Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes

ANDREW D MITCHELL*

1. Introduction

The War Crimes Trials held immediately after the conclusion of World War II marked a clear recognition by the international community that all members of the chain of command who participate or acquiesce in war crimes must bear individual criminal responsibility. A critical aspect of this individual criminal responsibility is the doctrine of criminal culpability under international law, known as command responsibility. Under this doctrine, superiors can incur criminal liability for war crimes committed by their subordinates if they fail to exercise sufficient control over those subordinates.[1] As criminal responsibility under this doctrine arises from a failure to control or punish subordinates, it is a form of complicity through omission.[2]

The purpose of the doctrine of command responsibility is to encourage leaders to control their subordinates and to establish objective standards of diligence.[3] Its significance is that large-scale atrocities during wartime typically involve an organisational hierarchy based on a chain of command. While the superior may be physically distanced from the illegal act of the subordinate, the superior may nevertheless be the most morally culpable for the ultimate atrocities that are committed. This notion becomes more controversial where the superior did not order that criminal acts be committed or even prohibited them from being committed. Despite its significance, the jurisprudence surrounding command responsibility is limited, and important aspects of the doctrine remain unsettled.

This article begins by examining the structure and foundations of the doctrine of command responsibility including its rationale, early origins, and how it is distinguished from the defence of superior orders. The article goes on to consider

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* LLB (Hons) (Melb), BCom (Hons) (Melb); Lieutenant, Australian Army Legal Corps, Army Reserve; Solicitor, Arthur Robinson & Hedderwicks; Post-graduate student, University of Melbourne; LLM Candidate, Harvard University. I would like to thank Professor Timothy McCormack, Ms Tania Voon and the two anonymous referees for their helpful comments on an earlier draft of this article. The views expressed herein, and any errors or omissions, are my own.

1 Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (1997) at 119–120.

2 M Cherif Bassiouni & Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) at 345 and 348–350.

3 Mark Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War' (1998) 86 *Cal LR* 939 at 1040–1041; Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89 at 93.

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the doctrine's formal acceptance in post-World War II military trials, its subsequent decline in the 1970s and 1980s (due in part to extraneous political circumstances) and its most recent formulation. An examination of this kind highlights the impact of various wartime atrocities on the content of the doctrine, and its gradual acceptance as a part of international humanitarian law.[4] The article goes on to propose a more appropriate formulation of the doctrine for the future, having regard to the factual circumstances in which it has been used and the policy reasons behind it. A reassessment of this kind is worthwhile particularly because of the significant gaps in time between decisions on the doctrine, the application of the doctrine in different ways in different jurisdictions (often without identifying the precise formulation being used) and the absence of any reasoned consolidation of the doctrine into a balanced and workable rule.

2. *Foundations of the Doctrine*[5]

A. Rationale

Military and civilian superiors occupy positions of 'great public trust and responsibility'.[6] Recognising their authority and power, international law has imposed responsibility on them to prevent and punish atrocities. This responsibility is seen as appropriate for two reasons. First, superiors are often either the only or the best-suited individuals to prevent the commission of war crimes,[7] most obviously because the obligation on subordinates to obey their superiors is a 'basic tenet of military life'.[8] Secondly, superiors have voluntarily accepted their position, and 'may therefore be presumed to have knowingly acquiesced to the duties under international law that are a corollary of such positions.'[9]

However, the difficulty in this area of law is in striking a balance between the need to promote 'vigilance on the part of leaders in preventing the occurrence of violations of humanitarian law' and recognition of the fact that leaders may not always be able to do so.[10] If the law of command responsibility becomes too onerous, this might unfairly prejudice superiors or prevent officers from accepting military commissions and promotions.[11]

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4 Christopher Crowe, 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution' (1994) 29 *University of Richmond Law Review* 191 at 193.

5 See Weston Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra' (1985) 107 *Military Law Review* 71 at 77–84.

6 Timothy Wu & Yong-Sung King, 'Criminal Liability for the Actions of Subordinates — The Doctrine of Command Responsibility and its Analogues in United States Law' (1997) 38 *Harvard International Law Journal* 272 at 290.

7 Ibid.

8 Curt Hessler, 'Command Responsibility for War Crimes' (1973) 82 *Yale LJ* 1274 at 1292–1293.

9 Above n6.

10 Above n6 at 291.

11 Above n8 at 1294.

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B. Early Recognition

While command responsibility only became an established doctrine of international law after the end of World War II, elements of it appeared much earlier. For example, Charles VII of France issued an ordinance in 1439 declaring captains and lieutenants responsible for offences committed by members of their company.[12] A similar principle was contained in the Articles of War issued by Gustavus Adolphus of Sweden in 1621.[13]

More recently, in 1902, Brigadier-General Jacob Smith was convicted by court martial in connection with United States operations in the Philippines. The Brigadier-General had given orders to 'kill and burn; the more you kill and burn the better you will please me ... [T]he interior of Samar must be made a howling wilderness'.[14] In confirming the conviction, President Roosevelt stated:

> 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 positions perculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.[15]

The first multilateral recognition of command responsibility was under the Hague Conventions (IV)[16] and (X)[17] in 1907.[18] The Conventions impose affirmative duties on superior officers in relation to the conduct of their

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12 Louis Guillaume de Vilevault & Louis de Brèquigny (eds), *Ordonnances des Rois de France de la Troisième Race* (1782) cited in Leslie Green, 'Command Responsibility in International Humanitarian Law' (1995) 5 *Transnational Law & Contemporary Problems* 321: 'The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, *the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.*'

13 William Winthrop, *Military Law and Precedents* (2nd ed, 1920) at 910: 'No Colonell or Capitaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges.'

14 John Bassett Moore, *A Digest of International Law* (1906) at 187 cited in Green, above n12 at 326.

15 Id at 188 cited in Green, above n12 at 327.

16 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907: <http://www.tufts.edu/departments/fletcher/multi/texts/BH036.txt>.

17 Hague Convention (X) Adaptation to Maritime War of the Principles of the Geneva Convention, 18 October 1907: <http://www.tufts.edu/departments/fletcher/multi/texts/BH042.txt>.

18 Ann Ching, 'Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25 *North Carolina Journal of International Law and Commercial Regulation* 167 at 177; Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573 at 573.

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subordinates,[19] including a duty to ensure 'public order and safety' in areas occupied by military forces.[20] Article 3 of Convention (IV) provides for a belligerent State violating these regulations to be responsible for all acts committed by its armed forces and liable to pay compensation.[21]

C. *Major Elements*

Although the doctrine of command responsibility can be expressed in a number of ways, the most common formulation requires the establishment of three elements: (i) a superior-subordinate relationship; (ii) knowledge by the superior of crimes committed by the subordinate; and (iii) failure by the superior to halt, prevent or punish the subordinate.[22] These are discussed in turn below.

(i) Superior-Subordinate Relationship

Determining whether a superior-subordinate relationship exists sufficient to found command responsibility involves an assessment of the related concepts of authority and control. Identifying the existence of authority — the essence of command[23] — is perhaps the most obvious way of establishing a superior-subordinate relationship.[24] 'Authority' in this context means the legitimate right to demand that another person do or refrain from doing something,[25] and may arise at any stage along the chain of command.

A superior-subordinate relationship may also be established by actual control, being the ability to exercise restraint, power or direction over another person.[26] This may involve direct control, which is exercised by making decisions or choosing from available options given particular constraints. A lieutenant exercises direct control over the soldiers in his unit when he chooses the tactical approach to attack an enemy bunker. It may also involve indirect control, which is exercised by setting constraints on how direct control can be exercised. For example, a civilian administrator may decide not to assist an occupying commander with re-establishing communication systems in that administrator's territory, thereby constraining that commander's options to contact his soldiers and receive reports.

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19 Bantekas, ibid.

20 Above n16, Article 43 requires commanders occupying enemy territory to: 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

21 Above n16, Art 3, 36 Stat 2277, 2290, 205 Consol TS 277, 284 cited in Green, above n12 at 325.

22 *Prosecutor v Delalic*, Judgment No IT-96-21-T ICTY International Criminal Tribunal for Yugoslavia ('ICTY') (16 November 1998) (hereinafter *Celebici*) at para 346: <http://www.un.org/icty/celebici/trialc2/jugement/main.htm>; Vetter, above n3 at 97.

23 Joint Chiefs of Staff, *The Official Dictionary of Military Terms* (1988) at 76; *Macquarie Dictionary* (2nd ed, 1991) at 361.

24 Bantekas, above n18 at 578.

25 Ted Honderich (ed), *The Oxford Companion to Philosophy* (1995) at 68.

26 *Macquarie Dictionary* (2nd ed, 1991) at 390.

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A workable formulation of the doctrine of command responsibility should define the types of control that may be recognised, and the degree of authority and/or control required in order to establish a superior-subordinate relationship.

(ii) Knowledge

The *mens rea* of command responsibility is the superior's knowledge of the subordinate's crime. In determining an appropriate formulation of command responsibility, it is necessary to identify two factors:

(a) The type of knowledge the commander must have. This can be seen as a spectrum correlating with the degree of responsibility imposed on the commander. At one extreme, imposing a very high degree of responsibility, liability could result even where the commander has no knowledge at all of the crime. This can be termed the strict liability approach, which is discussed further below. Moving further along the spectrum, liability could result only where the commander has constructive knowledge of the crime. In other words, the commander was aware of it. Finally, at the opposite extreme, the commander might escape liability unless he or she has actual knowledge of the crime.

(b) The specificity of subordinate crime required to be known by the commander. This factor will only be relevant if some knowledge requirement is imposed. Thus, under a strict liability approach, the question of the specificity of knowledge does not arise. However, assuming that some knowledge is required (whether constructive or actual), it is then necessary to determine whether the knowledge must correctly identify the specific crime that has occurred or is likely to occur, the general nature of the crime, or simply the existence of a crime. This can be an important factor in determining 'the stringency of a command responsibility rule'.[27]

As can be seen from this brief introductory discussion, each of these two factors is capable of a number of variants. However, international and domestic tribunals considering command responsibility have typically not identified which of these variants is appropriate.

(iii) Failure to Act[28]

An important feature of the doctrine of command responsibility is that it is a crime of complicity based on accomplice liability.[29] The International Criminal Tribunal for Yugoslavia (ICTY) Prosecutor has suggested that this is a form of 'accomplice liability peculiar to international law'.[30] Complicity refers to the involvement of a

27 Above n8 at 1280.

28 See, for example, Article 7(3) of the International Criminal Tribunal for Yugoslavia ('ICTY') Statute: <http://www.un.org/icty/basic/statut/statute.htm>; Article 6(3) of the International Criminal Tribunal for Rwanda (ICTR) Statute: <http://www.ictr.org>; Article 86(2) of Geneva Protocol 1: <http://www.tufts.edu/departments/fletcher/multi/texts/BH707.txt>; Article 28 of the International Criminal Court statute: <http://www.iccnow.org> and above n8 at 1284–1287.

29 Bantekas, above n18 at 577.

30 Ibid.

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person (the accomplice) in an offence committed by another (the principal), such that the accomplice is criminally liable for the offence.[31] Typically, the accomplice is held equally liable with the principal. In Australia, words such as aid, abet, counsel or procure are often used to describe the manner in which the accomplice wilfully contributed to the commission of the crime.[32] These words convey the general concept of the participation of the accomplice.[33]

Australian criminal law recognises that omission can be a form of complicity.[34] For example, it has been held that a husband's absence of dissent at his wife's proposal to commit suicide amounted to participation in the crime of suicide.[35] This illustrates that the doctrine of criminal complicity does not depend upon causation.[36] Causation would impose the additional requirement that the accomplice instigate the crime — mere participation or failure to act would be insufficient to give rise to liability.[37]

In the context of command responsibility, liability arises from a failure to act because superiors have a duty to prevent, punish and control the commission of crimes by their subordinates. Prevention may extend as far as considering the subordinate's age, training and similar elements in assessing the likelihood of the subordinate committing crimes.[38] This duty may be regarded as an absolute duty, requiring that where a crime is or is about to be committed by a subordinate, it is either prevented or the perpetrator is punished for it. Alternatively, it may be regarded as a less onerous duty, being a duty to take measures associated with a particular normative standard, such as measures which a 'reasonable' or 'diligent' commander would take.

D. Defence of Superior Orders[39]

It is important to distinguish the doctrine of command responsibility from the defence of superior orders.[40] Individual soldiers accused of war crimes may rely on the defence of superior orders to avoid liability on the basis that 'they acted out of obligation and were merely "following orders" from their military superiors'.[41]

31 Peter Nygh & Peter Butt (gen eds), *Australian Legal Dictionary* (1997) at 234; David Walker, *The Oxford Companion to Law* (1980) at 262–263.

32 See, for example, *Crimes Act 1958* (Vic) ss323, 324.

33 *Giorgianni v R* (1985) 156 CLR 473.

34 Curt Hessler, 'Command Responsibility for War Crimes' (1973) 82 *Yale LJ* 1274.

35 *R v Russell* [1933] VLR 59.

36 Peter Gillies, *Criminal Law* (3rd ed, 1993) at 157.

37 Ibid.

38 Bantekas, above n18 at 591.

39 Above n2 at 374–409; Yoram Dinstein, 'The Distinctions Between War Crimes and Crimes Against Peace' in Yoram Dinstein & Mala Tabory (eds), *War Crimes in International Law* (1996) at 12–14; Green, above n12 at 293–295; Howard Levie, *Terrorism in War — The Law of War Crimes* (1993) at 512–521.

40 See Anthony D'Amato, 'Superior Orders vs. Command Responsibility' (1986) 80 *American Journal of International Law* 604 at 604; Howard Levie, 'Some Comments on Professor D'Amato's "Paradox"' (1986) 80 *American Journal of International Law* 608 at 608–609. See also Jeanne Bakker, 'The Defense of Obedience to Superior Orders: The Mens Rea Requirement' (1989) 17 *American Journal of Criminal Law* 55 at 56 cited in Vetter, above n3 at 101.

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This defence was a common feature of military regulations in States before World War II,[42] and was strongly influenced by the writings of the international law jurist Oppenheim.[43] It is based on the need to maintain discipline in the hierarchical military command structure. Military discipline is founded on complete obedience to superior orders, and it was considered impractical to expect a member of the armed services in conditions of war 'to weigh scrupulously the legal merits of the orders received'.[44]

However, the defence of superior orders is 'necessarily counterproductive to effective deterrence and prevention'[45] of war crimes, because it unduly restricts the base of responsibility to superiors.[46] The same cannot be said of the doctrine of command responsibility, which involves an extension of liability to both subordinate and superior in appropriate circumstances. The defence of superior orders has therefore had limited application since World War II. The Nuremberg principles state: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him'.[47] Article 33 of the Rome Statute of the International Criminal Court[48] recognises a limited version of the defence.[49] However, in most circumstances where the defence of superior orders is recognised, it may only be pleaded in mitigation of penalty.[50]

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41 H Victor Condé, *A Handbook of International Human Rights Terminology* (1999) at 146.

42 Above n2 at 375.

43 Lassa Oppenheim, *International Law* (1906) at 264–265.

44 United States Department of Army, *Field Manual* (1956) §509.

45 Above n2 at 375.

46 Id at 377.

47 Vetter, above n3 at 101 citing Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, in Report of the International Law Commission Covering Its Second Session, 5 June–29 July 1950, 5 UN GAOR Supp. (No. 12), UN Doc. A/1316, at 11–14 (1950), reprinted in Dietrich Schindler & Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd ed, 1988) 923 at 924. See also *USA v Ohledorf* (the *Einsatzgruppen* Case) (Nuremberg, 1948) 4 NMT 471 at 470: 'The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery.'

48 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9*: <http://www.un.org/law/icc/statute/romefra.htm>.

49 Article 33 provides:

1.The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a)The person was under a legal obligation to obey orders of the Government or the superior in question;

(b)The person did not know that the order was unlawful; and

(c)The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

50 See, for example, Article II, §4(b) of Control Council Law No. 10; above n41 at 146.

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3. *Development of the Doctrine during World War II*

The modern doctrine of command responsibility is closely associated with the war crimes trials that occurred at the end of World War II. Although the statutes of the Nuremberg and Tokyo military tribunals did not provide for command responsibility,[51] these tribunals developed the doctrine in response to the perceived need to hold superiors liable for crimes committed by their subordinates.[52] This section considers three of the most important World War II cases of command responsibility.

A. *General Yamashita*[53]

General Tomoyuki Yamashita was the Japanese Supreme Commander in the Philippines and commanded the 14th Area Army from 9 October 1944.[54] The United States invasion of Leyte began eleven days after Yamashita's appointment.[55] By December 1944, Yamashita had decided to abandon Leyte and concentrate on the defence of Luzon. He divided his army into three groups, leaving two of his subordinates in charge of two groups, and made each group responsible for the defence of a particular region of Luzon.[56] In the period that followed, numerous and large-scale atrocities were committed, including the rape of 500 civilians in Manila[57] and the killing of 25,000 civilians in Batangas Province.[58] Yamashita surrendered on 3 September 1945 and was subsequently charged before a military commission of five US Army officers (Commission) with having 'unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes'.[59]

Although there was no precedent for imposing command responsibility in these circumstances, the prosecution argued that a number of international conventions supported its imposition.[60] These included the Hague Conventions (IV)[61] and (X)[62] in 1907, the Geneva Red Cross Convention of 1929[63] and the

51 Vetter, above n3 at 105.

52 Above n6 at 274.

53 4 *Law Reports of Trials of War Criminals, Trial of General Tomoyuki Yamashita*, United Nations War Crimes Commission, (1948) 1. See generally Richard Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982) for a detailed historical and descriptive account of the Yamashita trial. See also Ching, above n18 at 180–182; Bantekas, above n18 at 585; Green, above n12 at 335–337; above n5 at 87–98.

54 Robert Smith, *The War in the Pacific: Triumph in the Philippines.*

55 Lael, above n53 at 6.

56 The 'Shobu' group, commanded by Yamashita, was responsible for the northern sector. The 'Shimbu' group, commanded by Lieutenant General Yokoyama, was responsible for the sector that included Manila. The 'Kembu' group, commanded by Major General Tsukada, was responsible for the Bataan Peninsula.

57 Lael, above n53 at 140.

58 *Re Yamashita*, 327 US 1, 14 (1945). This area was under the control of Colonel Fujishige, who reported to Lieutenant General Yokoyama.

59 4 *Law Reports of Trials of War Criminals* (1948) 3–4. Yamashita was charged on 25 September 1945.

60 Above n4 at 196.

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Convention on Treatment of Prisoners of War of 1929.[64] The prosecution sought to establish that the widespread and enormous nature of the atrocities was such that Yamashita must have known, or had made a deliberate effort not to know, that they were occurring.[65] The prosecution also relied on captured documents containing orders from senior officers to argue that the atrocities were secretly ordered by Yamashita.[66]

The defence did not generally dispute the occurrence of the atrocities. However, it argued that Yamashita's ignorance of the atrocities resulted from the short period Yamashita had to establish command before the American attack, the inferior nature of the troops under his command,[67] the constant attacks by American forces,[68] the collapse of communications[69] and the related necessity for decentralised command to preserve his forces.[70] The defence also maintained that Yamashita expressly ordered his troops not to commit war crimes. Yamashita stated:

> [c]ertain testimony has been given that I ordered the massacre of all the Filipinos, and I wish to say that I absolutely did not order this, nor did I receive the order to do this from any superior authority, nor did I ever permit such a thing, or if I had known of it would I have condoned such a thing.[71]

On 7 December 1945, the Commission found Yamashita guilty and sentenced him to hang,[72] stating:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless,

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61 Above n16 at Annex Arts 1 and 43.

62 Above n17 at Article 19.

63 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field (Red Cross Convention) 27 July 1929, Article 26: <http://www.austlii.edu.au/au/other/dfat/treaty_list/mulist/1929.html>.

64 Convention on Treatment of Prisoners of War, 27 July 1929, Article 63: <http://www.austlii.edu.au/au/other/dfat/treaties/1931/7.html>.

65 Lael, above n53 at 86.

66 Above n4 at 199: 'The diary of one officer read: '[R]eceived orders, on the mopping up of guerrillas ... it seems that all men are to be killed ... Our object is to wound and kill the men [and] ... to kill women who run away.' Captured orders from Colonel Masatochi Fujishige expressed that Japanese soldiers were to 'kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the emperor, even women and children'; (footnotes omitted).

67 A Frank Reel, *The Case of General Yamashita* (1949) at 149.

68 Id at 148.

69 Id at 148–149.

70 Lael, above n53 at 12–14; above n4 at 201–202.

71 Above n67 at 149–150. Lieutenant General Skizuo Yokoyama testified that Yamashita told him 'to be fair in all [his] dealings with Filipino people': above n4 at 202.

72 Lael, above n53 at 95.

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> where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[73]

The Commission accepted the prosecution claim that the extensive and widespread nature of the crimes indicated that Yamashita either deliberately permitted them to occur or secretly ordered them.[74] The Commission was particularly critical of Yamashita's failure to inspect his troops.[75] Although the exact knowledge standard applied by the Commission was unclear,[76] its decision appeared to recognise command responsibility for the actions of subordinates beyond the superior's de facto control because the superior is under a duty to supervise and control.[77] This duty cannot be discharged by delegating authority and consequently operating in ignorance of the actions of subordinates.[78]

Yamashita applied to the United States Supreme Court for a writ of habeas corpus, which was denied.[79] The Court considered that the purpose of international humanitarian law, being 'to protect civilian populations and prisoners of war from brutality',[80] is defeated when commanders are permitted to neglect their duties to protect civilians.[81] Accordingly, it is necessary to impose some responsibility on commanders for their subordinates.[82] Yamashita was executed on 23 February 1946.[83]

B. High Command Case[84]

The *High Command Case* involved the trial of a number of senior German officers,[85] and was held in Nuremberg by the United States occupying authority in 1948.[86] The officers were charged in relation to the killing of civilians, communists and commandos by their subordinates.[87] One of the accused was

73 4 *Law Reports of the Trials of War Criminals* (1948) 1 at 35.

74 Id at 34.

75 Id at 35.

76 Michael Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review* 155 at 181; above n4 at 207.

77 Bantekas, above n18 at 585.

78 Above n11 at 1283.

79 Above n58 at 15, although see the strong dissents by Justices Murphy and Rutledge 26–81; Lael, above n53 at 94.

80 Above n58 at 15.

81 Above n4 at 205.

82 Above n58 at 15.

83 4 *Law Reports of Trials of War Criminals* (1948) 75.

84 12 *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission (1948) 1. See above n4 at 209–215; Green, above n12 at 333–335.

85 Introduction to the *High Command Case*, 10 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.* 10 (1949) 3.

86 *United States v Von Leeb* (*High Command* Case), *11 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10* (1951) 462.

87 Bantekas, above n18 at 574.

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General Field Marshal Wilhelm von Leeb, commander of Army Group North, one of the three German armies on the Eastern front between June 1941 and January 1942. Von Leeb was charged, inter alia, for implementing two illegal orders that resulted in grave war crimes being committed.

The first order was the Barbarossa Order,[88] issued on 13 May 1941 by General Field Marshal Wilhelm Keitel.[89] Amongst its clauses were provisions allowing the German army to 'liquidate' franc-tireurs,[90] and making prosecutions of war crimes committed by the German army against enemy civilians optional. It resulted in the execution of a number of civilians and franc-tireurs.[91] The second order was the Commissar Order,[92] which was issued by Hitler on 6 June 1941, requiring the German army on the Eastern front to execute captured Soviet political officers. Between one and several hundred commissars were executed pursuant to this order,[93] which was in the following terms:

> In the fight against Bolshevism it is *not* to be expected that the enemy will act in accordance with the principles of Humanity or of the International Law. In particular, a vindictive, cruel and inhuman treatment of our prisoners must be expected on the part of *the political Commissars of all types*, as they are the actual leaders of the resistance. The troops must realize:
> (1) In this fight, leniency and consideration of International Law are out of place in dealing with these elements. They constitute a danger for their own safety and the swift pacification of the conquered territories.

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88 12 *Law Reports of Trials of War Criminals* (1949) 29–34..

89 'Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops'. An extract from the decree is reproduced below:

I. *Treatment of Crimes committed by Enemy Civilians*
   (1) Until further order the military courts and the courts-martial will not be competent for *crimes committed by enemy civilians.*
   (2) *Franc-tireurs* will be liquidated ruthlessly by the troops in combat or while fleeing.
   (3) *Also all other attacks by enemy civilians against the Armed Forces*, its members and auxiliaries will be suppressed on the spot by the troops with the most rigorous methods until the assailants are finished. ...

II. *Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries.*
   (1) With *regards to offences committed against enemy civilians by members of the Wehrmacht* or by its auxiliaries, *prosecution is not obligatory*, even where the deed is at the same time a military crime or misdemeanour.
   (2) When *judging such offences*, it will be taken into consideration in any type of procedure that the collapse of Germany in 1918, the subsequent sufferings of the German people and the fight against National Socialism which cost the blood of innumerable followers of the movement were caused primarily by bolshevist influence and that no German has forgotten this fact. [Emphasis in original.]

12 *Law Reports of Trials of War Criminals* (1949) 30.

90 'The franc-tireurs were guerilla fighters that did not fall within the Hague Convention of 1907's definition of legal combatants. Thus, Hitler felt no obligation to treat them according to the mandates of the convention': above n4 at fn 87 citing Matthew Cooper, *The Nazi War Against Soviet Partisans 1941–44* (1979) at 47–48.

91 Omer Bartov, *The Eastern Front 1941–45: German Troops and the Barbarisation of War* (1986) at 119–128.

92 12 *Law Reports of Trials of War Criminals* (1949) 23–29.

93 Eugene Davison, *The Trial of the Germans* (1966) at 567.

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> (2) The originators of barbarous Asiatic methods of warfare are the political commissars. They must therefore be dealt with most severely, *at once* and summarily.
> Therefore, they are to be liquidated at once when taken in combat or offering resistance.[94]

In his defence, von Leeb argued that apart from a single atrocity at Kowno, he was unaware of the atrocities that had been committed.[95] Further, as soon as he became aware of what had occurred at Kowno, he claimed to have acted immediately to prevent its recurrence.[96] Von Leeb also argued that the two illegal orders were contrary to orders he gave his troops. In relation to the Commissar Order, he argued that he repeatedly attempted to have Hitler change the order, and issued his own Maintenance of Discipline order to limit its effect.[97]

The Nuremberg Military Tribunal found von Leeb not guilty of implementing the Commissar Order, since von Leeb's headquarters had no authority over the Order and only acted in an administrative capacity.[98] The Tribunal stated: 'He did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it'.[99] However, the Tribunal found von Leeb guilty of implementing the Barbarossa Order by passing it down the chain of command and 'having set this instrument in motion, he must assume a measure of responsibility for its illegal application'.[100] Moving away from the Yamashita standard, the Tribunal held that culpability would attach only where there is a 'personal dereliction of duties':[101]

> The authority ... of a commander and his criminal responsibility are related but by no means coextensive ... Criminality 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. 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.[102]

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94 12 *Law Reports of Trials of War Criminals* (1949) 24 [emphasis in original].

95 Above n4 at 213; above n7 at 276.

96 Above n4 at 213.

97 Ibid.

98 William Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* at 45. In relation to the distinction between implementation and transmittal, the Tribunal stated: 'Transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the command without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command': *XI Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No 10* (1948) 510.

99 *XI Trials*, id at 557–558.

100 Id at 560–561.

101 Vetter, above n3 at 106.

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The Tribunal considered that a commander would not be responsible for offences committed by subordinates unless the offences were patently criminal and the commander knew of, participated or acquiesced in, or criminally neglected to interfere in their commission.[103] It would not be enough for the prosecution to establish the existence of material that would have permitted the commander to conclude that offences were being committed or that would have put the commander on notice that investigations were required.[104] In this case, the Tribunal found that von Leeb must either have had knowledge of the Barbarossa Order or acquiesced in its implementation, and sentenced von Leeb to three years imprisonment.[105]

C. *Hostage Case*[106]

In the *Hostage Case* in 1949,[107] senior German officers were charged by the Nuremberg Military Tribunal for, inter alia, wanton destruction not justified by military necessity, and the murder and deportation of thousands of Greek, Yugoslav, Norwegian and Albanian civilians.[108] One of the officers, General Field Marshal Wilhelm List, commanded the German Army during its invasion and occupation of the Balkan peninsula. Soon after its occupation began, the German Army experienced a number of attacks by civilian insurgents. On 16 September 1941, Hitler ordered List to suppress these insurgents and suggested that between 50 and 100 prisoners be executed for each German soldier killed by the guerrillas.[109] List forwarded this directive to his subordinates.[110]

In October 1941, List issued his own order ('the Hostage Order'):

102 Above n86 at 543–544; *12 Law Reports*, above n84 at 73–74.

103 *12 Law Reports* at 77 cited in above n4 at 214; Smidt, above n76 at 182–183.

104 Above n4 at 214.

105 The short term of imprisonment may be explained by the mitigating factors recognised by the Tribunal: 'He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.' *XI Trials*, above n98 at 563.

106 Above n5 at 109–113.

107 8 *Law Reports of Trials of War Criminals, United States v List*, 34 (1949); 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10*, 757 (1950).

108 *XI Trials*, above n98 at 759; Bantekas, above n18 at 574.

109 'Measures taken up to now to counteract this general communist insurgent movement have proven themselves to be inadequate. The Fuhrer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples can quiet be restored. The following directives are to be applied here: (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German solider.': cited in above n4 at fn 107, citing 8 *Law Reports of Trials of War Criminals* (1949) at 39.

110 Above n5 at 111.

> The male population of the territories to be mopped up of bandits is to be handled according to the following point of view:
> Men who take part in combat are to be judged by court martial.
> Men in the insurgent territories who were not encountered in battle, are to be examined and —
> If a former participation in combat can be proven of them, to be judged by court martial.
> If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the Wehrmacht in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the Wehrmacht is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot.[111]

Although a considerable number of civilians were killed pursuant to the Hostage Order, List claimed ignorance of the crimes. However, evidence was produced indicating that he was aware of a number of civilian murders that took place pursuant to the Hostage Order. The Tribunal noted that a superior is responsible for overseeing the territory occupied by his subordinates:[112] 'If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence'.[113] In this case, List was put on notice of the occurrence of unlawful killings not (like Yamashita) purely as a result of the scale of the atrocities, but due to subordinates' reports sent to List's headquarters.[114] He was therefore imputed with knowledge of the crimes, and having failed to punish those who committed them, or to take steps to prevent their recurrence, he was found guilty and sentenced to life imprisonment.[115]

4. *Decline of the Doctrine*

Despite the large number of cases concerning command responsibility in World War II, the Geneva Conventions of 1949[116] did not expressly provide for the doctrine. This probably contributed to the gradual decline of the doctrine over the next thirty to forty years.[117] Another contributing factor was the political ramifications of charges involving command responsibility. This became evident, for example, in the United States prosecution of the My Lai massacre and the Israeli prosecution of atrocities at Shatila and Sabra as discussed further below.[118]

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111 8 *Law Reports*, above n109 at 39–40 cited in above n4 at 217–218.

112 Above n5 at 111–112.

113 8 *Law Reports of Trials of War Criminals* (1949) 71.

114 Smidt, above n76 at 184; above n4 at 218–219.

115 8 *Law Reports of Trials of War Criminals* (1949) 75–76.

116 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

117 Bantekas, above n18 at 574.

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Further, many of the civil wars occurring during that period involved armies with decentralised command structures.[119] The doctrine was difficult to apply in these circumstances where the relevant commanders were often not easily identified.[120]

A. *My Lai Massacre*[121]

The My Lai massacre was one of the most notorious events arising out of the Vietnam War.[122] The My Lai 4 hamlet was suspected of harbouring hundreds of Viet Cong soldiers,[123] and United States Captain Ernest Medina was ordered to launch an assault on the hamlet. On the morning of 16 March 1968, Medina's Charlie Company was airlifted by helicopter to an area close to the hamlet.[124] While the company believed this was the first real contact it was going to have with the Viet Cong, when it entered the hamlet it encountered no enemy fire or resistance.[125] The Charlie Company began killing the civilians in the hamlet. A member of Charlie Company stated:

> We were all psyched up, and a result, when we got there the shooting started, almost as a chain reaction. The majority of us had expected to meet VC combat troops, but this did not turn out to be so. First we saw a few men running ... and the next thing I knew we were shooting at everybody. Everybody was just firing. After they got in the village, I guess you could say the men were out of control.[126]

A report by Lieutenant General William Peers into the massacre determined that the number killed 'was at least 175 and may exceed 400':[127] In 1971, Medina was court-martialled based on his command responsibility for the massacre.[128] The prosecution alleged Medina was in or around My Lai and in constant radio communication with his platoons during the operation and, on becoming aware that his subordinates were killing civilians, refused to order them to stop.[129]

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118 Ibid.

119 Bantekas, above n18 at 575. These civil wars may be governed by international law to the extent that they fall within Common Article 3 of the 1949 Conventions and if they meet the conditions of applicability of Geneva Protocol II (1977).

120 Bantekas, above n18 at 575.

121 See generally, Smidt, above n76 at 186–200; Bruce Watson, *When Soldiers Quit — Studies in Military Disintegration* (1997) at 131–153; Green, above n12 at 352–356; above n4 at 220–224; Jeffrey Addicott & William Hudson, 'The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons' (1993) 139 *Military Law Review* 153.

122 Green, above n12 at 352.

123 United States intelligence reports indicated that the village was a staging area for the 48th Viet Cong local force battalion and could contain up to 250 Viet Cong soldiers: Addicott & Hudson, above n121 at 157.

124 Two other companies provided support and blocking: Id at 156.

125 Seymour Hersh, *My Lai 4: A Report on the Massacre and its Aftermath* (1970) at 44–46; Smidt, above n76 at 189; above n4 at 220.

126 Hersh, id at 51.

127 Joseph Goldstein et al, *The My Lai Massacre and its Cover-up: Beyond the Reach of Law?* (1976) at 314. See generally, US Department of Army, *Report of the Department of Army, Review of the Preliminary Investigations into the My Lai Incident* (1970).

128 *United States v Medina* CM 427162 ACMR (1971).

129 Ibid; above n4 at 222.

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However, Medina stated that he believed that at the time of the operation the hamlet's women and children would have left to attend the market and that as soon as he became aware of the killings, he ordered a cease-fire.[130]

Colonel Kenneth Howard presided over the trial. His charge to the court was as follows:

> a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to ensure 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 ... [T]he commander-subordinate relationship alone will not allow an inference of knowledge.[131]

This formulation of the command responsibility doctrine takes the actual knowledge/criminal negligence requirement used in the *High Command Case*[132] even further, reducing the burden of responsibility placed on commanders.[133] The requirement of actual knowledge imposes a very high threshold for command responsibility. Not surprisingly, Medina was acquitted on the basis that he did not have actual knowledge of the crimes being committed.[134]

The impact of the massacre was enormous, solidifying the anti-war movement in the United States and casting 'a pall of confusion and shame over the nation at large'.[135] Despite clear evidence of responsibility of a number of soldiers and officers for the atrocity, only one conviction resulted.[136] The formulation of the command responsibility doctrine as including a requirement of actual knowledge was an important factor that contributed to the dearth of convictions. Significantly, this requirement is inconsistent with command responsibility as imposed by the military law manuals of most countries (including the US) at the time. For

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130 Above n128; above n4 at 222–223.

131 Above n128; above n4 at 223; Green, above n12 at 353.

132 United Nations War Crimes Commission, above n53 at 1. See '*High Command Case*', above n86.

133 If Colonel Howard's charge to the Court in *Medina*, above n128 is compared with Department of the Army, above n44 at para 501 'Responsibility for Acts of Subordinates' (see text before n137) the two are identical except for certain crucial additions and omissions, for example, the 'should have knowledge' element.

134 Above n128.

135 Addicott & Hudson, above n121 at 161.

136 In total, four officers and nine enlisted men were charged with their involvement in the massacre, and twelve other officers were charged in relation to its cover-up. The only conviction was that of First Lieutenant William J Calley Jr, the commander of Charlie Company's first Platoon, and one of the officers who supervised and directed the killings. '"You know what to do with them," Calley said, and walked off. Ten minutes later he returned and asked, "Haven't you got rid of them yet? I want them dead. Waste them." ... We stood about ten to fifteen feet away from them [a group of eighty men, woman, and children herded together] and then started shooting them. I used more than a whole clip — used four or five clips.': Addicott & Hudson, above n121 at 168, 157, 160–161; William Peers, *The My Lai Inquiry* (1979) at 172–175. See generally, Richard Hammer, *The Court-Martial of Lt Calley* (1971).

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example, the US Army Manual, *The Law of Land Warfare* did not include a requirement for actual knowledge in establishing command responsibility:

> 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.[137]

This inconsistency would seem to indicate an extreme reluctance on the part of the relevant military authorities to recognise that US soldiers could be war criminals and a fervent desire to minimise political fallout from the massacre.

B. 1977 Protocols[138]

Some steps towards reinvigorating the doctrine of command responsibility were made with Articles 86 and 87 of Geneva Protocol I in 1977.[139] Article 86(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.[140]

Article 87 requires commanders to 'prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this

137 Department of the Army, above n44 at para 501; Smidt, above n76 at 185; Green, above n12 at 354; Lael, above n53 at 127–128. The US Army definition is very similar to the definition used in the Great Britain War Office, *The Law of War on Land: Being Part 3 of the Manual of Military Law* (1958) para 631: '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 if he fails to use the means at his disposal to ensure compliance with the law of war.'

138 International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at 1005–1023; above n4 at 224–226; Green, above n12 at 341–343.

139 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, UN Doc. A/32/144 (1977), reprinted in 16 ILM (1977) 1391.

140 Protocols I and II, id, Art. 86(2) at 1428–1429. There is an important discrepancy between the French and English versions of Article 87(2). The French version refers to '*des informations leur permettant de conclure*' ('information enabling them to conclude') whereas the English version refers to 'information that should have enabled them to conclude'. The French version may prevail: International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1013–1014; see Wu & King, above n6, n24 at 276.

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Protocol' by persons under their control, including by taking disciplinary or penal action against violators.

Despite the apparent unwillingness to embrace command responsibility in cases during the years before and after the adoption of the Protocol, these Articles recognising the doctrine were uncontested during deliberations on the Protocol and were also held to conform with pre-existing law.[141] Perhaps the absence of debate was due in part to their limited nature. Specifically, while it is clear that a commander who failed to prevent or initiate disciplinary action for offences committed by subordinates would be in breach of the Protocol, the commander would not be liable under the Protocol for the actual offence committed by the subordinate. The commander's liability in this respect would still be governed by international customary law.[142]

C. *Sabra and Shatila*[143]

In 1975, civil war broke out in Lebanon and conflict erupted between, among others, the Maronite Christians and the Palestine Liberation Organisation ('PLO'). Until 1988, the PLO was committed to the destruction of the State of Israel and adopted terrorist means to achieve its objectives. Partly in response to this, Israel developed close ties with the Christian armed forces, supplying arms, uniforms and training.[144] Christian forces were dominant in southern Lebanon and provided a buffer between the PLO and Israel. On 6 June 1982, Israel invaded Lebanon with the objective of eradicating the PLO. By 14 June 1982, Israel controlled the Beirut suburbs and had connected with the Christian forces that controlled East Beirut. PLO forces agreed to withdraw from West Beirut and completed their withdrawal by 1 September 1982. Under the negotiated agreement, West Beirut was to be controlled by the Lebanese Army. On 14 September 1982, the leader of the main Christian militia force, the Phalangists,[145] was murdered.

The following day, Israel entered West Beirut, claiming that terrorists remained there in violation of the evacuation agreement. It was suspected that 2,000 PLO fighters were hiding at the refugee camps at Sabra and Shatila. On 16 September 1982, Israel agreed that the 'searching and mopping up of the camps' would be conducted by the Phalangists,[146] despite the fears of the Israeli Chief of Staff that there might be a bloodbath.[147] Phalangist forces entered the refugee camps that day.[148] Appalling crimes were then committed as Phalangists

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141 The Yugoslav representative offered the view that command duties were accepted in 'military codes of all countries'. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1978) 9 at 399, CCDH/1/SR.71 para 2; Bantekas, above n18 at 576.

142 Green, above n12 at 342.

143 Green, above n12 at 361–368; above n5 at 148–186.

144 Above n5 at 151.

145 A right-wing Christian militia in Lebanon, founded in 1936 on Spain's fascist Falangist movement: Nicholas Comfort, *Politics* (rev ed, 1995) at 196, 456.

146 Above n5 at 155.

147 Green, above n12 at 362–363.

148 Above n5 at 156–157.

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slaughtered and raped unarmed civilians in the camps.[149] The estimated number of killings ranged from 800 by the Israeli Board of Inquiry to 2,400 (according to the International Committee of the Red Cross).[150]

Israel established a Commission of Inquiry into the massacre which delivered the Kahan Report.[151] This report established that:

> the Israeli military authorities were aware of the killings that were taking place, but took no steps to order Israeli troops to stop the massacre, nor was any action taken by the Minister of Defence to this end. Eventually, the Phalangists were ordered to leave the camps, but no attempt was made to seek out or punish any of those responsible for what happened.[152]

The Commission held that Israel was not directly responsible for the crimes that occurred. However, it stated that those who should have foreseen the risk of massacre and did nothing to prevent it, as well as those who did not do everything in their power to stop the massacre once they were aware of it, were indirectly responsible.[153] The Commission's qualification of this responsibility as 'indirect' is at odds with the doctrine of command responsibility, which regards the responsibility of a superior accomplice as direct even though the crime is actually committed by their subordinate.

Perhaps a more surprising feature of the Kahan Report was its discussion of the responsibility of the Israeli Minister of Defence, who was a member of the Reserve and acted in a manner consistent with a commander in the field.[154] The Commission stated:

> [R]esponsibility is to be imputed to the Minister of Defence for having disregarded the danger of acts of vengeance and bloodshed ... [by] ... having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defence for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. These blunders constitute the non-fulfilment of a duty with which the Defence Minister was charged.[155]

Despite this clear recognition of his responsibility for the massacre, the Commission absolved the Minister from liability, perhaps concerned about the political ramifications of such a finding.[156] These included the potential for serious destabilisation within Israel and worsening of the relations between Israel

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149 Above n5 at 159.

150 Ibid.

151 *Final Report of Commission of Inquiry into the Events at the Refugee Camps in Beirut*, 7 Feb 1983 reprinted in 22 ILM (1983) 473 (hereinafter the Kahan Report).

152 Green, above n12 at 363–364.

153 The Kahan Report, above n151 at 496–497 cited in Green, above n12 at 364–365.

154 Green, above n12 at 362.

155 Kahan Report, above n151 at 503.

156 Green, above n12 at 367.

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and Lebanon which could result from an Israeli minister being found complicit in war crimes and possibly a genocidal act.[157] Like the My Lai Massacre decisions, political considerations thus prevented the forceful application and development of the command responsibility doctrine. Nevertheless, the Commission's findings demonstrate the potential force of the doctrine of command responsibility in imposing liability on political leaders for war crimes.[158]

5. *Recent Developments*

Despite the weakening of the doctrine that was witnessed in practice during the 1970s and 1980s, developments in the international arena in recent years have involved more careful analysis of the elements of command responsibility and have provided greater structural support to the doctrine.

A. Tribunal for the Former Yugoslavia

The Statute of the ICTY[159] was established by Security Council resolution 827 on 25 May 1993 and makes provision for command responsibility in the following terms:

> The fact that any of the acts ... 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.[160]

The *Celebici Case*[161] was the first international tribunal case since the Nuremberg and Tokyo trials to consider command responsibility.[162] It includes a comprehensive consideration of the doctrine and is probably the 'best evidence of customary international law for command responsibility'.[163]

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157 Above n5 at 167.

158 Green, above n12 at 368.

159 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, available at <http://www.un.org/icty/basic/statut/statute.htm>.

160 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, Statute, UN Doc. S/25704 annex (1993), reprinted in 32 ILM (1993) 1192 (ICTY Statute) Article 7(3); see also 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 for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, SC Res 955, annex UN SCOR, 49th Sess, Res & Dec, at 15, UN Doc S/INF/50 (1994) reprinted in 33 ILM (1994) 1602 (ICTR Statute) Article 6(3).

161 Celebici, above n22. See generally Ching, above n18 at 185–205.

162 See Press Release: *Celebici Case*: The Judgement of the Trial Chamber, No. CC/PIU/364-E, Nov. 16, 1998, available at <http://www.un.org/icty/pressreal/p364-e.htm>.

163 Vetter, above n3 at 111.

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In 1992, Bosnian Muslim and Croat forces took control of the predominantly Bosnian Serb Konjic municipality in Bosnia and Herzegovina.[164] These forces established a prison camp in the village of Celebici where Serb prisoners were 'killed, tortured, sexually assaulted and subjected to cruel and inhuman treatment'.[165] Four persons were indicted before the ICTY in relation to these crimes:[166] Esad Landzo (a camp guard),[167] Zdravko Mucic (the camp commander), Hazim Delic (the deputy camp commander and later commander)[168] and Zejnil Delalic (the coordinator of the Bosnian Muslim and Bosnian Croat forces in the area, and later commander in the Bosnian Army).[169] The charges against Mucic, Delic and Delalic included various human rights violations based on command responsibility.

The Trial Chamber adopted a broad interpretation of the first two elements of command responsibility.[170] It held that a 'superior-subordinate relationship' may include military and civilian subordinates, and *de facto* and *de jure* superiors.[171] The essential criterion is the ability of superiors to exercise 'effective control' over subordinates, meaning the 'material ability to prevent and punish' the commission of offences by subordinates.[172] In relation to the requirement of knowledge, the Chamber was concerned to establish knowledge as at the time the crime was committed. It stated that this knowledge could be either actual knowledge, established by direct or circumstantial evidence,[173] or constructive knowledge, established by proving that the superior possessed information that would have put the superior on notice that further investigations were required.[174]

Based on this formulation of command responsibility, the Chamber acquitted Delic and Delalic on the charges based on command responsibility because of the absence of a superior-subordinate relationship.[175] Delic's suggestions were often followed by the guards, but he was not part of the chain of command with an ability to issue orders or to control or punish subordinates.[176] Delalic was a commander, but did not have authority 'over the camp, its commander, its deputy commander or the guards'.[177] His function as coordinator, although influential, was one outside the chain of command — it 'consisted of negotiating agreements for the President'.[178]

164 *Celebici*, above n22 at para 38.

165 Olivia Swaak-Goldman, '*Prosecutor v Delali*' (1999) 93 *American Journal of International Law* 514 at 514; See *Celebici*, above n22 at paras 109, 120, 122, 130, 141–143, 146–157.

166 *Celebici*, above n22 at paras 2–5.

167 Id at para 6.

168 Id at paras 20, 11.

169 Id at para 19.

170 Id at para 346. See 'Major Elements' above.

171 Id at para 354.

172 Id at para 378.

173 Id at paras 142–144

174 Id at paras 146, 383, 393.

175 However, Delic was convicted of several crimes where he was a direct participant: Id at paras 443–446.

176 Id at para 810; Ching, above n18 at 192–195.

177 Swaak-Goldman, above n165 at 517; Ching, above n18 at 198–202.

178 *Celebici*, above n22 at paras 653–658; Bantekas, above n18 at 580.

However, the Chamber found that Mucic did possess effective control over subordinates.[179] Although the Chamber rejected the notion of a presumption of knowledge,[180] the *mens rea* in the case of Mucic was also satisfied, despite the fact that Mucic 'wilfully sought to avoid knowledge' by removing himself from the camp.[181] Mucic was therefore responsible for failing to prevent war crimes and to punish subordinate perpetrators:[182]

> Mr Mucic was the *de facto* commander of the Celebici prison-camp. He exercised *de facto* authority over the prison-camp, the deputy commander and the guards. Mr Mucic is accordingly criminally responsible for the acts of the personnel in the Celebici prison-camp, on the basis of the principle of superior responsibility.[183]

An appeal of this case is pending at the time of writing.[184]

This case is most relevant to the establishment of a superior-subordinate relationship for command responsibility, as will be discussed further below.

B. International Criminal Court[185]

Article 28 of the 1998 Statute of the International Criminal Court ('ICC') makes command responsibility a basis of criminal liability when international crimes are committed, whether in military or civilian settings.[186] It provides that military commanders and non-military superiors (eg civilian leaders) 'shall be criminally responsible for crimes within the jurisdiction of the [ICC] committed by [those] forces under [their] effective command and control'.[187] However, the Statute distinguishes between military and civilian superiors, making it more difficult to establish the criminal liability of civilian superiors who commit war crimes.

6. Establishing a Suitable Formulation of the Doctrine

While the ICC Statute provides support to the doctrine of command responsibility, a reasoned and widely accepted formulation of the doctrine is yet to be established. It is appropriate to begin considering the issues that will help establish such a formulation, particularly given the useful development of the area by the ICTY. In the remainder of this article, I consider each of the elements of the doctrine and how they can best be refashioned to fulfil its policy objectives.

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179 *Celebici*, above n22 at para 263, 271–272.

180 Swaak-Goldman, above n165 at 518.

181 Id at 519.

182 *Celebici*, above n22 at para 775; Ching, above n18 at 195–198.

183 *Celebici*, above n22 at para 776.

184 On 26 November 1998, the Prosecution filed appeals against the acquittal of Zejnil Delalic and the sentence of Zdravko Mucic. Zdravko Mucic (27 November 1998), Hazim Delic (23 November 1998) and Esad Landzo (1 December 1998) have appealed against the Judgment.

185 The Rome Statute of the International Criminal Court, 17 July 1998, Art 28, UN Doc.A/CONF.183/9 reprinted in 37 ILM (1998) 999.

186 Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22; Danesh Sarooshi, 'The Statute of the International Criminal Court' (1999) 48 *ICLQ* 387.

187 Rome Statute, above n185, Art. 28(1).

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A. *Superior-Subordinate Relationship*

(i) *Authority and Control*

Where an individual possesses both direct control and authority over another (and putting to one side the question of non-military circumstances), it seems clear that a superior-subordinate relationship exists. This is because the superior not only has a normative right to demand the subordinate to act in a particular way, but also possesses power, the actual ability to control the subordinate. However, control and authority are distinct concepts and not necessarily synonymous. For example, a general may possess authority, but lack control because he has become isolated from his command. Conversely, a civilian regional governor may lack authority but possess control over soldiers operating a prisoner camp in his region. It is important to recognise this distinction in order to determine whether the existence of authority but not control (or vice versa) can form the basis for command responsibility.

The distinction between these concepts was muddied at times in the *Celebici Case*[188] where the Chamber made statements such as:

> [The Tokyo Tribunal considered] powers of influence not amounting to formal powers of command to provide a sufficient basis for the imposition of command responsibility.[189]

This statement confuses influence, which is a type of control, with command, which is based on authority.

The test for a superior-subordinate relationship in the *Celebici Case* was that:

> 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 the material ability to prevent and punish the commission of these offences.[190]

This test, which requires the existence of control alone, is dangerously broad in the possible scope of effective control and dangerously narrow in not recognising authority as a sufficient basis to found liability. The doctrine of command responsibility is based on superiors' ability to control their subordinates,[191] and it is true that control should be sufficient in itself to found a superior-subordinate relationship. 'If the case were different, superiors with ample means to intervene in crimes committed by troops under their control, but not under their command, would be fully justified in being passive'.[192] So much is recognised in Article 87 of Geneva Protocol I (1977) which makes commanders

188 *Celebici*, above n22.
189 Id at 375.
190 Id at 378.
191 Id at 377.
192 Bantekas, above n18 at 580.

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responsible for 'other persons under their control.' However, the Trial Chamber's reference to 'effective control' is vague and unhelpful. There are numerous types and degrees of control. The Trial Chamber in the *Celebici Case* cited other authorities where the individuals upon whom responsibility was imposed possessed merely a degree of informal influence — what would seem an extremely indirect and low degree of control. Such a low control threshold would give 'an aura of fantasy to war crimes law and ... give prosecutors nearly limitless discretion in selecting defendants'.[193]

A more certain test would be to require direct control to found a superior-subordinate relationship. This test imposes a higher control threshold than effective control and would not be satisfied by informal influence. The level of control required by the direct control test is analogous to the control exercised by an employer over an employee in relation to matters within the scope of their employment.

In addition, authority should be sufficient in itself to found a superior-subordinate relationship. This means that superiors cannot protect themselves from prosecution by simply abandoning control and permitting their troops to operate autonomously.[194] Where superiors retain authority but not control, they must still use all possible means to prevent and punish the commission of war crimes.[195] Thus, rather than the potential for liability being removed at the superior-subordinate relationship stage, the existence of liability is more likely to depend on the elements of knowledge and failure to act. In relation to the latter requirement, the duty of superiors to prevent war crimes where they no longer have control of their troops might still be fulfilled by 'protesting to the unit commander, notifying the next higher level of command, or, finally, seeking release from [their] position in the unit'.[196]

(ii) Non-Military Superiors[197]

Post-World War II cases clearly suggest that the doctrine of command responsibility applies to civilians in some form.[198] For example, the International Military Tribunal for the Far East charged a number of civilian political leaders with having failed to secure the observance of the laws of war and punish their breach.[199] These leaders included the Prime Minister Hideki Tojo and Foreign

193 Above n28 at 1294.

194 Bantekas, above n18 at 585.

195 Above n28 at 1286.

196 Parks, above n83 at 86.

197 *Celebici*, above n22 at paras 355–363.

198 W Fenrick, 'Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia' (1995) 6 *Duke Journal of Comparative & International Law* 103 at 110–125.

199 *Celebici*, above n22 at paras 357–358.

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Ministers Koki Hirota and Mamoru Shigemitsu.[200] Consistent with this practice, the Trial Chamber in the *Celebici Case* held that Article 7(3) of the ICTY Statute extended to non-military superiors.[201]

However, there is some debate as to whether the civilian command responsibility standard is different from the military command responsibility standard.[202] Bassiouni and Manikas have argued that a lower standard should apply to civilians based on the higher standard of discipline required to be maintained in the military and the difference in the effectiveness of deterrence in these two contexts.[203] The ICC Statute states that the doctrine of command responsibility applies to non-military superior and subordinate relationships, but adopts a lesser knowledge standard for civilians.[204] However, it would seem desirable for a 'symmetry in the treatment of those who have engaged in conduct resulting in similarly harmful outcomes'.[205] There seems no real policy reason for regarding the behaviour of civilian leaders as being of less concern than that of military leaders.[206] It is submitted that using control and authority as the basis of duty as outlined above would be sufficient to accommodate the fact that civilian superiors operate in a different hierarchy from their military counterparts. For example, an international criminal tribunal would be expected to distinguish the control that employers exercise over their employees from the control that captains exercise over their privates. In most circumstances, the extent of control and authority of a non-military superior would be lesser than that of a military superior.

(iii) Occupied Territories and Prisoners[207]

Before concluding the discussion of superior-subordinate relationship, the particular obligation of executive or occupation commanders in relation to occupied territory and prisoners must be considered. It is a well established principle that these commanders are liable for war crimes against civilians or prisoners committed in the area under their legal command.[208] This is often treated as an exception to the general principles applicable to the doctrine of command responsibility since the duty of the executive commander does not depend upon the existence of actual control over the occupied territory.[209] However, using the superior-subordinate relationship test suggested in this article, the liability is nevertheless explained on the basis of the executive commander's authority over

200 The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R John Pritchard & Sonia Magbanua Zaide (eds), *The Tokyo War Crimes Trial*, Vol 20 (1981) at 49781, 49816, 49831.

201 *Celebici*, above n22 at para 356 based on the 'the use of the generic term "superior" in this provision, together with its juxtaposition to the affirmation of the individual criminal responsibility of "Head[s] of State or Government" or "responsible Government official[s]" in Article 7(2)'.

202 Vetter, above n3 at 104.

203 Above n2 at 368–370.

204 Vetter, above n3 at 116.

205 Above n2 at 369.

206 Above n6 at 292.

207 Bantekas, above n18 at 586–587.

208 *Celebici*, above n22 at paras 371–373.

209 Bantekas, above n18 at 580–581.

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the occupied territory. Accordingly, it is not necessary to regard this situation as involving any exception to the general rules of command responsibility.

B. Knowledge[210]

(i) Strict Liability

A threshold question in relation to the mental element of command responsibility is whether a *mens rea* requirement should exist at all.[211] In other words, should superiors be strictly liable for crimes committed by their subordinates? Strict liability offences impose a sanction on the defendant without first requiring the prosecution to prove intention, recklessness or negligence in regard to at least one aspect of the *actus reus*. They are typically regulatory or welfare offences, concerned with 'the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not'.[212] Examples include speeding in a motor vehicle[213] and travelling on public transport without a ticket.[214] *Mens rea* is disregarded on the basis of expediency — it is argued that in relation to these types of offences it is simply not practical to require proof of *mens rea*. The statutes creating such crimes 'are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals'.[215]

Strict liability has clearly not been applied in circumstances analogous to command responsibility. Offences under the doctrine of command responsibility are not of a minor, welfare character.[216] They are extremely serious criminal offences which may result in substantial penalties. The imposition of strict liability would ultimately lead to manifestly unjust convictions of superiors which would undermine the legitimacy of war crimes prosecutions as well as public confidence in the system of justice.[217] Undoubtedly, the strict liability approach to command responsibility should be rejected.

(ii) Actual or Constructive Knowledge

Assuming that command responsibility is a crime of *mens rea* and not one of strict liability, it is necessary to determine the type of knowledge which the superior must have of the subordinate crime. Knowledge in this context could be one of two types. The first is *actual* knowledge — meaning the subjective knowledge that the superior had as a matter of fact of the subordinate's crime.[218] Of course, 'in

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210 Numerous references in this section are to national laws. Of course, 'general principles of law common to civilised nations' are a recognised source of international law: Statute of the International Court of Justice, Article 38(1)(c). Although the references in this section are to national laws of common law jurisdictions, similar concepts exist in other jurisdictions.

211 Above n6 at 279.

212 *Cameron v Holt* (1980) 28 ALR 490 at 494–495 (Mason J) citing *Sweet v Parsley* [1969] 2 WLR 470 at 487.

213 *Kearon v Grant* [1991] 1 VR 321 at 323.

214 *Phipps v State Rail Authority (NSW)* (1986) 4 NSWLR 444 at 451.

215 Roscoe Pound, *The Spirit of the Common* Law (1921) at 52.

216 Above n36 at 88.

217 *Sweet v Parsley* [1970] AC 132 at 150; Above n6 at 281.

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practice it would be impossible to prove a commander's actual knowledge, which would then deprive the provision of its deterrent effects'.[219] The second is *constructive* knowledge — meaning knowledge objectively attributed to the superior in relation to the subordinate's crime.[220] Constructive knowledge may be attributed to superiors who wilfully shut their eyes to the obvious,[221] wilfully and recklessly fail to make such inquiries as an honest and reasonable person would make, or are aware of circumstances which would reveal to an honest and reasonable person the facts or the need for further inquiry.[222]

Imputation or inference through circumstantial evidence of a commander's knowledge is certainly possible. The UN Commission of Experts investigating gross violations of humanitarian law in the former Yugoslavia noted that commanders 'must have known' about the crimes being committed given the:

> number, type and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the *modus operandi* of similar illegal acts, the offenders and staff involved and the location of the commander at that time.[223]

A test of constructive knowledge should apply requiring superiors to maintain a standard of diligence appropriate to their station. In effect, this creates a duty to know based on a negligence standard. It requires superiors to be conscientious in the supervision of their subordinates and rejects ignorance as a defence in itself. This is appropriate given the devastating consequences that may arise from failures by superiors to pay adequate attention to the conduct of their subordinates, both in relation to the commission of war crimes and the stability of the military more generally. A requirement of actual knowledge is too difficult to prove and permits superiors to bury their head in the sand and avoid liability.

(iii) Specification of the Crime

If constructive knowledge is all that is required in order to impose command responsibility, of what precisely must there be constructive knowledge? The rule may require the commander to have knowledge that *a specific crime* is going to occur. This would include the type of crime that was to be committed, when, where and by whom. Requiring this level of specificity would mean that high-level superiors would be unlikely to be convicted under either an actual or constructive knowledge standard since they 'will rarely know facts which inference or investigation would suggest the occurrence or imminence of a specific low-level subordinate crime'.[224]

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218 Nygh & Butt, above n31 at 23; *Swinton v China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553.

219 Bantekas, above n18 at 589.

220 Nygh & Butt, above n31 at 256; above n28 at 1278.

221 Nygh & Butt, above n31 at 1268.

222 Id at 256; above n28 at 1278–1279.

223 Final Report of the Commission of Experts, Established pursuant to Security Council Resolution 780 (1992), UN SCOR, Annex, UN Doc S/1994/674 at para 58 (27 May 1994).

224 Above n28 at 1280.

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Alternatively, the rule could require the superior to have knowledge of a *criminal policy* or custom.[225] For example, Yamashita may have acquired knowledge before he assumed his position as Japanese Supreme Commander in the Philippines that suspected guerillas were executed without trial as a matter of policy by Japanese forces occupying the Philippines. Applying this test, once Yamashita acquired command and a superior-subordinate relationship was established, he would be under a duty to prevent this criminal policy from continuing and to punish those who had committed crimes pursuant to it. While specific details of any particular incident would not be required, it would not be sufficient to impose liability on Yamashita if he merely had knowledge that the forces were, for example, poorly trained and often violent.[226]

Finally, the rule could require the superior to act once the *risk of a crime* exceeded a particular standard.[227] This could range from a low standard, where the risk must be virtually certain, to a high standard, where the risk of crime need only be possible. If this rule were adopted a constructive knowledge standard would also have to be applied, since the exact risks of a crime are never known, and the Tribunal must apply some kind of objective standard.[228] This rule was suggested by the Kahan Report which referred to the risk of Phalangists exacting revenge on those in the camps at Sabra and Shatila which should have been foreseen by the Israeli Minister of Defence. It is appropriate because it signals to superiors that the risks of war crimes being committed should always be considered and encourages them to structure their operations in such a way as to minimise these risks. Given the gravity of the consequences if the risk eventuates, the standard should be set high, but the standard should also recognise that a superior's best diligence and care may not be sufficient to eliminate all possibility of risk. An appropriate standard is therefore one of reasonable foreseeability which can incorporate the practicability of taking precautions against the risk.

C. *Failure to Act*

Domestic criminal laws do not usually impose criminal liability for a failure to intervene in, prevent or attempt to prevent a crime — as a general rule, there is no liability for inactivity.[229] This general rule can be partly explained by the difficulties that omissions can cause in establishing causation, and their potential to increase the scope of criminal liability dramatically.[230] Against this background, it is unsurprising that the doctrine of command responsibility (which imposes liability for failing to prevent or punish crimes)[231] is the subject of disagreement.[232]

225 Id at 1283.

226 Ibid.

227 Id at 1284.

228 Id at 1285.

229 John Smith, *Smith & Hogan — Criminal Law* (9th ed, 1999) at 44–52; P R Glazebrook 'Criminal Omissions. The Duty Requirement in Offences Against the Person' (1960) 76 *LQR* 386; Graham Hughes 'Criminal Omissions' (1958) 67 *Yale LJ* 590; Andrew Ashworth 'The Scope of Criminal Liability for Omissions' (1989) 105 *LQR* 424.

230 Vetter, above n3 at 102; Smith, above at n229 at 45.

231 Bantekas, above n18 at 575.

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However, liability may still attach to inactivity under domestic law in certain narrow circumstances where there is a duty to act or an offence of omission established by statute or the common law. A duty to act may be recognised in domestic criminal law where a person 'takes up employment in a position the performance of which has implications for the public health and safety'.[233] For example, members of the police force are considered to owe certain duties to the public and therefore must act to protect an individual when they witness a serious assault occurring.[234] A contractual duty may also found a duty to act.[235] Thus, for example, where a contract of employment imposes a duty on an employee to protect an employer's property, the employee may be liable for failing to prevent the theft of the employer's property.[236] Finally, a duty to act may arise where a person has a power of control over the offender, either through the first person's property[237] or status.[238]

The duty to act based on position in domestic law is similar to the duty to act based on authority under the doctrine of command responsibility. Similarly, the duty to act based on a power of control in domestic law is similar to the duty to act based on the power to control under the doctrine of command responsibility.

There are some difficulties in imposing a normative standard on the duty of a superior to prevent, punish and control. The phrase 'necessary and reasonable' is ambiguous,[239] and may create uncertainty for superiors who require specific guidance as to what steps they must take. This was conceded by the Trial Chamber in the *Celebici Case* when it stated: 'any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard in abstracto would not be meaningful'.[240] It has also been suggested that the concept of reasonableness is difficult to apply in this context since it requires a balancing of social costs and benefits when there are no accepted norms regarding the relative value of such things as war crimes prevention and military success.[241] However, the ICC Statute and the jurisprudence of the ICTY and ICTR suggest that such a consensus may be forming.

Despite these limitations of normative standards, some qualification on the superior's duty is required in order to avoid rendering superiors criminally liable when it is impossible for them to prevent, punish or control. As stated by Bassiouni

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232 Vetter, above n3 at 102.

233 Above n36 at 36.

234 *R v Dytham* [1979] QB 722 cited in Id at 37.

235 Smith, above n229 at 48.

236 *Ex parte Parker; Re Brotherson* [1957] SR (NSW) 326 cited in above n36 at 37.

237 *Dennis v Pight* (1968) 11 FLR 458 (car); *Tuck v Robson* [1970] 1 All ER 1171 (licensed premises).

238 *R v Russell* [1933] VLR 59 (husband's authority to control his wife); *R v Latifkhan* (1895) ILR 20 Bom 394 (constable's authority over another constable).

239 Above n28 at 1284.

240 *Celebici*, above n22 at para 394.

241 Above n28 at 1284–1285.

and Manikas, 'there is no deterrent effect if individuals are unable to prevent the conduct which the criminal law seeks to avert.'[242] This logic was also adopted in the *Celebici Case* when the Trial Chamber stated:

> international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers ... [W]e conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.[243]

While the reasonable standard would not, and should not, require the impossible, it should nevertheless require from superiors a very high standard of foresight. This would restrict what would be considered impossible because superiors would be expected to take action to prevent foreseeable situations arising which would prevent them from fulfilling their duty.[244] The reasonable standard should be adopted but better defined, to state that it requires all possible measures to be taken as would be expected from a prudent commander to prevent or punish the crime.

7. *Conclusion*

The doctrine of command responsibility plays an important role in regulating the behaviour of superiors and their subordinates in times of war. It is crucial to adopt a precise formulation of the doctrine in order to prevent confusion as to its scope and also to restrict the potential for its application to be improperly influenced by political considerations or other irrelevant concerns. So much becomes clear upon an examination of the doctrine's wavering application throughout history. Once an agreed formulation is established, it should become evident that the use of the doctrine will not undermine the command structures in place within the military or otherwise hinder effective military operations. Rather, the doctrine reinforces the chain of command and the importance of subordinates complying with directions of their superiors. This article suggests that authority or control should be sufficient to found a superior-subordinate relationship, that constructive knowledge of the risk of crime be sufficient to satisfy the knowledge element and that failure to act be based on a better defined concept of reasonableness. It is hoped that this test would act to clarify this important doctrine and therefore improve the deterrence value which command responsibility is intended to have against the commission of war crimes under international law.

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242 Above n2 at 351.

243 *Celebici*, above n22 at paras 394–395.

244 Above n28 at 1296.

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