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Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law

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Abstract

Many examples of modern war crimes exhibit a strong link between the institutional breakdown of the rule of law and subsequent commission of humanitarian abuses by service members. Unchecked misconduct, specifically including dehumanizing acts, tends to foster a climate where war crimes are likely to occur. Does the law adequately account for this common thread? This article examines the doctrine of command responsibility in the context of a superior's failure to maintain discipline among troops, and resulting criminal culpability for violations of the law of armed conflict. While customary international law, as applied by modern ad hoc tribunals, contemplates a wide range of misconduct that may trigger a commander's affirmative duty to prevent future abuses by subordinates, U.S. law does not. This article examines the contours of the command responsibility doctrine as it relates to this duty to prevent, and assesses its efficacy in averting humanitarian atrocities.

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I. INTRODUCTION

Sun Tzu advised military leaders that soldiers are to be treated "in the first instance with humanity, but kept under control by means of iron discipline."[1] Such an approach, he claimed, would lead to certain victory.[2] Fifteen hundred years later, in describing a unit of American service members responsible for guarding detainees at Abu Ghraib prison, an investigator quipped that it was analogous to the movie *Animal House*.[3] In the years since, numerous international tribunals have affirmed the important nexus between unaddressed misconduct among soldiers and the subsequent commission of war crimes.[4] Examining the wider backdrop of many modern law of war violations, it becomes apparent that the maintenance of good order and discipline among troops is essential to upholding the ideals entrenched in international humanitarian law. In fact, negligent supervision and failure to punish past wrongs in combat can have a unique "death spiral" effect on lawlessness and dehumanizing behavior. By failing to address early—sometimes minor—misconduct, a superior contributes to the degradation of the rule of law, which commonly lies at the root of modern humanitarian abuses. This article explores the extent to which the international legal framework accounts for a commander's role in the erosion in the rule of law and its consequences, and the subsequent assignment of criminal liability under the doctrine of command responsibility.

The current international legal framework permits military leaders to be held criminally responsible for the failure to address known past misconduct in two distinct ways.[5] First is the failure of a commander to discipline subordinate troops for law of war violations, or a *failure to punish*. Crimes that may trigger this responsibility include grave breaches of the Geneva Conventions, crimes against

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1 SUN TZU, THE ART OF WAR 98, ¶ 9.43 (Lionel Giles trans., 1910).

2 *Id.*

3 Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse*, WASH. POST, Aug. 25, 2004, at A01, http://www.washingtonpost.com/wp-dyn/articles/A28862-2004Aug24.html (citing ANIMAL HOUSE (Universal Pictures 1978)).

4 *See, for example*, Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgement, ¶ 238 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) [hereinafter *Ćelebici* Appeals Judgment]; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 422 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) [hereinafter *Strugar*]; Prosecutor v. Sesay, Case No. SCSL-04-15-A, Appeals Judgment, ¶ 861 (Special Ct. for Sierra Leone Oct. 26, 2009).

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, S.C. Res. 827, U.N. Doc. S/RES/827, May 25, 1993 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6, S.C. Res. 955, U.N. Doc. S/RES/955, Nov. 8, 1994 [hereinafter ICTR Statute].

humanity, and other offenses under the law of war.[6] Second is the commander's *failure to prevent* future crimes when that leader is on notice that previous misconduct has gone unpunished and future crimes are likely to occur. The two are undeniably linked, but form distinct theories of criminal responsibility.

This article is primarily focused on the failure to avoid future crimes under the *failure to prevent* doctrine.[7] Minor misconduct—including acts that do not constitute law of armed conflict violations in themselves—can lead to a degradation of the rule of law and give rise to more serious war crimes.[8] A failure to remedy these low-level infractions may not be chargeable under the *failure to punish* theory. A commander's continued inaction, however, may be sufficient for criminal liability under the *failure to prevent* doctrine. The current exploration seeks to determine the extent to which notice of past unaddressed bad behavior can give rise to legal liability of a superior for subsequent crimes. The article will also assess whether the international legal framework governing command responsibility, interpretation by international courts, and domestic application by the U.S., adequately address the culpability of these rule of law breakdowns within commands.

II. INTRODUCTION TO COMMAND RESPONSIBILITY

Military leaders hold positions imbued with significant levels of public trust and great responsibility.[9] Although high-ranking superiors are commonly ensconced far from the fields of conflict, the theory of command responsibility ensures that even those without battle-scarred hands are accountable for humanitarian abuses that they order, implement, or incite.[10] In some cases, however, superiors play a more indirect role in the commission of war crimes. Permitting unchecked behavior of soldiers in war-time creates a substantial risk of humanitarian violations.[11] The authority possessed by military leaders places them

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6 *See, for example*, ICTY Statute, *supra* note 5, at art. 2. Additional Protocol I assigns responsibility to commanders to repress all violations of the laws of war. *Supra* note 5, at art. 36.

7 Prosecutor v. Hadzihasanović, Case No. IT-01-47-A, Appeals Judgment, ¶ 259 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008); *see also* Prosecutor v. Ndahimana, Case No. ICTR-01-68-A, Appeals Judgment, ¶ 79 (Dec. 16, 2013).

8 *See* Section IV, *infra.*

9 Timothy Wu & Yong-Sung King, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 290 (1997).

10 *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 390–96 (2010). For a thorough historical exploration of command responsibility in war crimes, see Williams H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

11 *In re* Yamashita, 327 U.S. 1, 15 (1946) [hereinafter *Yamashita*] ("It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their

in the best position to prevent war crimes committed by subordinates.[12] For these reasons, and because of the unique nature of military command, in some circumstances leaders may be criminally culpable for failing to act.[13]

Under a modern understanding, the doctrine of command responsibility for superior omissions is generally comprised of three distinct elements: an authoritative relationship to a subordinate; *mens rea*, or an incriminating state of mind; and a failure to take steps to prevent or punish misconduct.[14] Definitions of these elements differ between international and domestic legal codes and have changed over time.

A. A Brief History of Command Responsibility Beginning Post-WWII

Following World War II, international tribunals, various national military commissions, and domestic courts tried thousands of defeated Axis war criminals. Among those prosecuted by U.S. military commission was General Tomoyuki Yamashita—former commander of the Japanese Army in the Philippines.[15] General Yamashita's troops had undoubtedly committed massive atrocities in the Philippines, including the rape and murder of tens of thousands of civilians.[16] However, many have questioned the legal standard under which he was convicted and later executed.[17] According to the tribunal:

> It is absurd [ ] to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, 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 . . . .[18]

Throughout his defense, Yamashita maintained that he did not order nor knew of the war crimes that were being committed by his soldiers.[19] In fact, the

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commander would almost certainly result in violations which it is the purpose of the law of war to prevent.").

12 Wu & King, *supra* note 9, at 290.

13 *See* SOLIS, *supra* note 10, at 390–96.

14 *See* Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213, 1218 (2003).

15 *Yamashita*, *supra* note 11, at 5.

16 *See id.* at 14, 29.

17 *See* Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

18 *Verdict and Sentence*, *Trial of General Tomoyuki Yamashita*, *in* 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (U.N. War Crimes Commission ed., 1948) [hereinafter 4 TRIALS OF WAR CRIMINALS].

19 *Id.* at 26–27.

evidence showed he had inherited his command position at a particularly tumultuous time in the Pacific theater, and the Allies had made major efforts to disrupt his communications with subordinate Japanese commanders.[20] The plain language of the judgment indicates a finding of command liability when a commander *should have known* about the lawless actions of subordinates, despite the lack of evidence that he or she actually knew about or condoned them. Some suggest that the American approach to command responsibility in *In re Yamashita*[21] is a glaring example of victor's justice.[22] The *Yamashita* holding has been highly criticized in intervening years, as the tribunal failed to articulate the precise standard of *mens rea* it applied.[23]

Complicating this issue is a prior discussion by the tribunal in which it is doubted that General Yamashita *could not have known* about the atrocities being committed by his subordinates.[24] According to the tribunal, General Yamashita must have known about the conduct of his subordinates, as it was so egregious and widespread.[25] In other words, the court may have been inferring knowledge by Yamashita based on circumstantial evidence, despite his claims to the contrary.[26] As will be discussed below, the modern understanding of command responsibility under a *failure to act* theory distinguishes between actual or constructive knowledge, on one hand, and an affirmative duty to discover such knowledge under certain conditions, on the other. Both are distinctive bases for assignment of criminal liability under the modern approach. The U.S. Supreme

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20 *Id.* at 18.

21 *Yamashita*, *supra* note 11.

22 *See, for example*, Landrum*, supra* note 17, at 297.

23 *See* Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility*, 5 J. INT'L CRIM. JUS. 638, 648–49 (2007).

24 4 TRIALS OF WAR CRIMINALS, *supra* note 18, at 34. The President of the tribunal discussed the Prosecution's evidence tending to show the abuses were so common and widespread, that General Yamashita must have either "willfully permitted" or "secretly ordered" them. *Id.*

25 *Id.*

26 Similarly, in modern international case law, courts have assigned criminal liability through inferred—or circumstantial—knowledge by commanders, based on the specific circumstances of the crime. *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 383 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [hereinafter *Ćelebici* Trial Judgment]. Scholars have disagreed over the actual standard used by the *Yamashita* tribunal, although most see it as an expansion of the command responsibility doctrine. *See, for example*, Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1, 19, 24 (2001); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 719, 720 (2002).

Court reviewed *Yamashita* in 1946, but did not overturn the military's findings or sentence.[27]

The Nuremberg Trials are perhaps better known from this era. Dozens of high-ranking Nazi war criminals, including government officials and senior military officers, were prosecuted at Nuremberg in a joint effort by the Americans, British, Soviets and French. Charges included conspiracy and crimes against peace, including participation in the planning and waging of a war of aggression in violation of numerous international treaties and rules for waging war, as well as crimes against humanity, including murder, enslavement and other inhumane acts.[28] In the so-called "High Command Case," which consolidated the cases of more than a dozen Nazi leaders including Willhelm von Leeb, the court articulated its standard for command responsibility. Only when a crime directly resulted from a commander's action, or from the commander's failure to properly supervise subordinates—amounting to a "wanton, immoral disregard"[29]—could criminal liability attach. Central to the court's definition was the idea that criminal liability may only be assigned as the result of some personal guilt.[30] Mere failure on the part of a superior to investigate or take precautions would not be sufficient to reach this standard of culpability.

The International Military Tribunal for the Far East, also known as the Tokyo War Crimes Trial, was the major trial of high-ranking Japanese war criminals, corresponding to the Nuremburg Trials in Germany. This was another joint effort by the Allied powers, and over twenty alleged war criminals were tried.[31] Many cases involved humanitarian abuses over detained persons.[32] In these cases, commanders charged with authority over prisoners could be held criminally liable for acts of their subordinates if they knew or failed to attain information

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27 *Yamashita*, *supra* note 11, at 25–26. In upholding the military tribunal's authority to try Yamashita, the Court noted that the purpose of the law of war is:

> [T]o protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

Id. at 15.

28 Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

29 *Judgment of the Tribunal*, *Trial of Wilhelm von Leeb and Thirteen Others (The German High Command Trial)*, *in* 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 46 (U.N. War Crimes Commission ed., 1949) [hereinafter 7 TRIALS OF WAR CRIMINALS].

30 *Id.* at 75.

31 R. JOHN PRITCHARD & SONIA MAGBANUA ZAIDE, JUDGEMENT: INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO WAR CRIMES TRIAL 1 (1948).

32 *Id.* at 1001–36.

about abuse through negligence.[33] The verdicts also indicated that commanders were duty-bound to take preventative measures to ensure that mistreatment of prisoners did not occur following a discovery of prior abuse.[34] The command responsibility standard in this instance indicated that, presuming knowledge of past offenses, the onus was on commanders to take preventative actions to stop future bad acts. As described below, this articulation echoes more modern international tribunals in establishing the threshold for command responsibility in *failures to prevent*, particularly involving prior misconduct of service members.

B. Codification of Command Responsibility and Customary Law

Precedents set by World War II cases influenced the later codification of command responsibility doctrine in international law.[35]Although the notion of command responsibility was nominally referred to in preceding treaties governing the laws of war,[36] the most definitive legal obligation was first outlined in Article 86(2) of Additional Protocol I to the 1949 Geneva Conventions:

> 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

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33 *Id.* at 28–32; *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3548 (Yves Sandoz, Christopher Swinarski, & Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY TO ADDITIONAL PROTOCOL I].

34 PRITCHARD & ZAIDE, *supra* note 31, at 31–32 ("If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.").

35 *See* Jamie Allen Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90 INT'L REV. OF THE RED CROSS 303, 305 (2008).

36 The 1907 Hague Regulations required military forces "to be commanded by a person responsible for his subordinates" in order to be given the protective status as belligerents. Convention (IV) Respecting the Laws and Customs of War on Land art. 1(1), Oct. 18, 1907, 36 Stat. 2277 (Fourth Hague Convention). Furthermore, it stated that "[t]he commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention. Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention art. 19, Oct. 18, 1907, 36 Stat. 2371. The Geneva Convention of 1929 used almost identical language: "[t]he Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 26, Jul. 27, 1929, 47 Stat. 2074.

> 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.[37]

The U.S. signed but has never ratified Additional Protocol I.[38] The command responsibility doctrine, as outlined by Additional Protocol I, is considered to reflect international customary law.[39] Although by its wording the treaty specifically applies to international conflicts, most provisions—including its superior responsibility doctrine—are also understood to apply to internal conflicts through customary law.[40] Many states have adopted similar definitions in their

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37 Additional Protocol I, *supra* note 5, at art. 86(2) (emphasis added). There is a slight variation in phrasing in the French translation. *See* COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 33, at ¶ 3545 (noting that the French version's wording—"information enabling them to conclude"—constitutes a significant discrepancy from the English version). Article 87 then states:

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Additional Protocol I, *supra* note 5, at art. 87.

38 *See generally* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

39 *See* Martinez, *supra* note 23, at 641; Anthony D'Amato, *Agora: Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604, 607 (1986). Although the U.S. has criticized the ICRC's methods in determining customary law vis á vis Additional Protocol I, *see, for example*, John B. Bellinger & William J. Haynes, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. OF THE RED CROSS 443 (2007), it has publicly affirmed the majority of its provisions as customary international law. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *Remarks from the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U.J. INT'L L. & POL'Y 419, 420 (1987); *see also* W. Hays Parks et al., *Memorandum for Mr. John McNeill—1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications* (May 9, 1986), *in* LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234 (David H. Lee ed., 5th ed. 2014), https://perma.cc/F4AW-DTAA.

40 *See generally* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005). International conflicts occur between nation states, whereas non-international armed conflicts involve a non-state party. The vast majority of provisions in the Geneva Conventions apply, by wording of the treaties, only to international armed conflicts.

domestic legal codes, although exact standards do vary.[41] Since its drafting, there has been much debate regarding the *mens rea* requirement in Article 86, as viewed through the standards of criminal law jurisprudence,[42] as well as the practical and doctrinal challenges to prosecuting such cases,[43] but such discussions are beyond the scope of this paper. Modern international tribunals have been reluctant to classify command responsibility under conventional criminal law theories of negligence.[44]

A breakdown in the rule of law can be comprised of various forms of misconduct—some of which may not constitute violations of the law of war that trigger a *duty to repress or punish*. However, this article is primarily concerned with the *duty to prevent* future crimes, where a superior lacks actual knowledge that those crimes will occur. In its commentary on Article 86, the International Committee of the Red Cross (ICRC) notes various factors that may be considered in determining whether a superior had information which should have enabled that person to predict that war crimes were about to be committed.[45] Information in this context may refer to the tactical situation at the time, the level of training on laws of war and international humanitarian law received by subordinates, and relative character traits of service members.[46] Additionally, commanders are assumed to be aware of the risks of attacking densely populated areas, and of the scarcity of medical services available to treat prisoners of war.[47] Every case must be considered on a situational basis.[48] Modern war crimes tribunals have referred to this commentary in applying international customary norms in command responsibility cases.[49]

The Nuremburg and Tokyo War Trials were examples of internationally sanctioned ad hoc tribunals. Tribunals of this nature established by the United Nations have been increasingly used in the past two decades to address war crimes committed in various regional conflicts. As will be discussed below, ad hoc

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41 *See Practice Relating to Rule 153, Command Responsibility for Failure to Prevent, Punish, or Report War Crimes*, INT'L COMMITTEE OF THE RED CROSS, https://perma.cc/UXH4-H85A (last visited Nov. 6, 2017).

42 *See, for example*, Martinez, *supra* note 23. This debate is long-standing and goes back to the drafting of Additional Protocol I. *See* COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 33, at ¶ 3541.

43 *See generally* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

44 *See, for example*, Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeals Judgement, ¶ 35 (Jul. 3, 2002) [hereinafter *Bagilishema* Appeals Judgment].

45 COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 33, at ¶ 3545.

46 *Id.*

47 *Id.*

48 *Id.*

49 *See, for example*, *Čelebici* Appeals Judgment, *supra* note 4, at ¶ 238.

tribunals have largely adopted the Additional Protocol I standard for command responsibility, and have interpreted it according to customary international law.

III. COMMAND RESPONSIBILITY UNDER INTERNATIONAL LAW

A. International Criminal Tribunal for the former Yugoslavia

Between 1991 and 2001, over 100,000 people lost their lives in the Yugoslav Wars, including the wars in Bosnia and Kosovo—a series of ethnic conflicts leading to the break-up of the former Yugoslavia.[50] Reports of widespread ethnic cleansing, civilian and detainee abuse, and sexual violence by Serb forces surrounded these conflicts.[51] As a response, the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague. This ad hoc court's jurisdiction covers four categories of crimes: grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity.[52] Its charter also gives the tribunal jurisdiction to prosecute superiors who fail to *punish* or *prevent* these abuses.[53] The court has charged over 160 persons since its inception—primarily Serbs, but also Croats, Bosnian Muslims and Kosovo Albanians. Cases are ongoing as of 2017.[54]

The governing statute for ICTY dictates a *knew or had reason to know* standard for superior liability, and otherwise generally mirrors Additional Protocol I, Article 86:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures *to prevent* such acts or *to punish* the perpetrators thereof.[55]

The court has interpreted the command responsibility standard in the ICTY statute as congruent with that of Additional Protocol I and customary international law.[56] Jurisprudence has indicated a preference for superiors to

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50 United Nations, *The Conflicts*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://perma.cc/7VXV-2TG2 (last visited Nov. 4, 2017).

51 *Id.*

52 ICTY Statute, *supra* note 5, at arts. 1–5.

53 *Id.* at art. 7(3).

54 *About the ICTY*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, https://perma.cc/6R73-RQ3U (last visited Nov. 6, 2017).

55 ICTY Statute, *supra* note 5, at art. 7(3) (emphasis added). Like Additional Protocol I, the ICTY Statute contemplates criminal liability for all military superiors, not just commanders.

56 *Čelebici* Appeals Judgment, *supra* note 4, at ¶¶ 235–39. The tribunal is tasked to apply customary international law. *Id.* ¶ 227.

prevent future crimes. Where a superior *knew or had reason to know* that a subordinate was going to commit a war crime but failed to prevent the action, the superior cannot rectify that failure by then punishing the subordinate.[57] These cases, discussed below, explore the extent of this *duty to prevent*.

Under ICTY holdings, actual knowledge may be inferred from circumstantial evidence.[58] However, the more nuanced issue is when a superior has a *duty to prevent* crimes, short of actual knowledge that such crimes are being, or will be, committed. In the *Ćelebici* case (*Prosecutor v. Delalić*[59]*),* ICTY substantively articulated the command responsibility standard under the *reason to know* framework.[60] The appeals chamber clarified that general information in possession of a commander—provided to that person or otherwise available—which would put the superior on notice about possible unlawful acts by subordinates, is sufficient to fulfill the requirement.[61] The court rejected a strict-liability *duty to discover* misconduct standard for superiors.[62] In other words, some information must trigger a commander's duty to halt possible future wrongdoing. In addition to citing the factors listed in the ICRC commentary on Additional Protocol I,[63] the appeals tribunal identified information that may trigger a *duty to prevent*. This data need not be specifically regarding the nature of the future unlawful acts, and may include information that subordinate service members "have a violent or unstable character, or have been drinking prior to being sent on a mission."[64] The trial chamber in *Ćelebici* also noted a "likely" causal link between the failure of a commander to punish past crimes and the commission of future crimes.[65] In *Ćelebici,* the ICTY chambers opened the door for a finding of superior responsibility where prior unresolved bad acts of subordinates are sufficient to put the commander on notice of the risks of future crimes, thereby triggering a *duty to prevent*. It also identified particular character traits and patterns of behavior that would tend to indicate the lawless nature of a commander's troops, which may also prompt a legal duty to act. In other ICTY cases, the appeals chamber

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57 Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 336 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

58 *Id.* at ¶ 307; *see also* Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 427 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

59 *Ćelebici* Appeals Judgment*, supra* note 4.

60 *Id.*, at ¶¶ 222–41.

61 *Id.* at ¶ 238.

62 *Id.* at ¶¶ 228–39.

63 *Id.* at ¶ 238.

64 *Id.*

65 *Ćelebici* Trial Judgment, *supra* note 26, at ¶ 400.

further explored the *reason to know* standard in conjunction with a superior's *duty to prevent*.

In *Prosecutor v. Krnojelac*,[66] the appeals chamber broadened the possibility of command criminal liability when previous unaddressed misconduct escalates into more serious crimes. In that case, the court considered a situation in which a prison warden was charged under a theory of command responsibility for the torture of detainees by his subordinates. At issue was whether knowledge of prior unpunished prisoner mistreatment was sufficiently alarming information to put Milorad Krnojelac on notice of a future risk of torture by subordinates and a corresponding *duty to prevent*.[67] Torture, as interpreted by ICTY, requires a showing of the infliction of severe pain or suffering in order to obtain information or a confession, or to punish, intimidate or coerce the victim or another person, or to discriminate against the victim or another.[68]

The *Krnojelac* appeals chamber rejected a formulaic approach to the *reason to know* standard advocated by the prosecution in that knowledge of a lesser included offense was automatically sufficient to create criminal liability over the subsequently committed greater offense.[69] Instead, the court reiterated its position in *Ćelebici* that sufficient information, even of a general nature, must have been possessed by Krnojelac that would have adequately put him on notice that there was a risk his subordinates would commit the act of torture.[70] The appeals chamber found such information in the underlying facts of the case: the warden knew that individuals were being detained solely because they were non-Serb; he was aware of the deplorable conditions at the prison; he knew that Muslim prisoners had suffered beatings and had otherwise been mistreated; and he had witnessed the beating of a prisoner after an escape attempt.[71] Knowledge of the mistreatment and discriminatory conduct was adequate to place Krnojelac on notice for the future risk of beatings being inflicted for one of the purposes outlined in the prohibition against torture, and make him criminally liable for failing to prevent that torture.[72] In short, Krnojelac had reason to know of the future occurrence of torture, and failed in his *duty to prevent* it.

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66 Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sep. 17, 2003).

67 *Krnojelac*, *supra* note 66, at ¶ 155.

68 Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 497 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

69 *Krnojelac*, *supra* note 67.

70 *Id.*

71 *Id.* at ¶¶ 166–71.

72 *Id.* at ¶¶ 170–71.

In a case against Pavle Strugar, a high-ranking commander of the Yugoslav People's Army,[73] ICTY further clarified the *reason to know* standard within the *duty to prevent* theory of command responsibility. Strugar was assessed criminal responsibility in the unlawful shelling of a town by subordinates, which resulted in civilian deaths and damage to cultural property.[74] Importantly, this was the second such incident that occurred under his command. The appeals chamber considered the following circumstances as controlling in its analysis: (1) Strugar had known of the military unit's previous unlawful shelling of the same town; (2) the previous attack, which resulted in indiscriminate strikes, had gone unpunished; and (3) the subsequent ordered attack would likewise involve shelling.[75] In considering the duty Strugar had to re-enforce already-existing orders to prevent the unlawful shelling by his troops, the trial chamber had found it "very relevant" that the unit had widespread disciplinary problems, including "unauthorized opening of fire, refusal to carry out orders, looting, arson and drinking" in addition to "wanton arson and destruction of facilities, plundering, violent behavior, drunkenness and refusal to carry out orders."[76] This generalized rule of law breakdown among his soldiers was a factor in the trial court's satisfaction that Strugar was sufficiently on notice that his troops would likely violate orders again. Strugar was found criminally responsible for the subsequent shelling, as he had not heeded the numerous warning signs displayed by his soldiers and failed to adequately prevent the second instance of indiscriminate strikes.

In the *Kubura* case (*Prosecutor v. Hadžihasanović*[77]), the appeals chamber took a relatively narrow view of the *reason to know* standard in a commander's *duty to prevent* war crimes. That case involved a commander who failed to address unlawful plunder committed by his subordinates, who then repeated the misconduct five months later.[78] In outlining the standard for command responsibility, the court reiterated that a superior's failure to punish prior crimes is relevant to the determination of whether the superior possessed enough information that was "sufficiently alarming" to put the superior on notice that additional crimes might be likely in the future.[79] The appeals chamber noted that the failure of the commander to adequately address the first instance of plunder likely encouraged

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73 *Strugar*, *supra* note 4, at ¶ 1.

74 *Id.* at ¶¶ 121–40.

75 Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgment, ¶¶ 305–08 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 17, 2008).

76 *Strugar*, *supra* note 4, at ¶ 422, n.1221.

77 Prosecutor v. Hadžihasanović, Case No. IT-01-47-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008).

78 *Id.* at ¶ 262.

79 *Id.* at ¶ 30.

future misconduct.[80] In assessing Kubura's liability for later repeated plunder, however, several considerations weighted against a finding of liability.[81] Much time had passed between the two instances.[82] Although the unlawful activities were widespread on both occasions, they were generally infrequent occurrences under Kubura's command.[83] The two events also occurred more than 40 kilometers apart.[84] None of the other warning signs discussed in *Strugar*, including generally lawless actions and attitudes by subordinates, were evident in Kubura's ranks. Therefore, the information available to Kubura did not sufficiently provide him a *reason to know* of the second instance of plunder.[85] The appeals chamber rejected the reasoning of the trial court that the previous unaddressed misconduct automatically subjected Kubura to command liability for *failing to prevent* the later crimes.[86] Familiarity with his subordinates' previous incidents of plunder, while relevant, was not sufficient to give Kubura a *reason to know* of the future crimes, based on other surrounding circumstances.

Thus, while knowledge of past misconduct does not necessarily establish that a commander *knew* of the future misconduct, it can be sufficient to establish that the commander had a *duty to prevent* under the *reason to know* standard.[87] The specific circumstances of the case must be considered in any analysis.[88] Relevant to this consideration is whether the misconduct was of a nature to put the commander on notice that future similar actions were likely.[89] Evidence of the generalized lawlessness of subordinates, as shown in *Strugar*, is a relevant factor in this analysis. The fact that a commander failed to address the earlier known misconduct is instructive to the court because such inaction may be seen as acceptance or encouragement, and may serve to increase the risk of future crimes.[90] The *reason to know* and corresponding *duty to prevent* jurisprudence developed in the ICTY cases has similarly been followed by other ad hoc tribunals.

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80 *Id.* at ¶ 267.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* at ¶ 269 (holding also, however, that a report received regarding the second acts of plunder while they were occurring were "sufficiently alarming" and did trigger a duty to halt ongoing crimes).

86 *Id.* at ¶ 265 (stating that this fact does not mean that he had *reason to know* of the later plunder).

87 *Id.* at ¶ 30.

88 *Id.* at ¶ 28.

89 *Id.*

90 *Id.*

B. International Criminal Tribunal for Rwanda

During an approximate one hundred-day period in 1994, in the midst of the Rwandan Civil War, the Hutu majority in Rwanda slaughtered between 800,000 and 1,000,000 Tutsis and moderate Hutus.[91] Maiming and rape were also widespread and accompanied the genocide.[92] In response, the U.N. established the International Criminal Tribunal for Rwanda (ICTR), based in Tanzania, to try Rwandan government and military officials responsible for these extensive war crimes.[93] Its jurisdiction is limited to acts committed in Rwanda or by Rwandan nationals in neighboring states during 1994 and covers three categories of crimes: genocide, crimes against humanity, and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, which governs non-international armed conflicts.[94] The jurisdiction also extends to failures of omission by leaders when subordinates have committed one of the listed crimes, under a command responsibility theory.[95] The court has indicted 93 individuals since opening in 1995.[96]

Like ICTY, ICTR uses a *knew or had reason to know* standard for command responsibility.[97] Its case law reflects a similar openness to consider prior unaddressed misconduct in a *duty to prevent* analysis. In *Prosecutor v. Nahimana*,[98] the tribunal considered the scope of this duty. Ferdinand Nahimana was co-founder of *Radio Television Libre des Mille Collines*—a Rwandan radio station.[99] He was prosecuted in the ICTR partly on the basis of superior responsibility, based on the radio station's incitement of violence against Tutsis. According to the trial judgment, the broadcasts "engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population" and advocated physical

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91 United Nations, *The Genocide*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA, https://perma.cc/64GM-R8LD (last visited Nov. 6, 2017).

92 *Id.*

93 ICTR Statute, *supra* note 5, at arts. 1–4.

94 *ICTR in Brief*, U.N. INT'L CRIM. TRIB. FOR RWANDA, https://perma.cc/VMU4-BQNP (last visited Nov. 6, 2017); *see generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S 609 [hereinafter Additional Protocol II].

95 ICTR Statute, *supra* note 5, at art. 6.

96 *ICTR in Brief*, *supra* note 94.

97 "The fact that any of the acts referred to in articles 2 or 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." ICTR Statute, *supra* note 5, at art. 6(3).

98 Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment (Nov. 28, 2007).

99 *Id.* at ¶ 2.

force.[100] According to evidence, Nahimana had received notice by a government office that his station had been broadcasting messages that advocated ethnic hatred and included false propaganda.[101] These factors contributed to the appeals court holding that Nahimana had, at a minimum, *reason to know* that radio broadcasters would likely incite serious crimes against that group.[102] He failed in his *duty to prevent* future misconduct and was found criminally responsible.[103] In this case, ICTR followed similar rulings from ICTY in finding knowledge of past unpunished wrongs giving rise to notice of future, escalating crimes.[104] Other tribunals have similarly interpreted the modern command responsibility doctrine.

C. Special Court for Sierra Leone

The civil war in Sierra Leone raged from 1991 until 2002.[105] Rebel groups within Sierra Leone were bolstered by Liberian Special Forces at the behest of Liberian President Charles Taylor, and attempted to overthrow the Sierra Leone government. These groups forcibly recruited thousands of child soldiers and massacred tens of thousands of civilians, in addition to raping and maiming many

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100 *Id.* at ¶ 503.

101 *Id.* at ¶ 838.

102 *Id.* at ¶ 840.

103 *Id.*

104 Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment (Jun. 7, 2001) [hereinafter *Bagilishema* Trial Judgment] is another such case. There, the ICTR trial chamber drew on ICTY case law to find a broad duty for commanders to maintain law and order within their units:

> The Chamber is of the view that, in the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law . . . Both Mucic and Blaskic tolerated indiscipline among their subordinates, causing them to believe that acts in disregard of the dictates of humanitarian law would go unpunished. It follows that command responsibility for failure to punish may be triggered by a broadly-based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.

Id. at ¶ 50.

The court here seems to be conflating *failure to prevent* with *failure to punish* in its analysis. The trial chamber found the defendant not guilty of superior liability on other grounds, apparently concluding that the prosecution failed to meet the *reason to know* standard. On appeal, the tribunal rejected the trial court's articulation of command responsibility as it had relied on a broader criminal negligence theory, instead of the established standard of command responsibility. *Bagilishema* Appeals Judgment, *supra* note 44, at ¶¶ 26–37. It is unclear whether the appeals tribunal agreed that a widespread failure on the part of a superior to maintain law and order was a relevant consideration in a command responsibility analysis.

105 *The Special Court for Sierra Leone: Its History and Jurisprudence*, SPECIAL CT. FOR SIERRA LEONE, https://perma.cc/3H7X-5DSQ (last visited Nov. 6, 2017).

more.[106] The U.N. established the Special Court for Sierra Leone (SCSL) in 2000 to prosecute war crimes related to these events. The court was a hybrid tribunal located in Sierra Leone and jointly run by that country's government. It indicted a total of 13 persons and fulfilled its U.N. mandate in 2013, closing shortly thereafter.[107]

Like ICTY and ICTR, SCSL used a *knew or had reason to know* standard for command responsibility.[108] The SCSL tribunal used guidance on the customary law standard of command responsibility as formulated in ICTY jurisprudence.[109] In a case involving criminal liability of a commander whose soldiers had committed widespread forced marriage, the SCSL appeals chamber drew an interesting link between criminal misconduct committed by subordinates and similar crimes occurring in the same geographic area by other soldiers:

> Having reasonably found that RUF [Revolutionary United Front] fighters throughout Sierra Leone and specifically in Kono District were committing the crime of forced marriage . . . the commission of the crime was so widespread and obvious, that Kallon was on notice of the risk that similar crimes would be carried out by RUF members over whom he exercised effective control in Kono District, including Kissi Town."[110]

Criminal liability was upheld against Kallon for failing to prevent future crimes by his subordinates based on the knowledge that the misconduct was common among nearby troops.[111] Here the court relied on the broader operational context and prevailing norms to infer the likely behavior of a specific group of soldiers. It is possible, at least under this jurisprudence, for a commander to have *reason to know* a crime is about to be committed by subordinates, solely on the basis that such types of war crimes are so widespread in the conflict. In other words, a large-scale breakdown in the rule of law, which includes certain humanitarian violations, was sufficient notice to trigger a *duty to prevent*. The *Kallon* decision seems to reflect

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106 *"We'll Kill You if You Cry:" Sexual Violence in the Sierra Leone Conflict*, HUM. RTS. WATCH (Jan. 16, 2003), https://perma.cc/MYU9-X225.

107 *The Special Court for Sierra Leone Its History and Jurisprudence*, *supra* note 105.

108 "The fact that any of the acts referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II, and other serious violations of international humanitarian law] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior had *failed to take the necessary and reasonable measures to prevent such acts or to punish* the perpetrators thereof." Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 145 (emphasis added) (citing Additional Protocol II, *supra* note 94).

109 *Sesay*, *supra* note 4, at 306–07, n.2247.

110 *Id.* at ¶ 861.

111 *Id.* at ¶ 862.

a broadening of the command responsibility framework as explored by ad hoc tribunal rulings.

D. International Criminal Court

The command responsibility of Additional Protocol I has not been uniformly adopted by other domestic and international courts. The International Criminal Court (ICC) is an example of one such venue. The ICC, created by treaty, has jurisdiction to try all war crimes as it defines them, including serious violations of the Geneva Conventions, genocide and crimes against humanity.[112] All 124 states party to the Rome Statute are subject to its jurisdiction.[113] The ICC is a court of last resort, and it is generally used when the internal state justice systems fail or are not appropriate.[114] To date, the ICC has considered twenty-three war crimes cases.[115]

The Rome Statute outlines a unique *mens rea* standard for command responsibility. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the court committed by forces under his or her effective command and control, or effective authority and control as the case may be, *as a result of his or her failure to exercise control properly over such forces*, where:

> (i) That military commander or person either *knew* or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power *to prevent or repress* their commission or to submit the matter to the competent authorities for investigation and prosecution.[116]

The ICC standard is dissimilar to the customary law and Additional Protocol I standard used by the ad hoc courts in several important ways. First, the Rome Statute requires a causal nexus between a commander's inaction and the

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112 Rome Statute of the International Criminal Court art. 5, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

113 *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://perma.cc/SGD4-P4CG (last visited Nov. 6, 2017). The U.S. is not a party to the Rome Statute. *Id.*

114 *About*, INT'L CRIM. CT., https://perma.cc/SPW7-PTZS (last visited Nov. 6, 2017).

115 *Cases of the International Criminal Court*, INT'L CRIM. CT., https://perma.cc/7WK9-JLJK (last visited Nov. 6, 2017). These cases originate from incidents in Uganda, Democratic Republic of the Congo, Central African Republic, Mali, Sudan and Libya. The court has come under recent criticism because the majority of its prosecutions have involved African defendants. *See* Thierry Cruvellier, *The ICC, Out of Africa*, N.Y. TIMES (Nov. 6, 2016), https://www.nytimes.com/2016/11/07/opinion/the-icc-out-of-africa.html.

116 Rome Statute, *supra* note 112, at art. 28(a) (emphasis added). The statute requires a stricter version of *mens rea* for civilian leaders. *Id.* at art. 28(b).

subsequent war crime. Customary law, as interpreted by the ad hoc tribunals, requires no such causal relationship.[117] The causation requirement may pose a problem in assessing liability for a superior's having permitted misconduct to go unchecked. By wording of the statute, the court would have to be satisfied that a punishment available to the superior would have been adequate to prevent the future crimes.

More importantly, the *should have known* language is vastly more expansive than the customary legal standard as interpreted by the ad hoc tribunals. The difference in definition was intentional by the drafters of the statute to ensure a higher degree of accountability than is required by customary international law.[118] The ICC has yet to fully explore the contours of this standard, however. In the *Bemba* case, the court was poised to make its first substantive pronouncement regarding the command responsibility provision in the Rome Statute. Bemba was the president of the Movement for the Liberation of Congo and served as commander in chief of the *Armée de Libération du Congo*.[119] His soldiers committed massive atrocities against the civilian population in the Central African Republic, including widespread pillaging, rape, and murder.[120] However, as the court found that Bemba had actual knowledge of war crimes being committed by subordinates, an exploration of the *should have known* standard was unnecessary.[121]

E. Causation not an Element in Crimes of Omission under Command Responsibility

Although the requirement for superiors to address past misconduct by subordinates is intended to aid in preventing future abuses, there is no requirement for a showing of causality under customary law.[122] The international tribunals have drawn a close relationship between failure to address misconduct and future humanitarian crimes.[123] However, in a commitment to ensure no

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117 *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 77 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 29, 2004) [hereinafter *Blaškić* Appeals Judgment]..

118 Brief for Amnesty International as Amicus Curiae, Prosecutor v. Gombo, Case No. ICC-01/05-01/08, at 7–8 (Apr. 20, 2009), https://perma.cc/828G-U8ZD.

119 *Case Information Sheet*, Prosecutor v. Gombo, INT'L CRIM. CT. 1 (Jul. 26, 2016), https://perma.cc/E6U4-H3F7.

120 *Id.* at 2.

121 Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Judgment, ¶ 196 (Mar. 21, 2016); *see also* Prosecutor v. Gombo, Case No. ICC-01/05-01/08, ¶¶ 16–24 (Mar. 21, 2016) (separate opinion by Steiner, J.) (discussing the causation requirement); Prosecutor v. Gombo, Case No. ICC-01/05-01/08 (Mar. 21, 2016) (separate opinion by Ozaki, J.) (discussing the standard in light of requirements for criminal responsibility).

122 Additional Protocol I*, supra* note 5, at art. 86; *Blaškić* Appeals Judgment, *supra* note 117.

123 *See, for example*, *Ćelebici* Trial Judgment*, supra* note 26, at ¶ 400.

element of causation is inserted into the command responsibility doctrine, courts have been careful to omit such a requirement of proof.[124] In other words, in neither cases of *failure to punish* nor *failure to prevent* is the prosecution required to show causation between the commander's omission and the relevant crimes committed by subordinates. It would be illogical, in fact, to require causation in a *failure to punish* case, as the omission by the commander after the incident bears no causal connection to the original crime perpetrated by the subordinate.

In cases of *failing to prevent*, courts have been clear that information tending to put the superior on notice of the future risk of crimes triggers the requirement to investigate and prevent. This is consistent with the ICRC commentary's guidance that knowledge of a subordinate's lack of training on the law of war, for example, is instructive information for which the commander cannot plead ignorance, and is relevant in a command responsibility analysis. In other words, both previous unpunished misconduct and the failure to train soldiers adequately provide warning signs that future bad acts may occur. It is not the failure to rectify past misconduct itself that gives rise to liability under *failure to prevent*, but the superior's knowledge of it and the fact that it makes future bad acts more likely.

F. Culpability of Commanders Responsible

International case law is nuanced and fact-specific on the issue of appropriate sentencing for superiors found criminally liable under the theory of command responsibility. Historically, courts have ascribed full liability for the actual war crimes committed by a subordinate to the commander under this doctrine. In the modern ad hoc tribunals, this practice has been largely followed, but some case law is mixed.[125] The standard for determining an appropriate punishment for leaders is twofold: a consideration both of the seriousness of the underlying war crime, and the gravity of the leaders' involvement.[126] Some international courts have stated that superiors should bear a heavier sentence for their role in war crimes because of the high level of responsibility that customary law places on them.[127] Even in cases involving a commander's omissions, the ad

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124 *Blaškić*, *supra* note 117; *see also* Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

125 *See, for example*, Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 40 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003) (assigning full criminal responsibility for crimes of subordinates when the defendant knew or had reason to know of the actions but failed to adequately prevent them). *But see Halilović*, *supra* note 124.

126 *Hadžihasanović*, *supra* note 77, at ¶ 313.

127 Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4 1998); *Blaškić*, *supra* note 57, ¶ 789.

hoc tribunals have ascribed full criminal culpability for the underlying crimes.[128] However, several tribunals have rejected this level of liability for commanders who failed to act in particular circumstances.[129] In these cases, criminal liability still attached under the command responsibility doctrine for the failure, but the mode of liability was through something akin to dereliction of duty.[130]

Because of the nature of the superior's breach and the relative gravity of its consequences, courts have stated that some instances of command omission warrant disciplinary sanctions, rather than criminal punishment.[131] As for conduct by a superior that falls short of statutory and customary law standards of command responsibility, the ad hoc courts have fervently maintained that it would be unfair to hold such a person criminally liable.[132] Omissions by superiors falling short of the standard as outlined by the international tribunals may also still be subject to disciplinary action for failing to abide by Additional Protocol I Article 87.[133]

IV. THE U.S. STANDARD FOR AMERICAN SERVICE PERSONNEL

Although international tribunals have recognized a relatively inclusive scope of superior criminal liability in humanitarian abuses, the U.S. has not shown a similar tendency in prosecution of its own service members. War crimes trials from the Vietnam War era highlight a troubling trend in U.S. domestic application of the Geneva Conventions. In March 1968, a company of U.S. soldiers massacred the village of Son My, Vietnam—marked as My Lai on Army maps—intentionally

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128 *See*, *for example*, Prosecutor v. Ntabakuze, Case No. ICTR-98-41A-A, Appeals Judgment, ¶¶ 300–05 (May 8, 2012) (upholding a life sentence solely on the basis of *failure to punish* and *failure to prevent* theories of command responsibility).

129 *See, for example*, *Halilović*, *supra* note 124, at 23, ¶ 54 (holding that a commander does not share the same responsibility as subordinates who *have* committed the crime, solely on the basis of a *failure to punish*). *But see* Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 268–70 (2009) (discussing the questionable foundations for the *Halilović* court's holding). *See also* Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶ 783 (Jun. 20, 2007). It is unclear to what extent the ICC will impute culpability on leaders for omissions under the command responsibility doctrine. Unlike the ad hoc tribunal charters, the Rome Statute specifically states that superiors "shall be criminally responsible for crimes . . . committed by forces under his or her effective command control." Rome Statute, *supra* note 112, art. 28(a).

130 *Halilović*, *supra* note 124, at ¶ 42. Although causation is not an element of command responsibility for the ad hoc tribunals, it does appear to play a role in the extent to which they are willing to assign a relative weight of criminal liability to superiors.

131 Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeals Judgment, ¶ 36 (Jul. 3, 2002).

132 *See, for example*, *id.* at ¶ 34 (stating that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law").

133 *See* COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 37.

killing approximately 350 unarmed civilians, many of them women and children.[134] Although over a dozen service members were initially charged with the murders, only one, First Lieutenant William Calley, was convicted. Calley had personally shot dozens of civilians, and had ordered his soldiers to line up and execute dozens more.[135] He was found guilty of the premeditated murder of over twenty persons and sentenced to life in prison at court martial.[136] However, President Nixon had Calley released from armed custody two days later, and put under house arrest pending his appeal, which was later unsuccessful in military court. In 1971, Calley's sentence was reduced by a military commander to twenty years of confinement. He would eventually only serve three-and-a-half years under house arrest, because his sentence was further reduced by the Secretary of the Army in 1974.[137]

Calley's commanding officer, Captain Ernest Medina, was originally charged with intentional murder under a theory of command responsibility.[138] The prosecution argued that he was in constant radio contact with the unit while the atrocities were taking place and knew that his men were firing on a village that had failed to return any fire in kind.[139] Charges against Medina were reduced to manslaughter by the trial judge.[140] To support the manslaughter charge, the prosecution had to prove that Medina had a legal duty to prevent the killings, a duty not clearly articulated by military law.[141] Medina was ultimately acquitted of all charges at his court martial.[142] Many critics point to My Lai as the quintessential example of partiality in the military justice system when meting out justice to American soldiers—the reluctance of military commanders, jury panels and high-ranking officials to punish soldiers for crimes committed in warzones. [143]

The trial judge's instructions in Medina's case regarding command responsibility for the atrocities are particularly telling:

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134 SOLIS, *supra* note 10, at 388.

135 *Id.*

136 *Id.*

137 Linda Charlton, *Calley Sentence is Cut to 10 Years by Head of Army*, N.Y. TIMES. (Apr. 17, 1974), http://www.nytimes.com/1974/04/17/archives/calley-sentence-is-cut-to-10-years-by-head-of-army-secretary-cites.html.

138 GUENTER LEWY, AMERICA IN VIETNAM 359 (1978).

139 *Id.*

140 William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 13–14 (1982).

141 *Id. See also* Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335, 392–93 (2007).

142 LEWY, *supra* note 138, at 360.

143 SOLIS, *supra* note 10, at 388.

> [A]s a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has *actual knowledge* that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to inure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act . . . While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.[144]

The judge thus used an *actual knowledge* standard for command responsibility under the *failure to prevent* doctrine, rather than a *reason to know* standard as used by modern international courts. Since that time, it has been suggested that the test as articulated in *Medina* may partly explain why so few military leaders were criminally punished for war crimes occurring in the Vietnam era.[145]

The prosecution of Ernest Medina highlights a troubling contradiction in the U.S.'s standard for prosecuting cases under a theory of command responsibility.[146] Although military warfare doctrine outlines quite broad categories of conduct that may subject leaders to liability, this standard is not reflected in the Uniform Code of Military Justice (UCMJ)—the criminal law to which all U.S. military personnel are subject.[147]According to the doctrinal military field manual that explains the contours of command responsibility for U.S. Army officers:

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

144 United States v. Medina, C.M. 427162 (1971), *reprinted in* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 16 (1972) (emphasis added).

145 LEWY, *supra* note 138, at 360.

146 *See* Eckhardt, *supra* note 140, at 11–22.

147 Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2016).

> reasonable steps to ensure compliance with the law of war or to punish violators thereof.[148]

The Army Field Manual—still in effect—effectively adopts a broad standard of command responsibility that exceeds even international custom. Problematically, however, the manual is itself not a basis for punitive action. The UCMJ, under which the U.S. prosecutes war crimes committed by its own service members, is relatively silent on the issue of command responsibility. Instead, culpability under this theory must be charged as a separate crime, with the element of command responsibility "bootstrapped" in.[149]

Importantly, the UCMJ does not allow for a prosecution based on superior omission for the actual crime committed by a subordinate. Article 77 of the UCMJ outlines the requirements to charge someone as a principal to a crime:

> Any person punishable under this chapter who—
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.[150]

A person who qualifies as a principal under this framework can be charged and sentenced exactly as the person who physically committed the crime.[151] However, the elements as written would not allow for a prosecution under a theory of superior responsibility by omission. The *mens rea* requirement to be charged as a principal in the UCMJ context is much higher than is reflected in international command responsibility doctrine, and requires more than knowing about misconduct, or having *reason to know* of it. An American commander cannot be charged as a principal—which carries the same potential sentence as the actual perpetrator of the crime—under a *knew*, *had reason to know*, or *should have known* standard. The inability to hold a commander fully culpable for a serious war crime,

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148 U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 501 (1956), https://perma.cc/52HC-AP47 [hereinafter Field Manual] (emphasis added).

149 *See* Hansen, *supra* note 141, at 393–94.

150 10 U.S.C. § 877 (1956). The president has authority to make rules and regulations regarding the UCMJ. 10 U.S.C. § 836 (2006). These rules are set forth in the Manual for Courts Martial. The Manual for Courts Martial, which incorporates statutory definitions of military crimes, states that, regarding a principal: "[i]n some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator." DEP'T OF DEF., MANUAL FOR COURTS MARTIAL §1(b)(2)(a) (2012), https://perma.cc/RD98-FKPM [hereinafter MCM]. To qualify under a "duty to act" standard, then, requires intent. Even if it were clear that leaders did have a legal duty to act in law of war violations by subordinates, the "intent" requirement makes this standard ill-fitting for command responsibility failures of omission.

151 MCM, *supra* note 150, at art. 92.

in the case where that superior knew about yet failed to prevent it, is inconsistent with historical practice and modern international jurisprudence.

There are other potential charges that a leader may face based on the theory of command responsibility under the UCMJ. A military leader who fails to prevent a war crime committed by subordinates may, for example, be criminally charged with dereliction of duty,[152] or failing to follow an order or regulation.[153] However, these offenses carry vastly lower criminal penalties than does acting as a principal to a crime.[154] The *mens rea* for these offenses is also not consistent with international custom regarding command responsibility. For instance, the dereliction of duty charge requires that the perpetrator *knew or reasonably knew* of a duty to act.[155] It is not sufficient under this framework that a leader *had reason to know* of a crime about to be committed and *failed to prevent* it. And none of these offenses specifically incorporate a command responsibility theory of culpability. It is unlikely that a pattern of unaddressed misconduct by subordinates could ever form the basis for a true *failure to prevent* theory of prosecution under the UCMJ. Where superiors facing trial at international ad hoc tribunals have received sentences commensurate with the underlying crimes committed by subordinates based on a command responsibility through omission theory, the same does not seem possible for U.S. military members.

A. Mistakes Were Made: A Modern U.S. Understanding of War Crimes

Compounding the shortfalls in U.S. military law for holding commanders fully accountable for failures to act is a position taken by high-ranking officials regarding a recent humanitarian tragedy. In the early morning of October 2, 2015, an American AC-130 gunship fired multiple times on the Médicins Sans

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152 *Id.*

153 *Id.*

154 *Id.* A dereliction of duty conviction, for example, carries a maximum penalty of six months of confinement. *Id.* A person convicted of being a principal to a crime, on the other hand, may be punished to the same extent as the person who committed the actual offense. *Id.* at art. 77. Although the Department of Defense Law of War Manual suggests that culpable negligence may be a basis to charge a commander for the criminal offense of a subordinate, it offers no enforcement mechanism to do so. *See* DEP'T OF DEF., LAW OF WAR MANUAL at 1123, ¶ 18.23.3.2 (2015), https://perma.cc/8LWP-BP64.

155 MCM, *supra* note 150, at art. 92. *See* Hansen, *supra* note 141, at 61–63 (discussing issues in using dereliction of duty charge, and the possibility of charging command responsibility under manslaughter).

Frontières (MSF) hospital in Kunduz, Afghanistan.[156] Lasting over 30 minutes, the attack killed forty-two patients, staff, and caretakers and injured dozens more.[157] The military's internal investigation noted numerous failures, both mechanical and human, that contributed to the catastrophic incident.[158] These included an accelerated departure for the aircraft because of an emergency threat, multiple equipment failures, as well as poor communication, coordination and situational awareness by the air and ground crews.[159] Specifically, service personnel failed to abide by the cardinal rule of distinction mandated by the Geneva Conventions—they failed to visually identify the target of the attack and neglected to distinguish between combatants and civilians. Nonetheless, the U.S. military did not deem it a war crime, noting that:

> [C]ertain personnel failed to comply with the rules of engagement and the law of armed conflict. However, the investigation did not conclude that these failures amounted to a war crime. The label "war crimes" is typically reserved for intentional acts—intentionally targeting civilians or intentionally targeting protected objects. The investigation found that the tragic incident resulted from a combination of unintentional human errors and equipment failures, and that none of the personnel knew that they were striking a medical facility.[160]

No criminal charges were filed as a result of the incident, although some personnel did receive adverse disciplinary actions.[161] Many reacted to this outcome with incredulity.[162] Especially concerning is the definition of "war crimes" used in the report, as it is directly at odds with U.S. military doctrine. Army Field Manual 27-10 defines war crimes quite broadly as the "technical expression for a violation of the law of war by any person or persons, military or civilian."[163] It further states that every violation of the law of war is a war crime.[164]

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156 U.S. CENTRAL COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS 3, https://perma.cc/KWS2-BW8B [hereinafter Kunduz Memorandum].

157 *Kunduz Hospital Attack: MSF Factsheet*, DRS. WITHOUT BORDERS (Oct. 7, 2015), https://perma.cc/86WN-9ZNU.

158 Kunduz Memorandum, *supra* note 156, at 3–4.

159 *Id.*

160 *Id.* at 2.

161 These included letters of reprimand, suspension, removal from command position, and removal from theater. *Id.* at 4.

162 *See, for example*, *MSF Initial Reaction to US Military Investigation into Kunduz Attack*, DRS. WITHOUT BORDERS (Nov. 25, 2015), https://perma.cc/6A4Q-Q43J (categorizing the actions of military personnel as "gross negligence").

163 Field Manual, *supra* note 148, at ¶ 499.

164 *Id.*

The official report on Kunduz indicates that the U.S. may be generally unwilling to criminally prosecute law of war violations that are non-intentional. This position casts doubt on future war crimes prosecutions based on command responsibility failures to *punish* or *prevent*.

B. Duty to Prosecute or Suppress

Contrary to the stated standard in the Kunduz report, the international understanding of the term "war crime" is generally not limited to intentional acts.[165] International tribunals, including those described above, have found persons criminally responsible for reckless conduct and failures to act.[166] The term "war crime" itself is relatively unhelpful in discussing international standards of prosecution as it carries different meanings across national boundaries and legal frameworks.[167] As mentioned above, the charters for ad hoc tribunals outline the types of war crimes over which the tribunal has jurisdiction, generally described as "serious violations of the law of war."

The Geneva Conventions mandate that some violations of the laws of war be criminally prosecuted by signatory states.[168] The enforcement requirement hinges on whether the underlying misconduct qualifies as a "grave breach," which includes murder, torture, causing great suffering or injury, inhuman treatment, conducting medical experiments, and other bad acts.[169] The commission of a grave breach triggers certain obligations for member states, namely: the obligation to pass laws criminalizing grave breaches; the requirement to actively search for any person accused of a grave breach; and the obligation to prosecute such a person (or, alternatively, extradite and allow prosecution by another nation).[170] A failure in command responsibility does not specifically qualify as a grave breach.

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165 *See, for example*, *Čelebici* Trial Judgment, *supra* note 26, at ¶¶ 437, 439.

166 *See* COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 33, at ¶ 3474. Historical U.S. cases have also referred to failures to act as war crimes. *See supra* notes 15–33 and accompanying text.

167 *See Rule 158: Prosecution of War Crimes*, ICRC, https://perma.cc/SW4U-B6Y8 (last visited Nov. 6, 2017) [hereinafter Customary Law Database].

168 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146., Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

169 *Id.*

170 Geneva Convention I, *supra* note 168, at art. 50; Geneva Convention II, *supra* note 168, at art. 51; Geneva Convention III, *supra* note 168, at art. 130; Geneva Convention IV, *supra* note 168, at art. 147.

For violations that do not amount to grave breaches, or so-called "simple breaches," including all other violations of the Geneva Conventions, nations have the duty to "take measures necessary for the suppression of such acts."[171] Article 86 of Additional Protocol I dictates that states are to "take measures necessary to suppress all other breaches, of the [Geneva] Conventions or this Protocol which result from a failure to act when under a duty to do so."[172] This may include a criminal prosecution, but could also include something less severe such as adverse disciplinary action. Command responsibility failures of omission, regardless of whether the subordinate's underlying crime was a grave breach, do not trigger a duty to prosecute on behalf of the state. They do, however, trigger a duty to suppress. The duties to prosecute or suppress are considered customary law in both international and non-international armed conflicts.[173]

Although the U.S. does not violate its treaty obligations when it fails to prosecute commanders in *failing to prevent* war crimes, the framework of the UCMJ which disallows prosecution on the basis of principal culpability, and a state practice of not prosecuting unintentional war crimes, makes the country fall far short of international norms and practice. The U.S. standard for command responsibility for its own soldiers is also markedly different from the criminal standard used for enemy combatants.

C. U.S. Standard for Military Commissions in the Modern Day

The U.S. used military commissions quite liberally throughout the European and Pacific theaters to try lower-level war criminals following WWII.[174] The Geneva Conventions themselves contemplate member states using military commissions to try prisoners of war.[175] Since the advent of the War on Terror, public attention has increasingly focused on the U.S. military's contemporary use of military commissions for enemy combatants. Beginning shortly after its

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171 Geneva Convention I, *supra* note 168, at art. 49; Geneva Convention II, *supra* note 168, at art. 50; Geneva Convention III, *supra* note 168, at art. 129; Geneva Convention IV, *supra* note 168, at art. 146. By treaty, the above obligations apply to traditional international armed conflicts. However, these requirements are also considered customary law for non-international conflicts. *See* Customary Law Database, *supra* note 167.

172 Additional Protocol I, *supra* note 5, at art. 86(1).

173 *See* Customary Law Database, *supra* note 167.

174 *See* David B. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT'L L.J. 123 (2006) (noting that U.S. Army Generals in both theaters established various types of military commissions which differed in procedure based on geographic area).

175 Under Article 84 of the Third Geneva Convention: "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war." Geneva Convention III, *supra* note 168, at art. 84.

invasion of Afghanistan, the U.S. detained hundreds of detainees at the Guantanamo Bay Naval Base in Cuba. As of 2017, the U.S. military has completed five commission cases.[176] Six cases are currently pending, including the prosecution of Khalid Shaikh Muhammad (KSM), alleged mastermind of 9/11.[177]

Procedures for military commissions have varied greatly over time. Evidentiary rules and sentencing limitations at the WWII-era commissions may be characterized as quite relaxed,[178] whereas the procedures used at the Guantanamo Bay Commissions are currently similar to those of courts martial as delineated by the UCMJ.[179] Interestingly, however, the standard for command responsibility for those tried at military commissions differs significantly from that used for domestic prosecutions of U.S. service members. In the regulations governing the current military commissions, a "principal" to a war crime includes "a superior commander who, with regard to acts punishable by this chapter, *knew, had reason to know, or should have known*, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[180] Such a superior may be subject to the full criminal liability of the offense, as much as the actual perpetrator. The U.S. legal standard for command responsibility in tribunals for enemy combatants seems, along with the ICC definition, to be one of the most expansive.[181] Conversely, as discussed above, the U.S. standard for prosecuting its

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176 *Cases*, OFF. OF MIL. COMMISSIONS, https://perma.cc/8QHC-3FCK (last visited Nov. 6, 2017) (collecting cases against Guantanamo detainees).

177 *Id.*

178 THOMAS C. HARMON, JOSEPH E. COOPER, & WILLIAM F. GOODMAN, MIL. COMMISSIONS 74–75 (1953), https://perma.cc/56ST-DD47 (noting that the "[p]resident prescribed rules particularly of evidence which were entirely foreign to United States court-martial practice," all evidence considered probative was allowed to be admitted, and death sentences required the concurrence of only two-thirds of the panel members).

179 *See Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes*, OFF. OF MIL. COMMISSIONS, https://perma.cc/JRT2-EJLM (last visited Nov. 6, 2017). Conversely, commission procedures adopted early in the war on terror were deemed inadequate by the Supreme Court. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (requiring procedures of U.S. military commissions to mirror those of courts martial and also comply with Common Article 3 of the Geneva Conventions).

180 10 U.S.C. § 950(q)(3) (2009). This statute has been incorporated into the U.S. Military's Manual for Military Commissions. DEP'T OF DEF., MANUAL FOR MIL. COMMISSIONS IV-2 (2010), https://perma.cc/638B-H7MS (emphasis added).

181 Interestingly, U.S. federal courts have used the standard for command responsibility as outlined by the *Ćelebići* trial judgment at least for civil cases involving foreign war crimes. *See* Van Schaack, *supra* note 14, at 1223–24.

own service members as principals to a crime is much more restrictive.[182] It is difficult to reconcile the conflict between these two standards.

V. THE IMPORTANCE OF RECOGNIZING THE DEGRADATION OF THE RULE OF LAW IN THEORIES OF COMMAND LIABILITY

The standard of command liability pertaining to the *duty to prevent* war crimes is particularly important in the context of rule of law breakdowns. Bad actions that do not themselves constitute law of war violations may nonetheless play a role in the emergence of more serious crimes. The importance of maintaining a command climate that quickly responds to minor misconduct cannot be denied.[183] Stretching back years before the advent of modern psychology, behavioral science, or "broken windows theory," military leaders and scholars have consistently espoused the importance of maintaining a high level of discipline among troops.[184] Although usually couched in terms of battlefield success, this priority is also evidently essential to ensuring that soldiers uphold high standards of conduct and obey humanitarian precepts. As postulated in the ad hoc tribunals, when a leader fails to punish bad deeds, that inaction can serve to encourage other subordinates to similarly take part in misconduct.

Military units can form their own moral norms, especially when isolated in a deployed environment.[185] In a highly stressful environment such as combat,

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182 *See generally* Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001) (describing the disconnect between international standards of command responsibility and domestic criminal codes).

183 *See* Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395 (2010) (discussing the essential role that a military supervisor's censure of even "the most minor ethical transgressions" plays in reducing the risk of future misconduct).

184 *See, for example,* PUBLIUS FLAVIUS VEGETIUS RENATUS, THE MILITARY INSTITUTIONS OF THE ROMANS 13 (Thomas R. Phillips ed., John Clarke trans., 2011) (1940) ("We find that the Romans owed the conquest of the world to no other cause than continual military training, exact observance of discipline in their camps, and unwearied cultivation of the other arts of war."); GEORGE WASHINGTON, LETTER OF INSTRUCTIONS TO THE CAPTAINS OF THE VIRGINIA REGIMENTS (1757), https://perma.cc/7PKX-ZUHA ("Discipline is the soul of an army . . . it makes small numbers formidable; procures success to the weak, and esteem to all"); COLIN POWELL, IT WORKED FOR ME: IN LIFE AND LEADERSHIP 26 (2012) (stating that one of Colin Powell's Thirteen Rules was number 8, which was "Check small things"); DEP'T OF THE ARMY, ARMY REG. 600-20: ARMY COMMAND POLICY ¶ 1-5(c) (2014), https://perma.cc/XXH8-A8DA ("The commander is responsible for establishing leadership climate of the unit and developing disciplined and cohesive units. This sets the parameters within which command will be exercised and, therefore, sets the tone for social and duty relationships within the command.").

185 *See* Robert Rielly, *The Darker Side of the Force: The Negative Influences of Cohesion*, 81 MIL. REV. 58, 59 (2001).

soldiers may be more likely to choose loyalty to their friends and comrades over obedience to the larger organization.[186] Unit norms become an even more powerful force when there are unclear rules governing conduct or when there is a weak chain of command.[187] Unaddressed misconduct can nurture an atmosphere of lawlessness, negatively affecting the behavior of other unit members.[188] Compounding the problem, service members may come to believe that the emerging attitudes and behaviors are optimal to accomplish a military function or mission.[189] For example, a soldier may come to believe that mistreating a detainee is helpful to the military's war-fighting mission, or will help to save the lives of fellow soldiers.[190] Thus, a service member's actions, even if repugnant, become morally justifiable through the eyes of the service member.[191] Patterns of misconduct from military deployments confirm the notion of unit-wide influences on behavior. In documented court cases from overseas operations, it is more common that soldiers commit law of war violations in groups than in isolation.[192]

Maintaining the strict observance of good order and discipline is particularly important when the underlying misconduct tends to dehumanize detainees or civilians in the battle space. The notion of dehumanization is central to understanding soldier abuses and law of war violations. Dehumanization occurs when people view others as being outside of the human moral order.[193] The idea has been instrumental in understanding the nature of prejudice and racism,[194] as well as the abhorrent actions of relatively normal people involved in the Holocaust, Rwandan genocide, and other atrocities.[195] The use of degrading and derogatory language, especially, tends to facilitate violence against individuals and groups of persons.[196] Such disparaging language against local nationals is often

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186 *Id.* at 60 (citing WILLIAM DARRYL HENDERSON, COHESION: THE HUMAN ELEMENT IN COMBAT 23 (1985)).

187 Peter Rowe, *Military Misconduct During International Armed Operations: Bad Apples or Systemic Failure?,* 13 J. CONFLICT & SEC. L. 165, 172 (2008).

188 Rielly, *supra* note 185, at 60–61.

189 Rowe, *supra* note 187, at 180.

190 *Id.*

191 *Id.* at 171.

192 *Id.* at 180 (citing many examples, including the actions of Canadian soldiers in Somalia and the U.K.'s Camp Breadbasket court martial).

193 PHILIP ZIMBARDO, THE LUCIFER EFFECT 307 (2007).

194 *Id.*

195 *See* L. Edward Day & Margaret Vandiver, *Criminology and Genocide Studies: Notes on What Might Have Been and What Still Could Be*, 34 CRIME, L. & SOC. CHANGE 43, 54 (2004).

196 *'Less than Human': The Psychology of Cruelty, Interview with David Livingston Smith,* NPR (Mar. 29, 2011), http://www.npr.org/2011/03/29/134956180/criminals-see-their-victims-as-less-than-human

prohibited by U.S. military regulation in combat zones, and may subject a service member to disciplinary measures.[197] Research has shown that individuals are likely to treat "dehumanized" subjects more aggressively than non-dehumanized persons.[198] In this way, the dehumanization of persons can be cyclical and may lead to further escalation of abusive conduct.

In understanding the unique social dynamics at work in the military operational context, the relationship to the process of dehumanization, and the unique risks at issue, it is instructive to look at analogous patterns in law enforcement organizations. There does appear to be a strong link between the breakdown of the institutional rule of law, dehumanizing behavior, and the outbreak of police misconduct. The Christopher Commission was formed in 1991 to investigate the inner workings of the Los Angeles Police Department (LAPD) in the wake of the Rodney King beating. The commission discovered that overall, the interactions between LAPD officers and citizens were "overly contentious and violent" due to the organizational factors at work.[199] One of the commission's findings was that the department leadership had allowed widespread "crude, violent and racist language and attitudes" among the officers, in violation of a department policy against racist practices. [200] The commission proposed a link between the acceptance of this behavior, and the violence towards racial minorities and gay citizens that officers displayed while on duty.[201] These attitudes and behaviors went unchecked by the "deliberate indifference" of LAPD leadership.[202] As a result, law enforcement officers faced little deterrence in engaging in bad behavior, as these actions were seen as acceptable by superiors. The investigation highlighted a slippery slope of unethical behavior, rooted in dehumanizing language and attitudes, that culminated in full-blown physical

(explaining that dehumanizing terms such as "rats," "cockroaches," and "animals" assist perpetrators in overcoming natural inclinations against interpersonal violence).

197 *See, for example*, U.S. DEP'T OF DEF., *CJTF-1 General Order Number 1—Punitive Prohibitions*, at 5(j)(1) (May 21, 2011), https://perma.cc/BWY6-2HQC ("Words, gestures, or acts directed at, conveyed to, or made in the presence of any Afghan citizen by any person subject to this General Order, with intent to insult, disrespect or degrade Afghan citizens, their culture, or their religious beliefs, is prohibited."). Such disparaging statements may also constitute conduct which is prejudicial to good order and discipline or of a nature to bring discredit to the armed forces under Article 134 of the UCMJ. *See* MCM, *supra* note 150, at art. 134.

198 *See* U.S. DEP'T OF DEF., *supra* note 197. *See also* Albert Bandura et. al., *Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. IN PERSONALITY 253, 253 (1975).

199 Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 495 (2004).

200 *Id.* at 497.

201 *Id.*

202 *Id.* at 488.

violence against certain groups.[203] This phenomenon can be seen as a gradual erosion of the rule of law, widespread dehumanization of persons, and an accompanying rise of humanitarian abuses.

The erosion of the rule of law, then, has two compounding effects on military units in combat. When commanders fail to punish misconduct by subordinates, it tends to encourage future misbehavior by other soldiers, and may have the effect of allowing unit norms to degrade. Secondly, when the underlying misconduct involves dehumanizing attitudes, words, or actions, the result may be more widespread or more escalated personal abuses. The investigation into the unit from the My Lai massacre, for example, revealed many problems that were evident before the incident, including unit norms that permitted soldiers to beat and threaten others and grope local women.[204] It was common for personnel in the unit to refer to Vietnamese nationals in racially disparaging terms.[205] Moreover, a number of soldiers from the unit were involved in illegal acts against Vietnamese individuals prior to the My Lai incident.[206] These acts included mistreatment, rape and possible murder, and were met with no negative repercussions.[207] As in the LAPD example, the unit appeared to be influenced by the rampant dehumanizing acts of others and the corruption of group norms. Failure to exercise adequate discipline by superiors allowed this unchecked behavior to continue and escalate.

More modern examples further illustrate this pattern. For example, the self-proclaimed "Kill Team," a group of U.S. Army soldiers who murdered multiple unarmed Afghan civilians in 2010, was rife with illicit drug use, and unit service

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203 *Id.* at 493–99.

204 Rielly, *supra* note 185, at 59. A soldier in that unit described the attitudes of that company's soldiers:

> When you are in an infantry company, in an isolated environment like this, the rules of that company are foremost. They are the things that really count. The laws back home do not make any difference. What people think of you does not matter. What matters is what people here and now think about what you are doing. What matters is how the people around you are going to see you. Killing a bunch of civilians in this way—babies, women, old men, people who were unarmed, helpless—was wrong. Every American would know that. And yet this company, sitting out here isolated in this one place, did not see it that way. I am sure they did not. This group of people was all that mattered. It was the whole world. What they thought was right was right. And what they thought was wrong was wrong. The definition for things were turned around. Courage was seen as stupidity. Cowardice was cunning and wariness, and cruelty and brutality were seen as sometimes as heroic. That is what it eventually turned into.

Id. at 59.

205 U.S. DEP'T OF ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 8-3 (1970), https://perma.cc/2TYV-2NKG. The investigator notes that for some soldiers, the use of these terms "evidently suggested subordination (in their view) of the Vietnamese to an inferior status." *Id.*

206 *Id.* at 8-11.

207 *Id.* at 8-14.

members commonly referred to local nationals as "savages" prior to the commission of the crimes.[208] Similarly, rampant drug abuse and the frequent use of racially disparaging terms were predecessors to the 2006 rape and murder of an Iraqi girl, and the slaying of her family—acts that were committed by several U.S. service members.[209] Other wartime atrocities in Iraq, including the murders in Haditha, confirm the notion that unchecked dehumanizing conduct towards civilians often precedes later humanitarian violations.[210] These findings highlight the essential role of leaders in suppressing misconduct, particularly actions that have the effect of dehumanizing others, and the role this unaddressed behavior can play in the commission of more serious war crimes. This phenomenon can also be illustrated by the war crimes committed at Abu Ghraib.

A. Case Study: The Breakdown of the Rule of Law at Abu Ghraib

Perhaps the most notorious instance of humanitarian abuse committed during the war on terror was the torture at Abu Ghraib. In 2003, news outlets began reporting on the inhumane conditions of Abu Ghraib prison in Iraq. Pictures released months later revealed the horrific extent of the abuse of Iraqi detainees by U.S. soldiers.[211] Investigations showed that soldiers had physically and sexually abused male and female detainees at the prison. Eleven soldiers were eventually convicted at court martial for their actions, most receiving sentences

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208 Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 27, 2011), https://perma.cc/M58Z-ENTZ.

209 Brett Barrouquere, *Ex-soldier Talks about Slaying of Iraqi Family*, NBC NEWS (Dec. 19, 2010), https://perma.cc/UDM3-HMTN.

210 *See* Josh White, *Report on Haditha Condemns Marines*, WASH. POST (Apr. 21, 2007), https://perma.cc/8LJD-F9R6 (reporting the findings of an investigation into the chain of command of the Marine unit involved in the Haditha massacre). According to the Haditha investigation, "[s]tatements made by the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to get 'the job done' no matter what it takes." *Id.*; *see also* Raffi Khatchadourian, *The Kill Company: Did a Colonel's Fiery Rhetoric Set the Conditions for a Massacre*, THE NEW YORKER (Jul. 6, 2009), https://www.newyorker.com/magazine/2009/07/06/the-kill-company (reporting on the Army unit at fault in the Operation Iron Triangle killings). The unit had, among other things, maintained a dry erase board which recorded the number of persons soldiers had killed during the deployment. *Id.* At least one officer reported that civilians were also counted as part of the total. *Id.* Investigations of both of these incidents indicate command climates which permitted the dehumanization of civilians and enemy combatants alike.

211 *See, for example*, Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How far up Does the Responsibility Go?*, THE NEW YORKER (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

between six months and ten years of confinement and dishonorable discharges.[212] Several officers within the chain of command were also relieved of duty, reduced in rank and reprimanded.[213] Only one officer was criminally charged for the torture at Abu Ghraib for failing to train and supervise the soldiers involved.[214] He was later convicted for failing to obey an order, and punished with a formal reprimand.[215]

The degradation of the rule of law was both a cause and effect of the torture that occurred at Abu Ghraib prison. According to detailed investigations conducted by the Army, the reserve Military Police (MP) unit at the center of the most serious abuses at Abu Ghraib was riddled with serious command and culture problems.[216] The MP guards did not receive adequate training on the Geneva Conventions, had unclear standing operating procedures for detention operations, and also lacked an involved chain of command.[217] There was widespread lack of respect for a senior female commander, as well as dangerous, overcrowded and filthy living conditions.[218] Enforcement of military standards had been lax—it was common for unit members to wear improper or incomplete uniforms and display undue familiarity between soldiers of different rank.[219] There was also frequent sexual activity between soldiers, in direct violation of Army rules,[220] and at least one on-going adulterous affair between guards.[221] Other MPs were eventually reprimanded for gratuitously firing their weapons, unintentionally hitting a fuel tank.[222] One officer took nude photos of his female soldiers without their permission.[223] An investigator described the situation as analogous to *Animal House*.[224] According to an official investigation, the unit did not "articulate or

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212 Adam Zagorin, *The Abu Ghraib Cases: Not Over Yet*, TIME (Aug. 29, 2007), http://content.time.com/time/politics/article/0,8599,1656906,00.html.

213 *Id.*

214 *Id.*

215 *Id.*

216 ZIMBARDO, *supra* note 193, at 334–37, 346.

217 DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 19, 41-43 (2004) [hereinafter TAGUBA REPORT].

218 ZIMBARDO, *supra* note 193, at 334–35.

219 TAGUBA REPORT, *supra* note 217, at 38, 41.

220 ZIMBARDO, *supra* note 193, at 355.

221 *Id.* at 360.

222 *Id.* at 389.

223 *Id.*

224 *Id.* at 355; *see* ANIMAL HOUSE, *supra* note 3.

enforce clear and basic Soldier and Army standards."[225] Moreover, leaders failed to take corrective actions when needed.[226]

The MP guards were in frequent contact with Military Intelligence, CIA personnel and contracted interrogators who regularly used humiliating, degrading and abusive tactics when dealing with detainees.[227] These outsiders would also request help from the MPs in their dealings with detainees.[228] The intelligence and interrogation teams were not in the chain of command of the MPs, yet perhaps had a disproportionate effect on them. The teams allowed the guards to view some of their interrogations, though it was not allowed by military policy.[229] Detainees were frequently stripped of clothes, thus inculcating a dehumanizing atmosphere.[230] A military investigation stated that, among the guards, witnessing the abuses by interrogation teams spurred "speculation and resentment . . . out of a lack of personal responsibility, of some people being above the laws and regulations . . . . The resentment contributed to the unhealthy environment that existed at Abu Ghraib."[231] This general breakdown in the rule of law, characterized by frequent humanitarian abuses and a general aura of lawlessness almost certainly affected the MPs, who later committed the atrocious acts of physical and sexual abuse against detainees.[232] By failing to address the widespread disciplinary problems within the unit and abusive conduct by outside actors, leaders opened the door for more egregious conduct. Unfortunately, they were not adequately held criminally responsible for *failing to prevent* the resulting instances of torture.

VI. DOES THE LEGAL FRAMEWORK ADEQUATELY ACCOUNT FOR A SUPERIOR'S CRIMINAL LIABILITY IN FAILING TO ADDRESS AN ERODING RULE OF LAW?

A generalized breakdown in the rule of law within a military unit, when unaddressed, increases the risk of more, and potentially escalating misconduct among service members. The concern is particularly strong when the underlying misconduct involves acts that may tend to dehumanize civilians on the battlespace, or enemy detainees. The command responsibility provision of Additional Protocol I, and similar statutory constructions as used in the ad hoc

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225 TAGUBA REPORT, *supra* note 217, at 41–43.

226 *Id.* at 41, 43.

227 ZIMBARDO, *supra* note 193, at 390, 409.

228 TAGUBA REPORT, *supra* note 217, at 19. For example, one soldier stated: "MI would tell us to take away their mattresses, sheets and clothes." *Id.* Another soldier stated that her job "was to keep the detainees awake." *Id.*

229 ZIMBARDO, *supra* note 193, at 349.

230 *Id.* at 402.

231 *Id.* at 394.

232 *Id.* at 388, 394–95, 402.

tribunals, do offer a means to punish superiors for *failing to prevent* war crimes after previous unaddressed instances of bad behavior among soldiers. These prior bad acts may be dehumanizing or otherwise tend to degrade group conduct. As applied by the tribunals, the command responsibility doctrine constitutes a forceful deterrent for negligence by commanders in disciplinary matters.

Under Additional Protocol I and the tribunal statutes, superiors must have a *reason to know* that law of war violations will be committed by subordinates in order to have a legal duty to act. As interpreted by the international tribunals, a *duty to prevent* is triggered when a leader has information which is "sufficiently alarming" to put the superior on notice that the future commission of a violation of the law of war by a subordinate is likely.[233] Through various holdings, these courts have stated that knowledge of prior unpunished misconduct may, in some circumstances, constitute sufficient notice. Examples from ICTY jurisprudence include the prior indiscriminate shelling of an area by soldiers that went unaddressed and triggered criminal liability when the superior ordered a subsequent attack by the same soldiers.[234] Generalized lawless attitudes and behavior by subordinates have also been relevant considerations for tribunals.[235] Importantly, disciplinary problems such as failing to follow orders, the unauthorized firing of weapons, looting, and arson may also indicate the future commissions of war crimes.[236] Additional factors include whether soldiers have been drinking prior to a mission or have a violent or unstable character.[237] In one case, a commander was held criminally responsible for torture committed by subordinates when he failed to address prior reports of prisoner mistreatment and discriminatory conduct.[238] An ICTR case identified criminal culpability when a superior ignored escalating dehumanizing and inciting language by radio journalists.[239] In *Kallon*, the SCSL appeals tribunal affirmed a finding that knowledge of widespread humanitarian abuse committed by soldiers outside of a unit was sufficient to put a commander on notice that subordinate soldiers were at risk for the same behavior.[240] Additionally, the tribunals have been willing to adopt ICRC guidance that information regarding soldiers' inadequate training on the law of war and tactical considerations should be considered in this analysis.[241]

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233 *Ćelebici* Appeals Judgment, *supra* note 4, at ¶ 238.

234 *Strugar*, *supra* note 4, at ¶ 1.

235 *Id.* at 172–73, ¶ 422, n.1221.

236 *Id.*

237 *Ćelebici* Appeals Judgment, *supra* note 4, at ¶ 238.

238 *Krnojelac*, *supra* note 67, at ¶ 155.

239 *Nahimana*, *supra* note 98, at ¶ 840.

240 *Sesay*, *supra* note 4, at ¶¶ 861–62.

241 *Ćelebici* Appeals Judgment, *supra* note 4, at ¶ 238.

Taken together, these guidelines appear to anticipate a wide range of conduct which may indicate a breakdown in the rule of law and put a commander on notice of future crimes. More specifically, general lawless conduct, including low-level infractions and dehumanizing behavior, such as mistreatment of prisoners, is potentially sufficient to support a charge under the *duty to prevent* theory of command responsibility, as established by the relevant international jurisprudence. Although yet unexplored by the court, the Rome Statute gives the ICC even broader authority to criminally sanction superiors who fail to heed disciplinary warning signs that subordinates may commit future war crimes.

These international courts have been willing, however, to set limits on types of prior bad acts that are adequate to put a commander on notice. In *Kubura*, the ICTY appeals tribunal noted that knowledge of one occasion of plunder committed by subordinates did not warrant criminal liability on the part of the commander for *failure to prevent*, when the second incident of plunder was separated by both time and geography.[242] Isolated incidents, such as the example in *Kubura*, are unlikely to constitute adequate warning for a superior—a rational limitation considering the *mens rea* requirement for criminal culpability. Furthermore, in *Krnojelac*, the ICTY appeals chamber was careful to lay out the wide-ranging and escalating abuses that gave rise to the presumed notice of the future torture of detainees.[243] There, the chamber rejected an absolutist approach that knowledge of any prisoner's mistreatment would trigger a *reason to know* duty to prevent torture, without an indication of some prohibited purpose. The tribunals have been careful to outline the individual factors at play that give superiors a reason to know of future crimes, all of which are fact and situation-specific.

No language from these holdings indicates that the prior misconduct in question must include violations of the law of war in order to qualify as sufficient notice. In fact, these decisions indicate that low-level misconduct such as drinking and general disobedience can be meaningful considerations. However, in all of these tribunal cases, the prior bad acts did include law of war violations. This fact may be partly based on the premise that the international courts have been primarily concerned with defendants who were involved in multiple egregious wartime atrocities. The ad hoc tribunals have yet to decide a case that explores the limits of prior misconduct, which are solely constituted by bad acts that do not violate the laws and customs of war. These bad acts may include drinking, violations of military orders, using racially disparaging language, or other generally offensive conduct. It is unclear to what extent, and in what situations, these types of misconduct would be sufficient, in themselves, to put a commander on notice of future crimes, thereby triggering a *duty to prevent*.

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242 *Hadžihasanović*, *supra* note 77, at ¶ 269.

243 *Krnojelac*, *supra* note 66, at ¶¶ 166–71.

Unfortunately, the U.S. standard for command responsibility, as nominally codified in the UCMJ, does not seem at all adequate in capturing the dangers of an eroding rule of law. The U.S. domestic practice fails to appreciate the serious potential repercussions of ignoring disciplinary breakdowns, especially when they involve dehumanizing conduct by service members. Dereliction of duty, the most apt charge, carries a maximum punishment of only six months of confinement.[244] Based on recent comments by officials, moreover, it is unclear to what extent the U.S. military will be willing to criminally prosecute leadership crimes of omission in the future. This is juxtaposed with official U.S. Army doctrine, which, at least in theory, dictates a quite expansive view of superior culpability.

VII. CONCLUSION

This article has been particularly concerned with superiors' *failure to prevent* war crimes following a degradation of the rule of law. Customary international humanitarian law, as interpreted by the ad hoc tribunals, offers an effective framework for accountability over superiors who fail to heed warning signs that undisciplined subordinates will continue to take part in criminal misconduct and potentially escalate their unlawful behavior. The framework may be used to attach liability to commanders who ignore activities that tend to degrade or dehumanize civilians or prisoners, although such conduct might not, in itself, be subject to a *duty to punish*. International tribunals appear largely willing to criminally sanction superiors who ignore deteriorating conditions within units due to the serious corrosion of good order and discipline.

Where the U.S. has shown a willingness in recent years to criminally prosecute superiors who directly order subordinates to commit intentional war crimes,[245] the same cannot be said for leaders who commit crimes of omission. U.S. law and practice, in fact, do not adequately account for the potential for escalating misbehavior within a unit, which commanders are uniquely positioned to halt. Although international doctrine and tribunal rulings have recognized this potential through generally inclusive *mens rea* definitions for criminal command liability, the U.S. has not, at least not when American service members are involved. By neglecting to establish robust standards for command responsibility in *failure to prevent* crimes, the U.S. military has lost an opportunity to emphasize the importance of vigilance towards dehumanizing conduct and rule of law breakdowns while in positions of authority. At present, U.S. practice is inadequate

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244 MCM, *supra* note 150, at art. 92.

245 *See, for example*, Dave Phillips, *Cause Celebré, Scorned by Troops*, N.Y. TIMES (Feb. 24, 2015), https://www.nytimes.com/2015/02/25/us/jailed-ex-army-officer-has-support-but-not-from-his-platoon.html (reporting the court martial conviction of an Army lieutenant who unlawfully ordered subordinates to fire on unarmed civilians).

in setting strong criminal disincentives to maintain law and order within units in combat environments.