost avoider is therefore unreasonable.[41]

Second, the difference in the degree of punishment being imposed is considerable.[42] Strict liability RCO doctrine has almost exclusively been applied to misdemeanors.[43] Due process concerns suggest that given the severity of the punishment imposed on those eventually found guilty, reliance on strict liability would not only be unfair, but would also needlessly undermine the legitimacy of the prosecutions in the long run. The imposition of strict liability in the criminal context is only appropriate where "penalties commonly are relatively small, and conviction does not [sic] grave damage to an offender's reputation."[44] In fact, the Court in *Dotterweich* premised liability partially on the concept of misdemeanor itself, arguing that "the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty."[45]

Thus, strict liability RCO doctrine is an inapposite analogy to command responsibility. All those liable under strict liability statutes (such as the FDCA) are equally culpable regardless of their mental states, but in the context of crimes with higher mens rea requirements that impose felony-level penalties, different agents may be more or less culpable depending on their mental states.[46] Under strict liability, no agent who is implicated in the causal nexus that results in the crime is more or less blameworthy. The problem is that the underlying offenses involved in command responsibility are not strict liability crimes, so it becomes meaningful to compare the moral blameworthiness of the subordinate and the superior, an issue that is moot with

41. The *Dotterweich* court relied on precisely this kind of reasoning:

> Balancing relative hardships, Congress has preferred to place it upon those who have had at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are totally helpless.

Dotterweich, 320 U.S. at 285.

42. For example, General Yamashita was sentenced to death by hanging. *See* Yamashita, *supra* note 9, at 35. On the other hand, John Park was fined $50 on each of the five counts against him. *See Park*, 421 U.S. at 666. The maximum penalty for a violation of § 331(k) of the FDCA, under which Park was prosecuted, is ordinarily imprisonment for not more than one year and a fine not greater than $1,000. *See* 21 U.S.C. § 333(a) & (b).

43. The doctrine was applied in the context of "certain public health violations that were exclusively misdemeanor offenses." Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 ENVTL. L. REP. 10099 (1992). *But see id.* at 11 (noting that at least one circuit has extended the doctrine beyond misdemeanor offenses, in *United States v. Cattle Packing Co.*, 793 F.2d 232, 240 (10th Cir. 1986)).

44. *Morissette*, 342 U.S. at 256.

45. *Dotterweich*, 320 U.S. at 281 (citation omitted).

46. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 193 (1994), *citing* Alan Zarky, *The Responsible Corporate Officer Doctrine*, 5 TOX. L. REP. 983, 994 (1991).

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regard to strict liability crimes. The international crime of genocide, for example, requires intent.[47] When there is a genuine question as to how blameworthy one agent is with respect to another, and as to what mental states and actions must be attributable to that agent such that he is as guilty as the other, these questions cannot simply be assumed away by imposing strict liability.

B. Reduced Mens Rea Requirement

The foregoing discussion suggests that the imposition of strict liability is to be rejected, but there is still a need to specify the appropriate mens rea requirement. The critical issue here arises from the fact that the liability of the superior is derivative in some sense, even though it is not and should not be "imputed" or "vicarious." What relation should the mens rea of the superior have to the mens rea of the guilty subordinate? If the subordinate commits a crime for which intent is required, does the superior have to share that intent, or is mere knowledge, recklessness, or even negligence enough? A simple and consistent solution to this problem would be to require that the mental state of the superior be the same as that of the subordinate. Liability would then be straightforwardly personal, and "vicarious" only to the extent that the last link in the chain of causation leading to the result element is the subordinate, not the superior. The doctrine of accomplice liability in some United States jurisdictions embodies this approach. Model Penal Code (MPC) §2.06(3) provides that "[a] person is an accomplice of another person in the commission of an offense [if he or she has] . . . the purpose of promoting or facilitating the commission of the offense . . . ." An accomplice is therefore punished to the same degree as a principal if he shares the mens rea of the principal with respect to the result element of the crime.[48] This contrasts with the approach of other legal systems, where complicity may be punished less severely and therefore, to some extent, constitutes a separate and distinct crime.[49]

There are several justifications for this stringent mens rea requirement.[50] One powerful argument is that because the act requirement is

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47. "[G]enocide means . . . acts committed with *intent* to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 280 (emphasis added).

48. *See* MPC § 2.06(1)–(2).

49. *See, e.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 643 (5th ed., 1995). On the issue of whether the actions of the superior or accomplice should constitute a separate crime, see *infra* notes 75–88 and accompanying text.

50. *See, e.g.*, Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2173–74 (1988).

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so attenuated in this case (such that any action that aids or encourages the principal or even a mere omission will suffice)[51] and because the chain of causation between the accomplice-superior and the result element is indirect, there is a particular need to be vigilant and demanding with respect to mens rea. The equal mens rea approach would silence any doubts regarding the equal moral culpability of the accomplice, which is important given that the same punishment is to be imposed on all responsible agents. It is arguable that this approach would sacrifice some of the deterrent effects of the doctrines of accomplice liability and command responsibility, as it imposes an increased burden of proof on the prosecution. The deterrent effect of a lower mens rea standard, however, is not unambiguously greater. A lower mens rea requirement could have a "chilling effect" on blameless and desirable conduct, because a more attenuated connection with subject mental blameworthiness makes the scope of the criminal law less predictable from each individual's point of view.[52] In other words, deterrence is ineffective if agents cannot anticipate being held liable for the crime in question, and what is worse, deterrence may even result in substantial costs being imposed on ordinary activity.

In making a legal policy decision there is, therefore, a tradeoff to be made between unambiguous culpability and deterrence. Subjective mens rea criteria may be more difficult to prove and thus undermine the enforceability of the doctrine, but objective criteria introduce a greater degree of strictness that may be overly demanding.[53] An example of an attempt to effect a compromise between these considerations is the rule that knowing assistance or encouragement will suffice for the accomplice liability.[54] The deterrence objectives of the criminal law are furthered by such a rule, as intent no longer needs to be established.

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51. *See infra* text accompanying notes 89–119.

52. *See* Mueller, *supra* note 50, at 2173.

53. For a brief discussion of precisely this tradeoff with respect to command responsibility, see BASSIOUNI, *supra* note 1, at 368–69 (1992).

54. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 582–84 (2d ed., 1986). An oft-cited case that advances this view is *Backun v. United States*:

> The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun.

112 F.2d 635, 637 (4th Cir. 1940). The leading case to the contrary is *United States v. Peoni*, in which Judge Learned Hand argued that traditional definitions of accomplice liability

> have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, the he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.

100 F.2d 401, 402 (1938).

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At the same time, the requirement of a "guilty mind" is protected, as knowledge that one's behavior facilitates a criminal purpose must still be proved. While the MPC and many jurisdictions in the United States have rejected such a rule as being overbroad,[55] the central idea that a reduced (but not entirely eliminated) mens rea requirement for the defendant who is derivatively liable seems a compelling one. A number of commentators have suggested that where RCO doctrine has been applied to environmental statutes, such as the Resource Conservation and Recovery Act (RCRA),[56] the Clean Water Act (CWA),[57] and the Clean Air Act (CAA),[58] a reduced mens rea requirement is imposed on a superior.[59] The key decision here is *United States v. Johnson & Towers*,[60] in which the Third Circuit Court of Appeals held that the mens rea requirement of knowledge for a violation of the RCRA "may be inferred by the jury as to those individuals who hold the requisite responsible position with the corporate defendant."[61] A reduced mens rea requirement therefore reflects a balance between the competing objectives of the criminal law with respect to derivative liability.

C. *The Multiplicity of Mens Rea Standards*

Command responsibility is in some ways a kind of accomplice liability, and the existing international law of command responsibility seems to support a mens rea requirement analogous to the "knowing facilitation" rule of United States accomplice liability.[62] Protocol I, art. 86(2), and the Yugoslav and Rwanda Statutes seem to culminate in a "knew or had reason to know" standard. But this formulation is not determinative of exactly how objective or subjective is the mens rea standard. Consider the exact language of Protocol I, art.86(2), by way of illustration: the requirement that the defendant "knew, or had information that should have enabled [him] to conclude in the circumstances at the time"[63] may imply one of the following: (1) a secondary actor holding a responsible position has an obligation to monitor the

55. *See* MPC § 2.06(3)(a). *See also* LAFAVE & SCOTT, *supra* note 54, at 582–84.

56. 42 U.S.C. § 6928(d) (1994).

57. 33 U.S.C. §§ 1251–1266 (1994).

58. 42 U.S.C. §§ 7401–7508 (1994).

59. *See, e.g.*, Hustis & Gotanda, *supra* note 46, at 188–89.

60. 741 F.2d 662 (1984). For an opposing interpretation of *Johnson & Towers*, see Hustis & Gotanda, *supra* note 46, at 188–89.

61. 741 F.2d at 669. This language suggests that the burden on the prosecution is reduced, but there is some ambiguity as to how much it has been reduced and to what the mens rea requirement has been reduced. It is at least arguable that allowing the inference of knowledge from the circumstances in which the superior finds himself is a stricter and more objective standard.

62. *See infra* notes 75–88 and accompanying text.

63. Protocol I, *supra* note 24, at 43.

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actions of his subordinates, and will thus be held responsible for the knowledge that a reasonable agent in his position would have possessed; (2) the defendant must be guilty of "willful blindness" such that knowledge should be assumed because "deliberate ignorance and positive knowledge are equally culpable;"[64] (3) knowledge *must* be constructively imputed on him based on his position, because there is no way that he could not have known; or (4) actual knowledge must still be proved, but it *may* be inferred from circumstantial evidence such as the defendant's responsible position. Each of these potential interpretations embodies a different conception of the degree and kind of subjective mental fault required, and the distinctions between them are sometimes far from clear.

The objective standard of (1) is a straightforward negligence standard. Any conscious apprehension of the actions of the primary actor is superfluous as long as a reasonable secondary agent in the defendant's position would have known of them. Of course, there is a further problem of how objectively or subjectively this negligence standard is to be construed, that is, how particularized the relevant definition of the "reasonable agent" should be. The "willful blindness" or "ostrich" standard of (2) arguably makes recklessness (the conscious disregard of a substantial and unjustifiable risk)[65] a sufficient condition for knowledge.[66] This doctrine embodies the belief that the possession of the means to obtain knowledge is equivalent to the possession of such knowledge. While "mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge," a defendant "cannot avoid responsibility by purposefully avoiding learning the truth."[67] The difference between (3) and (4) is a subtle one: the former makes the actual knowledge requirement necessarily superfluous, while the latter makes the inference *directly* contingent on credibility determinations to be made by the finder of fact. The concept of "constructive knowledge" is therefore a kind of fudge. Under (3), a prosecutor would never have to prove that the defendant had any actual knowledge of the atrocities. There are two steps to the proof of knowledge: establishment that certain events occurred and establishment that it

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64. *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976). For a discussion of the "willful blindness" instruction, see KADISH & SCHULHOFER, *supra* note 49, at 223–24. This issue was explicitly raised in the command responsibility context in Yamashita, *supra* note 9, at 94–95 ("Means of knowledge and knowledge itself are, in legal effect, the same thing." (internal quotation marks and citation omitted)).

65. *See* MPC § 2.02(2)(c).

66. *See* KADISH & SCHULHOFER, *supra* note 49, at 223.

67. United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52 n.15 (1st Cir. 1991) (quoting the trial court's "willful blindness" jury instruction in an RCRA prosecution involving RCO doctrine).

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was impossible for the defendant not to have known about them. If an imputation of constructive knowledge is allowed, this second step becomes automatic.

Yet the fact that the exact mens rea requirement is ambiguous is not necessarily troubling. The doctrine may be flexible and expansive enough to encompass a number of different mens rea requirements, as long as each of them are fair and sufficient to establish responsibility. The report of the Commission of Experts on the Former Yugoslavia appears to endorse this kind of expansive conception:

> It is the view of the Commission that the mental element necessary [in the doctrine of command responsibility] is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offenses charged and acquiesced therein.[68]

The problem with this "kitchen sink" formulation, however, is that in practice the mens rea requirement would tend to be reduced to the lowest common denominator. There would never be a need for the prosecution to prove actual knowledge, when the establishment of the relevant indices for constructive knowledge would provide a necessary and automatic presumption of knowledge.[69] Therefore, the doctrine's actual knowledge requirement is redundant and may be bypassed at the whim of the prosecutors and judges.

The foregoing discussion may suggest that the specification of a single, rigorously defined, unambiguous mens rea requirement may be the best approach; but this would be a fruitless exercise as it is almost impossible to discern the precise holdings of derivative liability cases with respect to mens rea in practice. The controversy surrounding the

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68. *United Nations, Security Council, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council*, U.N. Doc. S/1994/674, at 17 (1994).

69. Some of the relevant factors in making a constructive knowledge finding include:

a. The number of illegal acts;
b. The type of illegal acts;
c. The scope of illegal acts;
d. The time during which the illegal acts occurred;
e. The number and type of troops involved;
f. The logistics involved, if any;
g. The geographical location of the acts;
h. The widespread occurrence of the acts;
i. The tactical tempo of operations;
j. The modus operandi of similar illegal acts; [. . .]
l. The location of the commander at the time.

Id. Of course, this list is far from exhaustive.

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proper interpretation of the Yamashita case is but one instance of a more systematic and general problem.[70] The four different formulations of the knowledge requirement are distinct in theory, but the holdings of cases are rarely precise enough to permit only one interpretation and commentators formulate the relevant doctrines differently.[71] For example, the distinction between using circumstantial evidence to establish actual knowledge, and relying on the doctrines of willful blindness and constructive knowledge, is extremely difficult to make out in practice. Willful blindness has been described as a kind of recklessness, but the requirement that the defendant purposefully contrived to avoid learning of the illegal conduct may distinguish it from ordinary recklessness.[72] On the other hand, the "ostrich" instruction may simply make "a negligent failure to make inquiry sufficient to establish 'knowledge.'"[73] It is extremely difficult to make *ex ante* specifications of the exact parameters of the doctrine, as each case is decided largely on its particulars and does not tend to produce generalizable conclusions at this level of doctrinal detail.

> It would be too treacherous to define or even to indicate by way of illustration the class of [agents who] stand in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering [an illegal action] would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers."[74]

D. Foreseeability and the Idea of a Separate Crime

Therefore, while the basic rule is that the derivative criminal liability of command responsibility demands only the reduced mens rea of "knew or has reason to know," the interpretation of this standard, both in theory and practice, is extremely problematic. One solution would be to impose the uniformly stringent requirement of intent on the conduct of both the primary and secondary agents. This position, however, lacks sufficient deterrent effect. Two alternative approaches to the problem will be suggested in this section: the importation of the

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70. *See supra* note 17.

71. There is an ongoing debate with respect to the proper interpretation of environmental cases that invoke RCO doctrine. *Compare* Barry M. Hartman & Charles De Monaco, *The Present Use of Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ENVTL. L. REP. 10,145 (1993) *with* Onsdorff & Mesnard, *supra* note 43, at 10,099.

72. *See* KADISH & SCHULHOFER, *supra* note 49, at 223–24.

73. *Id.* at 223.

74. *Dotterweich*, 320 U.S. at 285 (citation omitted) (alterations added).

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"natural and probable consequence" rule of accomplice liability into command responsibility,[75] and the establishment of a separate crime for the neglect of a superior's duty of vigilance.

The "natural and probable consequence" rule probably constitutes the majority view in the United States, as the courts have abandoned the view that accomplice liability must be premised on shared criminal intent.[76] In *People v. Luparello*,[77] the court found that the victim's death was a "natural and probable consequence" of the defendant's aiding and abetting, and convicted the defendant of first-degree murder although he did not know that the perpetrators intended to kill the victim, and had merely wanted to extract information from him.[78] The court argued that the defendant "errs when he concludes the perpetrator and accomplice must 'share' an identical intent to be found criminally responsible for the same crime. Technically, only the perpetrator can (and must) manifest the mens rea of the crime committed. Accomplice liability is premised on a different or, more appropriately, an equivalent mens rea."[79] Therefore, to some extent, "[h]is liability is vicarious . . . . [H]e is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets . . . ."[80] The "natural and probable consequence" rule is therefore akin to the felony-murder and misdemeanor-manslaughter rules of United States criminal law, in that criminal liability is extended beyond the scope of the defendant's subjective mens rea.[81] The justification behind this move is that if the secondary actor possesses intent with respect to the lesser offense encompassed by his aiding and abetting, his mens rea is transferable to all the foreseeable consequences, as he has assumed the risk by voluntarily engaging in the initial criminal enterprise.[82]

A similar doctrinal device may be employed for the prosecution of guilty superiors. If a superior does not fulfill his duty to prevent or punish the illegal conduct of his subordinates, he is certainly guilty of a breach of Protocol I.[83] But the superior's guilt for the underlying substantive crime that is committed by the subordinate is premised on

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75. *See* LAFAVE & SCOTT, *supra* note 54, at 590.

76. *See* KADISH & SCHULHOFER, *supra* note 49, at 657–58.

77. 187 Cal.App.3d 410 (1987).

78. *Id.* at 445.

79. *Id.* at 439.

80. *Id.* at 441 (alterations added) (quoting People v. Croy, 710 P.2d 392).

81. *See* LAFAVE & SCOTT, *supra* note 54, at 591.

82. There is opposition to this rule as being "inconsistent with more fundamental principles of our system of criminal law," because it makes agents guilty of crimes for which they did not have the requisite mental state. LAFAVE & SCOTT, *supra* note 54, at 590. The rule, however, is no more (and probably less) objectionable than the felony-murder rule. *See id.* at 591.

83. *See infra* text accompanying notes 75–119 for a discussion of the circumstances under which this duty attaches and the scope of this duty.

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customary international law. Therefore, the establishment of a superior's guilt is a two-step process. Green endorses this view of the structure of the command responsibility doctrine:

> [T]he only treaty liability to fall upon the commander is to do everything of which he is capable to prevent or punish breaches by his subordinates. Should he fail to do so, he would undoubtedly be guilty of a breach of the Protocol, but this does not mean that he would carry any penal liability in respect of the actual breach committed. Liability for this would presumably still stem from customary law.[84]

Therefore, a superior could be found liable as follows: he could be guilty of creating an unreasonable risk of illegal conduct by his subordinates, and possess full intent (or at the very least, unambiguous actual knowledge) as to this culpable omission. Then, command responsibility could operate as a kind of analogue to the "necessary and foreseeable consequence" doctrine, holding the superior liable for all the predictable consequences of his omission. There would still be questions of detail as to how objectively or subjectively the foreseeability test should be applied; a strong case could be made for applying the test from a relatively subjective viewpoint because we are dealing with the transfer of a culpable mental state from one crime to another.[85]

This approach would avoid the problem of deciphering what kind of mens rea the secondary actor must have with respect to the actions of the primary actor. The focus would be on the conduct of the secondary actor alone and liability would be extended by a kind of negligence extrapolation that construes the superior's violation of the Protocol as a separate crime of reckless or negligent omission. The designation of command responsibility as a separate crime could sidestep entirely the problems associated with derivative liability. The crime would be conceived more along the lines of direct command responsibility for the issuance of illegal orders, which is fairly uncontroversial in international criminal law.[86] This solution to the problem would be analogous to the designation of criminal facilitation as a separate crime with a lesser penalty in New York,[87] wherein a person who renders aid to another believing that it is "probable" that he intends to commit a crime is guilty of a misdemeanor as a primary agent.[88] In cases where proof of extensive mens rea is problematic, "secondary" agents could be prosecuted for the criminal neglect of a

84. Green, *Command Responsibility in International Humanitarian Law, supra* note 8, at 342.
85. *See* LAFAVE & SCOTT, *supra* note 54, at 590.
86. BASSIOUNI, *supra* note 1, at 368, 370.
87. *See* N.Y. PENAL LAW § 115. *See also* KADISH & SCHULHOFER, *supra* note 49, at 654.
88. *See* N.Y. PENAL LAW § 115.

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superior's duty, a crime for which they would be unambiguously guilty as principals. The lowering of the degree and scope of the mens rea requirement would have to be balanced against a reduction in the punishment imposed, but this approach would nevertheless provide prosecutors with a useful tool, as mens rea is often the most contentious issue in a command responsibility case.

III. THE CONTOURS OF THE SUPERIOR'S DUTY

Liability through the command responsibility doctrine depends on an affirmative duty on the part of the superior, whereby an omission may constitute the *actus reus* of the crime. As the liability of the superior is derivative of the subordinates' illegal act, a duty must exist if there is to be a legally relevant connection between the subordinate's act, the superior's omission, and the eventual imposition of liability. The superior's duty thus defines the contours of the command responsibility doctrine—to whom and in what situations command responsibility should apply.

It may seem *prima facie* unfair to hold someone *criminally* liable for failing to prevent another from committing an illegal act. A mitigating consideration, however, is that because military and civilian leaders are in a position of great public trust and responsibility, it is not unreasonable to impose some kind of legal duty on those who are in position to prevent atrocities.[89] In this regard it should be remembered that military and civilian leaders voluntarily assume their positions and may therefore be presumed to have knowingly acquiesced to the duties under international law that are a corollary of such positions. From a regulatory standpoint, it is often a military or civil leader who is the only, or at least best-situated, person to prevent the commission of atrocities—society's last line of defense.[90] Under this analysis, the burden of the duty must be placed where it will make a difference.[91]

The chief practical benefit of a duty placed on superiors to prevent the commission of atrocities is its deterrence function. The underlying

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89. This can also be stated in terms of the public's right to responsible leadership. Such justification is echoed in United States responsible corporate officer cases: "[T]he public has a right to expect [foresight and vigilance] of those who voluntarily assume positions of authority in business enterprises whose services and well-being affect the health and well-being of the public that supports them." United States v. Park, 421 U.S. 658, 672 (1975).

90. *Cf. id.* at 671 ("[A leader, even] if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.") (quoting Morissette v. United States, 342 U.S. 246, 255 (1952)).

91. This second justification was drawn upon by the United States Military Commission in their conviction of General Yamashita: "Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history." Yamashita, *supra* note 9, at 35.

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purpose of the duty should be to promote vigilance on the part of leaders in preventing the occurrence of violations of humanitarian law. It is grossly unfair, however, to punish leaders for violations committed by their subordinates that they cannot be said to have been in a position to prevent or repress.[92] Therefore, an equitable and reasonable duty is one that effectively deters negligent behavior and promotes vigilance yet avoids being unnecessarily onerous.[93] The following analysis thus asks two general questions: to whom and under what circumstances should the duty attach; and what measures should the duty require—or put differently, what should constitute an omission?

A. Civilian Leaders

Most considerations of the superior's duty under international humanitarian law have been in the military context. There seems, however, to be no justification for the proposition that a similar duty does not also apply to civilian leaders.[94] The codification of command responsibility in Protocol I, art. 86, for instance, refers to "superiors" without limiting the definition to military commanders.[95] Furthermore, the ICRC Commentary to the Protocol makes it clear that "superior" refers to civilian as well as military leaders:

> [I]t should not be concluded that this provision [Article 86] only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of Commanders). The concept of a superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[96]

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92. As one scholar has noted:

> To place an unreasonably high standard of responsibility on commanders . . . is not likely to be accepted nor followed. Commanders cannot be held to be insurers of the proper conduct of their subordinates and no concept of imputed criminal responsibility for the conduct of another can deter anyone who is unable to foresee the unlawful conduct which the law requires him to prevent.

M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 368 (1992).

93. This notion of a balance between demanding standards and the public interest is also addressed in the RCO context by the United States Supreme Court: "The requirements of foresight and vigilance imposed on responsible corporate agents are . . . perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority . . . ." *Park*, 421 U.S. at 672.

94. *See generally* W.J. Fenrick, *Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 110–25 (1995) ("The customary international law doctrine of command responsibility . . . is applicable to military commanders, paramilitary commanders, political leaders, and other leaders who exercise a high degree of control over subordinates." *Id.* at 123.)

95. *See* Protocol I, *supra* note 24, art. 86.

96. ICRC Commentary, *supra* note 24, at 1013. The ICRC Commentary also makes use of a

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On theoretical grounds there does not seem to be any compelling reason why promoting responsible behavior by civilian leaders is a less important concern than with respect to military leaders.[97] This said, however, there may be instances where the different nature of a civilian hierarchy makes attachment of the duty or what the duty requires different than in an equivalent military context. What constitutes a fair duty in the civilian context is less obvious because of the lack of precedent and treaty codification, in contrast to the duties of military commanders.[98] For this reason, it is useful to consider more generally the parameters of the duties of superiors with respect to breaches of humanitarian law.

B. Control as the Basis of Duty

The fact that one is part of a chain of command should not automatically give rise to a duty to prevent or repress violations by a subordinate.[99] It is clear from the exercise of the doctrine in the military context that a duty is appropriate only when the superior has control over the subordinate.[100] Where the superior has no control over subordinate, placing a duty upon him to regulate the subordinate's actions would serve no effective deterrent function.

What exactly control means, or should mean, for the purposes of command responsibility is far from unambiguous. The first condition of a finding of control is formal authority over the subordinate, based on the command hierarchy. By this it is meant that the superior must have had, by virtue of his position, the authority to control the actions of the subordinates. Where the superior does not have authority over the subordinates in question, it is clearly both unfair and of no deterrent value to impose a duty on that superior to ensure compliance with the law. That the absence or presence of such formal authority is viewed as crucial can be seen in decisions such as The German High Command Trial.[101] In that case, the Tribunal rejected the notion that a commander is per se responsible for crimes committed within the area of

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civilian example (the Tokyo Case) where it discusses the nature of the obligation to prevent or repress breaches. *See id.* at 1015. For a discussion of the example used by the ICRC, *see infra* text accompanying notes 110–112.

97. The Tokyo Tribunal, for example, recognized very strict duties on the part of government leaders with respect to prisoners of war. *See* 20 THE TOKYO WAR CRIMES TRIAL 48,442–47 (R. John Pritchard et al. eds., 1981).

98. *See, e.g.*, Protocol I, *supra* note 24 at art. 87 (limiting the duty of commanders to "members of the armed forces under their command and other persons under their control").

99. *See, e.g.*, The German High Command Trial, *supra* note 18, at 76 ("Criminality does not attach to every individual in this chain of command from that fact alone.").

100. *See, e.g.*, Yamashita, *supra* note 9, at 35 ("[C]learly, assignment to command military troops is accompanied by broad authority and heavy responsibility.").

101. *See supra* text accompanying notes 18–23.

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his command, but saw it necessary to take into account "orders, regulations, and the laws of his superiors limiting his authority."[102] In particular, the Tribunal declined to apply the norms of Yamashita because the defendants' authority over the troops in question was usurped by the state and superior military authority.[103] From this consideration it can be seen that formal authority should be considered a necessary, but not sufficient, requirement of imposing a duty. The same kind of logic is central to finding a duty in the RCO context; a duty is imposed by upon those who "had, by reason of [their] position . . . responsibility and authority either to prevent . . . or promptly to correct the violation complained of."[104]

C. The Issue of Delegation of Authority

A recurring difficult question with respect to "control" is the responsibility of high-ranking military or civilian leaders who have delegated a great deal of their personal authority to trusted intermediates. In one sense, control seems to imply close personal supervision of the subordinate as opposed to formal hierarchical authority. To hold the president of a country liable for an atrocity committed by the lowliest subordinate seems unfair, because in all likelihood the president had no real control over the subordinate.[105] Imposing liability by virtue of position alone, where the superior did not actually have control, serves no deterrent or moral function.[106] This theory of control was cited with approval[107] by the German High Command Tribunal:

> The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-ex-

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102. The German High Command Trial, *supra* note 18, at 76.

103. "[T]he authority of Yamashita in the field of operations did not appear to have been restricted by either his military superiors or the State, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities." *Id.*

104. United States v. Park, 421 U.S. 658, 673–74 (1975).

105. This example was borrowed from The German High Command Trial: "The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him . . . ." The German High Command Trial, *supra* note 18, at 76.

106. In this regard consider the following RCO jury instruction:

> Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.

United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 50 (1st Cir. 1991). The question of whether the president has "direct responsibility" would presumably be difficult if the president was in a position of "general authority."

107. *But see* Parks, *supra* note 17, at 42 ("The Tribunal did not see fit, under ordinary

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> tensive . . . . [A high commander] has the right to assume that details entrusted to responsible subordinates will be legally executed.[108]

This would seem to be strongest in cases where the structure of the hierarchy was such that the superior actually had surrendered all authority and control over certain subordinates.[109]

While it is possible that the lack of direct personal control over a subordinate should mean no duty should attach at all, under a different approach a duty is always recognized along with formal authority; but the requirements of the duty may differ significantly. Thus the high-ranking superior's duty may be less related to day-to-day supervision and more related to providing for general measures or policies designed to prevent violations of humanitarian law. The Tokyo Tribunal adopted this approach in its description of the duty of government leaders with respect to prisoners of war:

> In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of government to prisoners . . . those persons which constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.[110]

Notably, the duty required "systemic" measures as opposed to direct supervision:

> It is the duty of [government leaders] to secure proper treatment of prisoners and prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. [They] fail in this duty if . . .
> (1) They fail to establish such a system,
> (2) If having established such a system, they fail to secure its continued and efficient working.[111]

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circumstances, to vary the traditional military adage that while a commander may delegate authority, he may never delegate responsibility.").

108. The German High Command Trial, *supra* note 18, at 76. This approach, roughly, was unsuccessfully argued by the defense counsel in Yamashita, who asserted that in General Yamashita's situation, the best he could do was "trust his subordinates to carry out his orders." Yamashita, *supra* note 9, at 27.

109. This seems especially unlikely to be the case in the military context.

110. 20 THE TOKYO WAR CRIMES TRIAL, *supra* note 97, at 48,443.

111. *Id.* at 48,444.

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This approach acknowledges that it would be unfair to oblige a high-ranking superior personally to prevent breaches when authority has been delegated, yet maintains deterrence by holding the high-ranking superior to ultimate responsibility over the functioning of the system as a whole. This approach in effect states that delegation to a subordinate is no excuse when reliance upon the subordinate is unreasonable.[112]

D. The Issue of Scope

Implicit in the notion of a duty to regulate subordinates over which a superior has control is the scope of the relationship as a limitation of this duty.[113] Scope should limit the conduct that the superior has a duty to control to that which is a part of their relationship.[114] This issue seems rarely to have been a consideration in the military context—likely because the scope of a soldier's "employment" encompasses most of his conduct and so there is little he might do that would be beyond the scope of the superior's duty. Scope, however, can be seen as pressing in the civilian context. For example, subordinates might have participated in a mass extermination or mass rape campaign that was unrelated to their employment. Under such circumstances it would seem unfair to say that the civilian leader had control over the subordinate, and thus it would serve little function and be unfair to impose a duty on the superior to control such employees.

E. The Limitation of Feasibility

Even where a superior has a duty to control a subordinate because of his position, circumstances may render the superior powerless to prevent breach. Where it is there is nothing the superior could have done to prevent a breach it seems onerous and of little deterrent function to impose liability.

112. This is the approach taken to delegation of authority under the RCO doctrine in United States v. Park, 421 U.S. 658, 678 (1975) (evidence presented rebutted respondent's defense that he had justifiably relied on subordinates).

113. "Scope of employment" as a limitation on liability is a familiar feature of the common-law *respondeat superior* doctrine. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). This similarity, however, should not be overstated. The tort doctrine of *respondeat superior* creates civil liability solely on the basis of the relationship between the superior and subordinate; while in this consideration the scope of the relationship is merely a factor in the finding of a duty.

114. One definition of the scope of employment is as follows: "To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." RESTATEMENT (SECOND) OF AGENCY § 229(1) (1958). The definitions of "master" and "servant" are also linked to notions of control. *See id.* § 2.

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In the Yamashita case, for example, while the defense did not deny that atrocities were committed by Japanese troops who were formally under General Yamashita's command, the defense argued that Yamashita could not possibly have exercised effective control over these troops in the circumstances.[115] The Commission noted the factual assertions of the defense, but apparently did not believe them, concluding that in fact Yamashita had "failed to provide effective control of [his] troops as was required by the circumstances."[116]

The feasibility issue is more explicitly considered in the context of the responsible corporate officer doctrine in United States criminal law. A feature of the doctrine is the "objective impossibility defense," which allows a defendant to make an affirmative claim that he was "'powerless' to prevent or correct a violation."[117] According to the Court, while the duty "does not require that which is objectively impossible" it does require "the highest standard of foresight and vigilance."[118] In practice the requirement of "vigilance and foresight" has sharply limited what can be considered objectively impossible. This is because even if preventing a breach turns out to be impossible at a certain time, there is often something the defendant could have done, had he exercised the "highest standard" of foresight, to prepare for or avoid the "impossible" situation.[119] By this logic, if a defendant is powerless to prevent a breach by subordinates but is himself responsible for allowing such a situation to develop he ought still to be held to have failed in his duty. For example, a commander might claim that in a given situation his troops were impossible to control, and that thus there were no feasible measures that could of prevented their breaches. If this were foreseeable, however, then a claim of non-feasibility should not be allowed

115. *See* Yamashita, *supra* note 9, at 23–29. The defense maintained that the troops "had passed into his command only one month before, at a time when he was 150 miles away—troops which he had never seen, trained, or inspected, whose commanding officers he could not change or designate, and over whose actions he had only the most nominal control." *Id.* at 24. In addition, the defense noted that General Yamashita's proper command function was hampered by "enemy action, disabling and destruction of supply lines, lines of communication and motor equipment, the lack of gas and oil for the operation of the vehicles . . ." and as a consequence it was "impossibl[e] to keep properly advised of the administrative functioning of his command." *Id.* at 29.

116. *Id.* at 35.

117. United States v. Park, 421 U.S. 658, 673 (1975) (quoting United States v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964)).

118. *Id.*

119. *See, e.g.*, United States v. Y. Hata & Co., 535 F.2d 508 (1976) (Putting a wire cage on a food warehouse to prevent contamination by birds was an obvious measure that should have been implemented earlier; therefore claim that materials had not arrived yet were insufficient for an objective impossibility instruction.); United States v. Starr, 535 F.2d 512 (1976) (That plowing a field would cause mice to flee and infest a food warehouse was foreseeable, and therefore contamination was not objectively impossible to prevent.).

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and the commander must be considered to have failed in his duty to control his subordinates.

IV. CONCLUSION

Therefore, the two pivotal issues with respect to command responsibility are the ambiguities that accompany the actual application of the "knew or should have known" mens rea standard and the difficulty of ascertaining exactly when a superior had formal and effective control. These theoretical and doctrinal puzzles can only be meaningfully addressed with respect to specific fact situations, although the kinds of general considerations discussed above must certainly be kept in mind. An important consideration is that the customary and treaty-based international law on the subject as it now stands leaves prosecutors, both present and future, with considerable flexibility and leaves room for the use of a number of variations on the basic prosecutorial theory of a command responsibility case. The cases currently pending with the Tribunals for the Former Yugoslavia and Rwanda will hopefully provide a useful addition to the minuscule body of case law available. But one way of dealing with this problem is to look for useful and illuminating analogies wherever a legal system has had to deal with structurally analogous problems.

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