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Corporate Torts: International Human Rights and Superior Officers

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Abstract

Recent decisions by U.S. courts have attacked the ability of human rights victims to hold corporations accountable for their complicity in atrocities around the world. This Article argues that in the face of this attack, advocates and scholars have given insufficient attention to a potent strategy—holding corporate officers liable. It examines the corporate officer liability question through the lens of tort liability, focusing on those officers with superior responsibility over their subordinates who physically commit the violations. It is the first to provide a systematic analysis of how superior officer liability under tort and international law approaches to superior responsibility and criminal liability might provide a basis for greater accountability for corporate officers. This Article examines the historical origins of military and state civilian command responsibility, the trials of civilian corporate officials in Nuremberg and Tokyo jurisprudence following World War II, the special international and hybrid criminal tribunals first established in the 1990s, and tort cases in the U.S. and other jurisdictions. In so doing, this Article complements important parallel efforts to hold corporations liable. This Article considers options

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for officer liability in situations when governments cannot or will not bring criminal charges, or when bringing claims against the officer may be the most efficient means of changing corporate behavior. It concludes that human rights law, international criminal law, and domestic tort and related liability standards all provide liability for corporate officers under a theory of superior responsibility for human rights violations. This common core standard provides an important tool for compensating victims of past abuses and deterring ongoing or future human rights violations.

Table of Contents

I. INTRODUCTION

Corporate accountability for human rights violations is at a critical juncture. Over the past two decades there have been allegations about the role of multinational corporations in forced labor in Burma, attacks on human rights activists and nonconsensual drug trials on children in Nigeria, and complicity with security forces in killings and torture in Indonesia, to name a few examples.[1] Globalization has expanded the economic power of multinational corporations, which has increased concerns about the lack of mechanisms to hold them accountable. Repeated efforts to strengthen international law protections against corporate human rights violations since at least the 1970s have faced multiple roadblocks. Notable examples are the 2012 and 2013 rulings by the U.S. Supreme Court which imposed limitations on two of the most crucial laws used by victims to access U.S. courts;[2] the Court limited the extraterritorial application of the Alien Tort Statute (ATS)[3] and prohibited all lawsuits against corporations under the Torture Victim Protection Act (TVPA).[4] This trend of increasing obstacles to human rights victims is also apparent in other national and international jurisdictions.[5]

This Article argues that the search for a means to protect against corporate abuses has given insufficient attention to an important aspect of a robust legal framework for accountability: holding corporate officers liable for their role in human rights violations when they had a direct role such as ordering a subordinate to commit a violation or an indirect role. The latter "indirect" or omission form of superior responsibility includes when a superior (1) had "effective control" over the lower-ranking person who physically committed the act, (2) in various permutations, that the superior knew or had reason to know about the violation(s), and (3) failed to take necessary and reasonable measures to prevent the act or

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1 *See* Jennifer M. Green, *The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute*, 35 U. PA. J. INT'L L. 1085, 1089–90, 1092 (2014).

2 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (limiting permissible Alien Tort claims to claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."); Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1708 (2012) (limiting Torture Victim Protection Act defendants to natural persons).

3 28 U.S.C. § 1350 (2012) (part of the Judiciary Act of 1789, which provided, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"); Kiobel, 133 S. Ct. at 1659.

4 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (provision signed into law in 1992 allowing foreign and U.S. citizen plaintiffs to sue for torture and summary execution) [hereinafter TVPA]; Mohamad, 132 S. Ct. at 1702.

5 *See*, *for example*, *infra* at notes 32–39 and accompanying text.

punish the perpetrator.[6] While direct responsibility is mentioned as part of the discussion of the historical development of standards, the focus of this Article is on the second, more contested form of liability. Holding corporate supervisors accountable can play an important role in providing compensation for victims and punishing violators.[7] An effective system may also deter future violations. Yet despite significant scholarship on corporate human rights abuses, there has been surprisingly little attention paid to the liability of corporate officers who are complicit in human rights violations. This Article seeks to address that gap by examining a long-neglected, traditional form of individual tort liability: superior responsibility.[8]

Most scholarship on superior responsibility for human rights abuses has focused on military standards and international criminal prosecutions rather than on civil liability.[9] The more limited scholarship on the duty of care has largely concentrated on fiduciary duties to the corporation and shareholders rather than the duty to third parties such as victims of human rights abuses.[10] However, this focus has begun to shift, with human rights advocates and scholars now arguing for a duty of care to be applied to corporations themselves with regard to human rights violations.[11] An important complement to these efforts is liability for individual officers.

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6 *See* 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, 122 (2005); GUÉNËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 24 (2009).

7 This Article focuses on corporate officers who make and implement policy on a day-to-day basis rather than the board of directors, who are in general more removed; this distance could cause more questions about the application of superior responsibility than there is space to address in this Article.

8 Although "command responsibility" is often applied to military commanders, "superior responsibility" more commonly encompasses civilian governmental officials and non-governmental officials such as corporate officers. Given its focus, this Article will use the term "superior responsibility."

9 *See, for example*, Timothy Wu & Jonathan Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272 (1997) (addresses criminal responsibility only and limited to U.S. and international jurisprudence as of 1997); Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1 (2012) (preliminary note written before the Supreme Court's decision in Kiobel and focused on selected common elements between U.S. federal common law and international criminal law).

10 *See, for example*, Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm,* 11 U. PA. J. BUS. L. 631 (2009).

11 *See, for example,* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE. L. J. 443, 506 (2001) ("[C]ommand responsibility itself seems a justifiable basis for corporate duties in situations where corporations are indeed superiors to governmental actors."); Douglass

This Article adds to this emerging area of corporate human rights accountability by explaining the importance of, and articulating a consistent standard of accountability for, corporate officers under existing international and domestic tort law. It surveys multiple sources of international and national law to demonstrate that a duty and related tort liability for corporate officers exists under the theory of superior responsibility. Under international and domestic law, corporate officers can and should be held liable under a superior responsibility standard for human rights violations that constitute torts, or as they are known in other legal systems, "non-contractual liability" or "delicts." Despite international agreement on the existence of this responsibility, it has been used rarely, resulting in the lack of enforcement of the duty to prevent and punish officers for human rights abuses committed by their subordinates. This Article makes both a conceptual contribution to scholarship on corporate accountability and a practical contribution to efforts to address human rights violations.

This analysis has a number of direct applications to human rights enforcement. It is relevant to litigation in U.S. courts under a number of statutes that authorize suits in U.S. state courts for common law torts based on conduct that violates human rights. In the first U.S case to address superior responsibility for corporate officers under the ATS or TVPA, the U.S. District Court for the Northern District of Alabama held that this form of liability did not apply to corporate officers.[12] On appeal, the legal ruling was reversed, but the U.S. Court of Appeals for the Eleventh Circuit held that there were insufficient facts to link the plaintiffs to the defendants and dismissed the allegations.[13] These rulings highlighted the challenge and the promise of superior responsibility in human rights cases in U.S. tort cases.

The application and potential application of superior officer liability for human rights violations extends beyond the ATS and TVPA cases. Survivors have brought cases around the world and in multiple jurisdictions in U.S. federal and state courts. Related cases in U.S. courts have been brought against corporate officers for environmental violations, including charges against Gary Southern of Freedom Industries for the 2014 Elk River chemical spill,[14] and corporate officers

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Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence* 1 BUS. & HUM. RIGHTS J. 1 (2016); *see also* AMNESTY INT'L, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY (2014); Swiss Coalition for Corporate Justice, *The Responsible Business Initiative: Protecting Human Rights and the Environment*, https://perma.cc/MZ2T-MXXU.

12 *See* Giraldo v. Drummond Co., No. 2:09-CV-1041-RDP, 2013 WL 3873978, at *1 (N.D. Ala. July 25, 2013).

13 *See* Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

14 *See* Daniel Heyman, *Ex-Executive Pleads Guilty in Toxic Spill in West Virginia*, N.Y. TIMES (Aug. 19, 2015), http://www.nytimes.com/2015/08/20/us/ex-executive-pleads-guilty-in-toxic-spill-in-

responsible for the Upper Big Branch mine collapse in which twenty-nine workers died.[15] In Germany, claims were brought against a senior manager for failure to supervise security forces for a subsidiary of a German company, the Danzer Group.[16] In May 2016, the U.N. High Commissioner for Human Rights noted that the "individual liability of corporate officers" is an important aspect of the right to remedy human rights victims.[17]

By strengthening the framework for accountability, suing corporate officers who are in positions of authority will build the body of law to provide remedies to human rights victims and deter violations. This Article's focus on tort law complements what has been a greater focus among scholars on criminal law for individual corporate officers. Tort law has the benefit of greater openness to victims of human rights violations, especially in systems where criminal charges must be brought by government prosecutors and political considerations may intervene and prevent charges from being brought. In addressing a lack of attention to the possibility of the greater use of tort liability for corporate superior officers, this Article further complements the tremendous body of scholarship on civil and criminal liability for corporations as institutions.

Section II of this Article offers an introduction to the development and attacks of the human rights framework and the relevance of tort and related civil damage law doctrines for individual victims. Section III analyzes the historical origins of superior responsibility and its application to private actors, including at the Nuremberg industrialist trials after the Second World War. Section IV examines the renewed judicial focus on the jurisprudence of international criminal tribunals, which began in the 1990s. Section V considers how U.S. courts have applied superior officer liability in human rights and other tort cases and compares these basic principles of superior responsibility for corporate officers to how other national legal systems deal with corporate officer liability. Section VI returns to the normative question of the value of this type of liability and the complementary relationship with corporate institutional accountability. This Article concludes that the doctrine of superior responsibility is fully applicable to, and has been applied to, corporate officials. While there may be differences in the periphery of legal application, there is a common core to the legal standard. This common core provides that those who are culpable can be held accountable, but it does not cast

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west-virginia.html?_r=0.

15 *See West Virginia Mine Owner Settles with Victims' Families*, CNN (Jan. 12, 2012), https://perma.cc/86BG-YR4W.

16 *See Criminal Complaint Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses Against Congolese Community*, GLOBAL WITNESS (Apr. 24, 2013), https://perma.cc/F6C2-SQLU.

17 U.N. High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse.* U.N. Doc. A/HRC/32/19, at 5, (May 10, 2016), https://perma.cc/9BLY-N9GB.

a net so widely as to ensnare those who were carrying out legitimate functions. The consistency of this inclusion of corporate officials across human rights law, international criminal law, and domestic tort law suggests that it could serve as an important tool for corporate accountability that complements corporate institutional accountability.

II. THE NEED TO REVISIT CORPORATE OFFICER TORT LIABILITY

The duty of corporate officers to prevent human rights violations and provide remedies to victims are concepts that have strong historical bases both in human rights law and in standards developed for corporate responsibility under international law. The human rights movement after World War II focused on the rights of individuals against violations by government officials and non-state actors, affirmed that these rights entail rights to remedies (including civil or tort remedies) for violations, and created responsibilities for those in positions of authority.

This Section provides the foundation for the rest of the Article. It addresses the historical developments and the underlying importance of holding corporate officers accountable as well as the types of acts for which they should be held accountable. In doing so, this Section lays out important underlying questions explored in this Article: (1) Why focus on corporate officer liability now, and (2) What is the relevance of tort liability to superior officer liability?

A. The Development of (and Attacks on) the Business and Human Rights Framework

The end of the Second World War produced important breakthroughs in the human rights movement. The Nuremberg and Tokyo tribunals tried military, civilian government, and industrialist (corporate) officials and found those in each category liable for their actions—and inaction. This inclusion of military and civilian state and private officials in the trials held in the occupied zones continued into the 1950s, although Cold War politics led to the dismissal of charges against the industrialists in the early 1950s.[18]

The growing movements for rights included the U.S. Civil Rights Movement, and increasing activism around human rights issues including the formation of organizations such as Amnesty International in 1961.[19] Rights were

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18 *See* Michael Bazyler & Jennifer Green, *Nuremberg-Era Jurisprudence Redux: The Supreme Court in Kiobel v. Royal Dutch Petroleum Co. and the Legal Legacy of Nuremberg*, 7 CHARLESTON L. REV. 23, 59 (2012).

19 *Who We Are*, AMNESTY INTERNATIONAL, https://perma.cc/WJY2-Q23L.

increasingly codified with the emergence of a growing number of human rights treaties in 1966[20] and the protocols on humanitarian law in 1977.[21] A complementary development was the increasing examination of the overlapping responsibilities for human rights violations of state and non-state actors, prominently in the context of gender rights, which examined and developed standards for due diligence in cases of domestic violence.[22]

It is against this backdrop of the development of human rights law that the role of transnational corporations began to receive additional international attention. In 1972, the U.N. Economic and Social Council ordered a study of the impact of transnational corporations on the development process and international relations.[23] In 1979, the U.N. established an advisory body, the Commission on Transnational Corporations (UNCTC).[24] From 1977–1990, the UNCTC developed a code of conduct for multinational corporations, but the final draft prepared in 1990 was never adopted.[25] Country-specific standards included the 1977 Sullivan Principles to address apartheid South Africa[26] and the 1984 MacBride Principles, the code of conduct for U.S. companies doing business in Northern Ireland.[27]

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20 As the literature led by Oona Hathaway, Ryan Goodman, Derek Jinks, and Beth Simmons has pointed out, the development, and even ratification, of a treaty are insufficient for change in human rights norms. Moreover, treaty ratification can sometimes be mere window-dressing and a substitute for substantive steps to improve human rights standards. However, the process of implementation with public scrutiny and the involvement of civil society can be important factors in the enforcement of the treaties. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE. L. J. 1935 (2002); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003); Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010), https://perma.cc/6SDL-9ERC.

21 *See, for example*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; 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 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

22 *See generally* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

23 *See* U.N. Economic and Social Council Res. 1721 (LIII) (July 28, 1972).

24 *See* Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 J. WORLD INV. & TRADE 11 15–16 (2015).

25 *See* Connie De La Vega, Amol Mehra, & Alexandra Wong, *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps* (July 2, 2011), https://perma.cc/8WAA-SGCC.

26 *See The Global Sullivan Principles*, THE UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, https://perma.cc/JU6X-WGCT.

27 *See* Father Sean McManus, *The MacBride Principles*, THE UNIVERSITY OF MINNESOTA HUMAN RIGHTS

The focus on actors with the highest levels of responsibility for human rights violations was an important development in these multiple movements for greater accountability. One underlying theme was that all perpetrators, including corporate actors, must be held accountable. Together, these dynamics added to the momentum for a universal system of accountability for non-state actors.

The 1990s also saw an increasing focus on the right of human rights victims to remedies for the violations against them. Special international tribunals were created to address mass atrocities in the former Yugoslavia and Rwanda, followed by the 1998 establishment of the International Criminal Court (ICC). The ICC statute, often referred to as the "Rome Statute," required the establishment of a trust fund so that victims of those convicted of human rights violations would benefit from the "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[28] In 2003, the ICC Prosecutor stated that these violations could include corporate officers,[29] and in September 2016, the ICC issued a policy paper discussing liability of corporate officials for environmental crimes.[30]

More broadly, in 1989, the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities began a study on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms.[31] This study examined violations by those with what was labeled more "indirect" responsibility, or who might have violated rights by omission rather than commission.[32] This ultimately led to a Resolution by the U.N. General Assembly which summarized the important steps toward an international system to advance the right of victims to remedies,

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LIBRARY, https://perma.cc/JA8X-5HCM.

28 Rome Statute of the International Criminal Court, art. 75, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), https://perma.cc/Z3ML-Q9FR [hereinafter Rome Statute].

29 *See* Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC 4 (2003), https://perma.cc/N9YL-36HM (Commenting on the relationship between resource extraction and violations in the conflict in the Democratic Republic of the Congo, the former Prosecutor stated, "[t]hose who direct mining operations, sell diamonds or gold extracted in these conditions . . . could also be authors of the crimes.").

30 International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, https://perma.cc/SDL9-A7B2.

31 *See* Theo van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. AUDIOVISUAL LIBR. INT'L L. 1 (2010), https://perma.cc/7U38-HQ8F.

32 *See id.* at 3.

including compensation and restitution.[33]

During the same period, the movement to impose transnational norms on corporations intensified. In addition to the cases in U.S. courts, cases were brought in Australia, England, and France against multinational corporations and corporate officers. The U.N. continued to develop standards for businesses and their officers. In 2002, the U.N. Commission on Human Rights/Subcommission drafted a set of principles to directly bind businesses and endorsed corporate officer responsibility.[34] The preamble "[r]eaffirm[ed] that transnational corporations and other business enterprises, *their officers*—including managers, members of corporate boards or directors and other executives—and persons working for them have, *inter alia*, human rights obligations and responsibilities."[35] However, these standards were met with strong opposition and were stopped at the U.N. Commission.[36]

In 2005, the U.N. shifted back to a voluntary framework, which in 2011 resulted in the U.N. Human Rights Council endorsement of the Guiding Principles on Business and Human Rights ("Guiding Principles").[37] The Guiding Principles contained three "pillars" on human rights and transnational corporations and other business enterprises: (1) the state duty to protect, the (2) corporate responsibility to respect human rights standards, and (3) the state duty to take measures to remedy violations. Significantly, the Guiding Principles endorsed private litigation as one appropriate remedy for victims, and rejected attacks on these remedies.[38] Some businesses began to implement internal policies,[39] and states began to develop National Action Plans to begin to

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33 G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005), https://perma.cc/C49S-5MA3.

34 Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

35 *Id.* at 3 (emphasis added); *see generally* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

36 *See supra* note 35.

37 U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*: *Implementing the United Nations "Protect, Respect and Remedy" Framework*, Annex to Final Report to the Human Rights Council by John Ruggie, Special Representative of the Secretary-General, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

38 Ruggie, *Kiobel and Corporate Social Responsibility: An Issues Brief, supra* note 37.

39 *See The Foundations for Human Rights Due Diligence*, NORTON ROSE FULBRIGHT, https://perma.cc/FHA6-5AKK; *Introduction*, NORTON ROSE FULBRIGHT, https://perma.cc/9FLQ-JMKN; *Key findings from our empirical research*, NORTON ROSE FULBRIGHT,

implement the Guiding Principles.[40]

Yet, for many, especially those continuing to suffer human rights abuses at the hands of multinational corporations, progress has been far too slow. The passage of time has also increased fears that voluntary implementation could allow too much discretion by corporate officers, and states have become reticent to establish limits on corporate activity. This desire for quicker, more binding action led some governments and non-governmental organizations to renew calls for a binding treaty. In 2014, the Human Rights Council established an international working group to begin the drafting process for a treaty on business and human rights.[41] In July 2015, the working group held its first meeting to begin discussing the parameters of a treaty.[42]

In the U.S., one step toward accountability for those who violated basic human rights has been a line of cases in U.S. courts. These cases were first brought under the ATS, a provision of the Judiciary Act of 1789 that allowed tort claims that are violations of the "law of nations" or a treaty of the U.S.[43] The first case to allege international human rights violations under the ATS was brought in 1979 against a police official who physically tortured a 17-year-old son of a political opposition leader to death.[44] In the 1980s, defendants included military and civilian commanders,[45] and in the 1990s, cases were brought against corporations and corporate officials.[46] However, in 2013, the Supreme Court issued a confusing ruling about how and when the ATS applies to acts occurring overseas,[47] which has imposed an additional hurdle to human rights victims seeking to bring claims in U.S. courts.[48] In 1992, the Torture Victim Protection Act was signed into law, but it was subsequently interpreted to limit defendants to natural persons.[49] These

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https://perma.cc/8BUH-WPDC.

40 *See* Cindy S. Woods, *Engaging the U.N. Guiding Principles on Business and Human Rights: The Inter-American Commission on Human Rights & the Extractive Sector*, 12 BRAZ. J. INT'L L. 571, 572 (2015) ("Over thirty countries have committed to creating a NAP, including many within the inter-American system, signaling the region's readiness to engage with the Guiding Principles.").

41 *See Open-Ended Intergovernmental Working on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, U.N. HUMAN RIGHTS COUNCIL, https://perma.cc/GY7A-JB3R.

42 *See id.*

43 28 U.S.C. § 1350 (2012). *See* Filartiga, 630 F.2d at 877.

44 *See* Filartiga, 630 F.2d at 877–80 (detailing the background of the case).

45 BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12–14 (2d ed. 2008).

46 *See id.* at 15

47 *See* Kiobel, 133 S. Ct. 1659 (2013).

48 *See* Green, *supra* note 1, at 1097–1101.

49 *See* Mohamad, 132 S. Ct. at 1708.

two statutes that allow tort remedies have been two of the key statutes allowing human rights victims to seek redress in U.S. courts.

In other countries there have been successful cases establishing or following the principle of corporate accountability for human rights violations. In England, a recent legislative change allowed foreign direct liability: if the parent company is directly involved in the subsidiary's operation or exercises *de facto* control over those operations, it owes a duty of care to employees and anyone affected by the operations.[50] Cases in England have resulted in numerous successful verdicts and settlements for the plaintiffs,[51] as have cases in Australia,[52] Argentina,[53] Colombia,[54] and Ghana.[55] Some countries have laws providing for a forum of necessity—plaintiffs may bring the claims in their domestic courts if there is no other forum where plaintiffs could reasonably seek relief.[56] A growing number of countries also allow for the possibility of corporate criminal liability.[57] Human

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50 Companies Act 2006, c. 46, § 1159 (U.K.), https://perma.cc/TE6F-MCUS.

51 *See, for example*, Chandler v. Cape PLC, [2012] EWCA (Civ) 525 (Eng.) (concerning a worker exposed to asbestos in an extinct subsidiary company who was able to recover from the parent company); Guerrero et al. v. Monterrico Metals PLC, [2010] EWHC 3228 (Q.B.) (Eng.) (concerning thirty-three Peruvians protesting a copper mine; the plaintiffs charged corporate complicity in torture and the case ended in confidential settlement); *Landmark Settlement of Miners' Claims Boosts Fight for Silicosis Compensation*, LEIGH DAY (Sept. 25, 2013), https://perma.cc/B3SH-XFWJ (discussing a settlement by a mining company to pay South African workers who contracted silicosis).

52 *See, for example*, *BHP Lawsuit (re Papua New Guinea),* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Feb. 18, 2014), https://perma.cc/V7WJ-2UJ5. Sued in Australia, the mining company BHP was required to pay AUS $40 million and remove mine tailings from a polluted river in Papua New Guinea.

53 *See, for example, Argentina: Court Halts Open-Pit Uranium Mine,* NUCLEAR MONITOR (WISE) (May 12, 2010), https://perma.cc/DQ5D-6F27; *Court Halts Open-Pit Mining in Northern Argentina*, LATIN AMERICAN HERALD TRIB. (Apr. 24, 2010), https://perma.cc/79UV-NZEL (reporting that the Argentinean Supreme Court halted open pit uranium mining until a transnational company could show that work would not cause contamination or environmental damage).

54 *See* Claudia Müller-Hoff, *Making Corporations Respond to the Damage They Cause: Strategic Approaches to Compensation and Corporate Accountability*, EUROPEAN CENTER FOR CONSTITUTIONAL & HUMAN RIGHTS 5, 15 (Jan. 1, 2013), https://perma.cc/ZGX6-LKLE.

55 *See id.* at 25 (explaining that the High Court of Ghana granted compensation to victims of forced displacement by Anglogold Ashanti at the Iduapriem mine in Ghana).

56 Mauro Bussani & Marta Infantino, *The Many Cultures of Tort Liability, in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES 11 (Mauro Bussani & Anthony J. Sebok eds., 2015) (forum non conveniens discussion).

57 Examples include Australia, Austria, Belgium, Canada, Denmark, Finland, France, India, Japan, Netherlands, Norway, South Africa, U.K., and the U.S. *See* ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW 13−27 (2006); Sara Sun Beale, *A Response to the*

rights victims in these countries have also seen pushback on their right to seek legal remedies, such as through increased procedural requirements and in reductions in legal aid and in court-ordered attorneys' fees in the U.K.[58]

Thus, the historical context for corporate accountability is one in which there are many forces in civil society, national and governmental systems, and laws on the books for accountability for human rights violations, including violations by corporate actors. These factors are important pressures which enhance the prospect for imposing civil liability on corporate officers responsible for human rights abuses. However, there are also numerous counterweights to these forces and laws, and many questions about the need to focus on tort liability for corporate officers.

B. Human Rights Violations and Tort Liability for Corporate Officers

This Section will introduce the theoretical framework for holding corporate officers accountable through tort remedies, or more broadly (to encompass variations in different types of legal systems), compensation for particular harms to individuals. The Section will also address the relationship of tort remedies to the more common framework of jurisprudence on human rights questions, namely, humanitarian and international criminal law.

1. Why tort law?

On the most basic level, the global human rights movement overlaps with straightforward concepts of tort liability—civil responsibility for wrongs one person causes another.[59] Tort remedies provide an important component in the enforcement of international law.[60] The starting point for the analysis of the relationship between tort remedies and international law is the multi-faceted nature of human rights litigation.

Elsewhere, Sandra Coliver, Paul Hoffman, and I have described the overlapping functions of ATS/TVPA litigation in the U.S., in which plaintiffs sue physical perpetrators, civilian and military superiors, and corporations and corporate officers for violations including genocide, war crimes, crimes against

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Critics of Corporate Criminal Liability, 46 AM. CRIM. L. REV. 1481, 1493–1500 (2009); *see also* Flomo, 643 F.3d at 1018–20.

58 *See* Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard,* 3 U.C. IRVINE L. REV. 127, 132–34 (2013).

59 *See* STEPHENS, CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45, at XXV.

60 *See, for example,* Flomo, 643 F.3d at 1013; Ruggie*, supra* note 37; GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 173–75 (2008).

humanity, extrajudicial executions, disappearances, torture, slavery and forced labor, and human trafficking.[61] The functions of this litigation include holding individual perpetrators accountable for human rights abuses, providing victims with some sense of official acknowledgment and reparation, contributing to the development of international human rights law, building constituency in the U.S. supporting application of international law, adding to a climate of deterrence, and supporting or catalyzing efforts in other countries for human rights enforcement.[62] Martha Minow discusses how legal proceedings have promoted reconciliation and healing in a conflicted society.[63]

Allowing survivors or surviving family members to bring claims can provide an opportunity for financial compensation that, while perhaps seeming mundane and insufficient to some, does provide an avenue for redress, and an opportunity for compensation to help injured people get on with their lives. The court process itself offers validation by providing a formal legal judgment. In the case of punitive damages, plaintiffs receive the added benefit of a public statement reflecting the gravity of what the survivor or their lost family member(s) have suffered. For the defendants, court proceedings provide public accountability for what they have done, and for those who might be tempted to commit the same categories of wrongs, a warning that there may be serious financial and reputational consequences for their actions.

Tort law also provides that there is a duty of reasonable care for one person to avoid causing harm to another, and it has a developed jurisprudence on the doctrine of reasonable care, foreseeable harm, and due diligence. The purpose of providing incentives for appropriate future behavior overlaps with the multiple functions of human rights law to contribute to the development of human rights norms and the deterrence of future violations.[64] Tort theory crosses legal systems and is commonly included in statutory or common law around the world.[65] In other legal systems, victims of abuses seek to both punish the perpetrators of the abuse through criminal and civil remedies, and receive compensation, sometimes

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61 *See generally* Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169 (2005).

62 *See generally id.*

63 MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 61 (1998).

64 *See* Danner & Martinez, *supra* note 6, at 777; Leon Gettler, *Liability Forges a New Morality*, GLOBAL POLICY FORUM (Aug. 3, 2005), https://perma.cc/YEK5-WDRN; Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207 (2008).

65 PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 5 (2010).

through a mechanism linked to their criminal claim.[66] For example, in the civil law system in France, the criminal system is the dominant system, with individuals able to be a partie civile, or civil party, to the criminal action.

In her analysis of whether there are parallel options for human rights victims to the Alien Tort Statute in other countries, Beth Stephens raised the concept of "translation" among different legal systems.[67] For a concept to be "translated" from one system to another does not require identical implementation, but adherence to the same underlying concept: "the mechanical transfer of legal procedure from one system to another is rarely effective. Instead, common goals must be realized through procedures appropriate to each national system."[68] At base are the "commonalities."[69] "Victims of human rights abuses around the world seek comparable results through varied procedural models, tailored to the requirements of their local legal systems."[70]

This Article will explore the common denominator of providing remedies to human rights victims in these multiple sources of law. To properly compare and translate the concept of superior liability across jurisdictions, it is necessary to focus on this common core of parallel tests in international and domestic systems rather than the differences in implementation throughout the different systems. After examining examples from different systems, I conclude that international law standards providing superior responsibility for corporate officers are consistent with parallel standards in U.S. law. Common types of actions have resulted in common types of liability, the availability of remedies to victims of

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66 *See* Ratner, *supra* note 11, at 497 ("For instance, certain important U.S. statutes hold private defendants civilly and criminally liable for violations of civil rights on the theory that such entities may be acting 'under the color of law'"); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 44–46 (2002) (explaining that the division between the civil and criminal actions should be eliminated by states); Robert C. Thompson, Anita Ramasastry, & Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 894 (2009) ("In other countries, the need for accountability may translate into criminal prosecutions or administrative processes instead of civil litigation, or else into hybrid remedies, such as the *action civile*.").

67 *See* Stephens, *supra* note 66, at 4.

68 *Id.* at 4 (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)) (constitutional interpretation); *see also* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 373 (1988); Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45–47 (Craig Scott ed., 2001).

69 Stephens, *supra* note 66, at 5.

70 *Id.* at 5; Thompson, Ramasastry, & Taylor, *supra* note 66, at 845.

human right violations, and enforcement of standard tort principles of the duty of care.

2. The relationship between tort remedies, international human rights law, and international criminal law.

In a common law system, the widespread understanding of the relationship between tort and criminal law is that tort law provides compensation while punishment is primarily the role of the criminal system.[71] In a system such as the U.S. where punitive damages are a possibility this line becomes more blurred because the goal of punitive damages is, as the name says, punishment; punitive damages also have the purpose of deterring future violations[72] and of naming and shaming the tortfeasor, which serves both the aims of deterrence and the declarative function of law.[73]

Another frequent distinction between the criminal and tort systems is that crimes are considered committed against society as a whole. In civil law systems, these functions are linked when a private party is able to join a criminal action. The nature of human rights violations further blurs the classic distinction between the criminal and civil systems.[74]

Tort and criminal liability have been set against each other—sometimes in an attempt to avoid any accountability. In his important opinion finding a legal basis for holding corporations liable in a civil suit for international law violations, Judge Richard Posner noted that those standing against criminal liability argue that there is no need for it because of civil liability.[75] However, in a common law system such as the U.S., tort and criminal law may complement each other and serve as

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71 *See* R.A. Duff, *Repairing Harms and Answering for Wrongs, in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 212–16 (John Oberdiek ed., 2014); R.A. Duff, *Torts, Crimes and Vindication: Whose Wrong Is It?, in* UNRAVELING TORT AND CRIME 148– 50 (Matthew Dyson ed., 2014).

72 *See generally* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753 (1943); J. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

73 *See Strengthening Targeted Sanctions Through Fair and Clear Procedure*, WATSON INSTITUTE FOR INTERNATIONAL STUDIES AT BROWN UNIVERSITY 5 (March 30, 2006), https://perma.cc/Y57L-PBW2 ("Targeted sanctions are typically applied either as incentives to change behavior or as preventive measures, as in the case of sanctions against individuals or entities that facilitate terrorist acts").

74 *See generally* Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005); Cassel, *supra* note 11, at 17–18 (discussing English cases on international human rights and common law torts).

75 *See* Flomo, 643 F.3d at 1019 ("Corporate criminal liability is criticized…but one of the principal criticisms is that it is superfluous given civil liability").

different levers in building accountability within a particular jurisdiction, across national systems, and in the international system itself. For example, in the U.S., plaintiffs have brought tort claims alleging superior responsibility for almost thirty years, but there is still no provision for command responsibility for human rights violations in the U.S. criminal code.[76]

Judge Posner cites a number of prominent treaties as examples of the importance of civil and administrative remedies where criminal remedies are unavailable: the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the U.N. International Convention for the Suppression of the Financing of Terrorism, and the U.N. Convention Against Transnational Organized Crime.[77] These treaties allow civil and administrative remedies as alternatives to criminal liability.[78]

In some jurisdictions, tort standards may lead to criminal standards for accountability for human rights violations.[79] Scholars Leigh Payne and Gabriel Pereira have noted a new trend in how countries transitioning from dictatorships and/or civil conflict have addressed corporate complicity. While "transitional justice" trials of state officials have been predominantly criminal prosecutions, when it comes to corporate complicity, civil trials have outnumbered criminal trials.[80]

Tort remedies do not contain the same constraints as criminal prosecutions. One significant difference is the balance of competing interests within a governmental office.[81] Survivors of human rights violations may secure private or public interest attorneys to pursue civil claims on their behalf, and these claims are likely subject to fewer political limitations than criminal prosecutions. The number of cases brought under the ATS and TVPA far outstripped the number

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76 *See* Letter from Yadh Ben Achour to Pamela Hamoto, Permanent Representative of the United States to the United Nations (Oct. 6, 2015), https://perma.cc/Z9HG-9C43.

77 *See* Flomo, 643 F.3d at 1020.

78 *See id.*

79 *See* Letter from Yadh Ben Achour to Pamela Hamoto, Permanent Representative of the United States to the United Nations (Oct. 6, 2015), https://perma.cc/Z9HG-9C43.

80 *See* Leigh A. Payne and Gabriel Pereira, *Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?, in* THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS 29, 29–44 (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2016).

81 Indeed, multiple doctrines exist to dismiss cases if a court determines that ruling on the case would require the court to pass judgment on the legitimate act of a foreign state (the act of state doctrine) or asking courts to perform the functions of one of the other political branches (the political question doctrine).

of criminal prosecutions for international human rights violations.[82] The U.S. government has prosecuted and deported Nazi war criminals and prosecuted those accused of human rights violations for immigration fraud,[83] yet only one person, Chuckie Taylor, has been criminally prosecuted for the underlying human rights violations (in his case for torture in Liberia).[84] In fact, no corporation or corporate official has been prosecuted in the U.S. for international human rights violations. Tort cases have the potential to provide remedies for human rights victims while moving the law forward and giving added impetus to criminal prosecutions.

Criminal prosecution around the world varies according to the level of participation afforded to those harmed by the violations. Some countries, such as the U.S., Australia, Belgium, Canada, France, India, Indonesia, and South Africa, give prosecutors "complete enforcement discretion, with little or no official participation by victims or their representatives."[85] Other countries, such as Argentina, Germany, Japan, Netherlands Spain, and Ukraine, allow higher levels of participation by victims, from participating in the charging decision to the appeal of decisions not to prosecute.[86]

Finally, and perhaps most important for the analysis of the standards applied in human rights tort cases, the jurisprudence on human rights claims looked to international criminal law to inform analysis in civil cases. For example, in rulings on the definitions of human rights norms, U.S. courts have frequently cited international criminal tribunal judgments to inform their rulings about the content of customary international law, in particular in cases brought under the ATS and TVPA.[87] International criminal law has been a primary source of developing standards, and U.S. and other national courts have looked to international criminal tribunal jurisprudence for guidance when they are ruling on tort cases.[88]

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82 *See* STEPHENS, CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45, at XXVI.

83 *See War Crimes Trials,* UNITED STATES HOLOCAUST MEMORIAL MUSEUM (last updated July 2, 2016), https://perma.cc/8EGM-XGT9; Kate Connolly, *Trial of Man Deported from U.S. to Germany for Nazi War Crimes to Begin*, THE GUARDIAN (Nov. 29, 2009), https://perma.cc/4T4E-NDT6.

84 The U.S. federal extraterritorial torture statute, 18 U.S.C. § 2340A (1994), allows prosecution of U.S. citizens or residents for torture or attempts or conspiracy to commit torture abroad).

85 Thompson, *supra* note 67, at 882.

86 *Id.*

87 *See*, *for example*, STEPHENS, CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45 at 256–64; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (sources of customary international law include judgments of international tribunals); Statute of International Court of Justice art 38 (same).

88 *See* STEPHENS, CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45 at 256–64.

In the international and domestic systems, accountability for human rights victims has incorporated principles from the international criminal system, as well as other sources of law. Section III turns to the development of standards for private (non-state) superior officers in international law.

III. THE EMERGENCE OF INTERNATIONAL LAW STANDARDS FOR SUPERIOR RESPONSIBILITY OF CORPORATE OFFICERS

One of the central questions that arises before bringing any charges against a defendant (criminal or civil) is whether the law or customary international law principle existed prior to an alleged violation. It is widely accepted that it is unfair to hold someone accountable for something that was not a legal violation before they committed the act.[89] The following Section details the development in the international legal system of approaches to hold individuals responsible for violations committed by those under their supervision, beginning with the responsibility of states and military officials and expanding to civilian government officials and then to corporate officials. This Section focuses on, but is not limited to, standards for private non-state superior responsibility for human rights violations. It brings together sources of law pertaining to superior responsibility with those sources dealing with private (non-state) responsibility, and includes the sources that deal with both. The Section concludes that it has been well established for decades that corporate officials can be held liable for international human rights violations and war crimes committed by those under their effective control.

A. The Historical Origins of the Command Responsibility Doctrine

Responsibility for the actions of a person under the command of another has a long and deep history. Scholars have traced the origins of the concept of command responsibility to the Roman Empire[90] and the writings of Sun Tzu in the sixth century.[91] Initial responsibilities accrued to the state (the crown) or military officials. In 1439, an edict from Charles VII of France, Ordinance at Orleans, stated: "each captain or lieutenant [is] held responsible for the abuses, ills and offences committed by members of his company" and must punish

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89 *See* Beth Van Schaack, *The Principle of Legality in International Criminal Law*, 103 AM. SOC'Y INT'L L. PROC. 101 (2009).

90 *Cf.* Arthur Thomas O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 73 (2004) ("The origins of command responsibility are ancient, with a long history of development and practice in the laws of various nations.").

91 *See* William H. Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1, 3–4 (1973); SUN ZI, THE ART OF WAR: SUN ZI'S MILITARY METHODS (Victor H. Mair trans., 2007).

offenses.[92] If there is a failure to punish or the officer "covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been."[93] In 1621, the Articles of War issued by Gustavus Adolphus of Sweden specified that a commander could issue no unlawful orders.[94] Scholar Hugo Grotius wrote in 1625: "The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so."[95]

This concept was not just stated as an ideal but was on occasion enforced. In one early example, in 1474, the Archduke of Austria ordered the trial of Peter von Hagenbach who was charged with responsibility for atrocities committed by his subordinates while carrying out orders from his master.[96]

Another important step in the evolution of the command responsibility doctrine was restitution for victims. During the early twentieth century, numerous countries ratified the Hague Conventions and the Geneva Convention of 1929. The most commonly cited inception of an affirmative duty to prevent war crimes in a treaty is the Hague Conventions.[97] The Hague Convention of 1907 also specified the duties for restitution to private parties: a belligerent party violating provisions "shall if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[98] The 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field reinforced duties of military "commanders in chief" to comply with the duties in the Convention.[99]

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92 L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 321 (1995) (quoting ORDONNANCES DES ROIS DE FRANCE DE LA TROSIEME RACE (Louis Guillaume de Vilevault & Louis G.O.F. de Brequigny eds., 1782) (*quoted in* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 149 & n. 40 (1993) (emphasis omitted)); *see* O'Reilly, *supra* note 90, at 74–75.

93 Green, *supra* note 92, at 321.

94 Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129, 130 (1981).

95 HUGO GROTIUS, THE LAW OF WAR AND PEACE, ch. 21§ II (Francis W. Kelsey trans., Oxford 1925) (1625).

96 Green, *supra* note 92.

97 *See* Danner &. Martinez, *supra* note 6, at 122 ("Although its roots probably go deeper, modern international law's imposition of an affirmative duty on military commanders to prevent war crimes is usually traced to the Hague Conventions of 1907") (also noting that a few offenders were tried before German national courts).

98 Hague Convention IV Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, https://perma.cc/G7RJ-9F89.

99 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 118 L.N.T.S. 303, at art. 26 (June 19, 1931).

Codification of the responsibility of civilian superiors, and in particular private superiors, began to be more systematically implemented over the course of the twentieth century. The following Section explores that development.

B. The Increasing Acceptance of Superior Responsibility for Private Actors in International Law

International treaties vary in the degree to which they mention corporate officers. Some mention categories of defendants and include both state and non-state actors, but do not distinguish modes of liability. Other treaties mention both potential liability of non-state actors as well as superior responsibility. This Section discusses the evolution and range of sources of international law that establish standards for non-state actors and codify standards for corporate superior officers. Section IV will examine how these standards have been applied in specific cases charging superiors for violations of these laws.

1. The transition from command responsibility to superior responsibility.

The trial of corporate officers for war crimes began after the Second World War with the trials of war criminals at Nuremberg throughout the occupied zones in Europe, and in Asia at the Tokyo Tribunal and in the subsequent trials in Singapore and Hong Kong.[100] The two documents establishing the legal basis for those trials, the Nuremberg[101] and Tokyo Charters for the International Military Tribunals (IMT),[102] did not explicitly include the terms "command" or "superior responsibility;" however, both charters include those with direct superior responsibility, such as "leaders, organizers and instigators."[103] These charters state that these individuals may be prosecuted when they participate in forming or executing a common plan or conspiracy for crimes against humanity, war crimes, or crimes against peace, and that they are liable for "all acts performed by any persons in execution of such plan."[104] As shown below, "leaders" were not limited to military and civilian government officials, but also included industrialists, or corporate officers.

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100 *See* Bazyler & Green, *supra* note 18, at 26.

101 Charter of the International Military Tribunal, annexed to the London Agreement on War Criminals, Aug. 8, 1945, 59 Stat. 1544 [hereinafter Nuremberg Charter].

102 Charter of the International Military Tribunal for the Far East, Jan. 9, 1946, T.I.A.S. 1589 [hereinafter Tokyo Charter].

103 *See id.* at 23 ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan").

104 *Id.*; Nuremberg Charter, *supra* note 101, 59 Stat. 1544 at 1252.

Neither IMT Charter provided for omission liability.[105] This form of superior responsibility was made more explicit by laws such as the French Ordinance Concerning the Suppression of War Crimes. This law allowed trial in cases "[w]here a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices [insofar] as they have organized or tolerated the criminal acts of their subordinates."[106]

The Geneva Conventions of 1949 and 1977 Protocol I to the Geneva Conventions took another important step forward by specifying in international treaties (with resulting broader application beyond that of the post-World War II national ordinance mentioned above) that superior responsibility extends beyond military commanders to civilians. The International Committee of the Red Cross ("ICRC") concluded that these two important sources clarified that the status as a military or civilian government official was too narrow: "[t]he concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control."[107]

The doctrine of superior liability as applied to international armed conflict was formally codified in 1977 in the Additional Protocol I to the Geneva Conventions. Article 86 of Protocol I provides that state parties "shall repress grave breaches and take measures necessary to suppress all other breaches" of the Geneva Convention or Protocol I when they are under a duty to act.[108] Superiors are responsible "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[109]

The language of Article 86 specifically identifies "superiors" (rather than "commanders") and is not limited to military or civilian government officials. Nor does Article 86 distinguish between the type of responsibility for civilian superiors

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105 Ilias Bantekas, *The Contemporary Law of Superior Responsibility,* 93 AM. J. INT'L L. 573, 573 (1999).

106 Prosecutor v. Mucić et al., Case No. IT-96-21-T, Judgment, ¶ 336 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998), https://perma.cc/F2XJ-PL6Y (translating *Ordonnance du 28 aout 1944 rleave a la repression des crimes de guerre*, *reprinted in* 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 88 (1948)).

107 International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1013 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). *See also* Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 114 & n. 31 (2012) (discussing the influence of the ICRC in interpreting humanitarian law).

108 Protocol I, *supra* note 21.

109 *Id.*

and military superiors—more specifically, it makes no distinction between government and private officials, such as corporate officers, nor between civilian leaders with governmental authority and those whose authority is derived from their positions in non-governmental entities. The definitive characteristic of superior responsibility is the superior's effective control over the subordinates who directly participated in the violations.[110]

In the 1990s, two tribunals were established by resolutions of the U.N. Security Council to try alleged perpetrators of genocide, war crimes, and crimes against humanity in the former Yugoslavia and Rwanda. The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) include superior liability. The common relevant clause reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[111] A superior is responsible "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."[112]

During the process of creating the ICTY, the U.N. Secretary General described superior responsibility as "imputed responsibility or criminal negligence,"[113] instead of a strict liability standard. Scholars have commented that

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110 *See* METTRAUX *supra* note 6, at 38.

111 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by the UN Security Council, Res. 827, May 25 1993, as amended by Res. 1166, Res. 1329, Res. 1411, Res. 1431, Res. 1481, Res. 1597, Res. 1660, Res. 1837, and Res. 1877 [hereinafter ICTY Statute], Article 7(3); *see also* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994, adopted by the UN Security Council, Res. 955 of 8 November 1994, as amended by Res. 1165 (1998), Res. 1329 (2000), 1411 (2002), and 1431 (2002) [hereinafter ICTR Statute], Art 6(3), https://perma.cc/4RL6-BDXG ("The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof").

112 ICTY Statute, *supra* note 110, art.7 ¶ 3; ICTR Statute, *supra* note 110, at art. 6 ¶ 3.

113 William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1026 (2003) (citing Report of the Secretary-General pursuant to paragraph 2 of Security Council Res. 808, U.N. Doc. S/25704, ¶ 56 (1993)); *see also* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER

the latter could be unfair and "impose responsibility on the superior even when an unruly subordinate has disobeyed direct orders to stop human rights abuses."[114]

Scholars analyzing the expansion of superior responsibility doctrine have often focused on the differences between military and civilian hierarchies.[115] Military hierarchies have the ability to court-martial and there is a higher expectation of obedience to commanders, the argument goes.[116] One body to distinguish between military and civilian superior responsibility was the ICC. The ICC provided similar but not identical standards in the document establishing the ICC's parameters, the Statute of the International Criminal Court (Rome Statute),[117] which specifies that civilian superiors can be held accountable for crimes committed by their subordinates. Article 28(b) states: "With respect to superior and subordinate relationships not described in paragraph (a) [addressing military superiors], a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates."[118]

For both military and civilian superiors, Article 28 of the Rome Statute adopts the "effective control" test; in the case of private civilians, that control must be over subordinates, but there is no requirement that the superior control be acting under government or military authority. The ICC is also consistent with the previous standard of "effective control."

The Rome Statute distinguishes civilian and military officials based on the level of knowledge necessary for criminal culpability. Specifically, military superiors are responsible if they "*knew or, owing to the circumstances at the time, should have known"* that the subordinates "were committing or about to commit crimes," whereas non-military superiors are responsible if they "*knew, or consciously disregarded information which clearly indicated,* that the subordinates were committing or were about to commit such crimes."[119]

YUGOSLAVIA 345-74 (1996).

114 Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 101 (1995).

115 *See, for example*, Yael Ronen, *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 VAND. J. TRANSNAT'L L. 313 (2010); METTRAUX, supra note 6, at 100–25.

116 *See, for example,* Danner & Martinez, *supra* note 6, at 148 (citing Hague Convention of 1907 and in re Yamashita (limits imposed by professional military).

117 *See generally* Rome Statute, *supra* note 28.

118 *Id.* at 106.

119 *Id.* (emphasis added).

Since the Rome Statute was created for the specific purpose of establishing the duties and parameters of that court, it does not necessarily reflect customary international law; instead, it defines what can be heard by that particular court. In addition, the history of the negotiations over the Rome Statute indicate that this statute was "a quite delicate compromise"[120] rather than reflecting the state of customary international law.[121] Roger Clark, present for the negotiations, noted that the Tokyo war crimes standard was in the ICC drafts until China and the Untied States "engineered the distinction now in Article 28."[122]

According to numerous scholars, customary international law provides for a common standard between military and non-military superiors and the ICC distinction is the outlier.[123] One, Guenael Mettraux, concludes the ICC standard for non-military superiors is regarded as consistent with customary international law while the standard of military liability is looser than under customary international law; this looser standard may have resulted from the goal to facilitate prosecutions.[124] Other scholars argue that a mens rea standard of "conscious disregard" is a higher standard than "should have known" or "had reason to know" and could "eliminate culpability for negligent supervision."[125] Still others argue the meaning of the "conscious disregard" language has yet to be determined because of the lack of case law applying the standard to non-military superiors.[126]

This distinction is not reflected in tribunal statutes other than the Statute of the Special Tribunal for Lebanon, which introduced a new variation on mens rea for its particular court, providing that both military and civilian superiors shall be criminally responsible for statute violations "committed by subordinates under his

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120 U.N. Doc. A/CONF.183/C.1.SR.23. 3 July 1998 Section 2; U.N. Doc. A/CONF. 183/C.1/WGGP/L.4, report of the Working Group on General Principles of Criminal Law, 18 June 1998.

121 Roger Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291, 315 & n. 80 (2001).

122 *Id.* (noting that "Article 28 was hardly one of the successes of codification at Rome") (citing Richard Baxter, *The Effects of Ill-Conceived Codification and Development of International Law, in* RECUEIL C'EDUDES DE EDROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 146 (1968)).

123 *See* METTRAUX, *supra* note 6, at 101 ("Under customary law, the state of mind that must be proved is the same for all categories of superiors.").

124 *Id.* at 26–27. Non-military superiors include civilian governmental officials as well as corporate and other non-governmental superiors.

125 Clark, *supra* note 121, at 315 & n. 80 (describing the civilian standard as "some kind of recklessness/willful blindness/knowledge test).

126 *See* Major James D. Levine, II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?,* 193 MIL. L. REV. 52, 83 (2007); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC),* 25 YALE J. INT'L L. 89, 110 (2000).

or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: [ ] the superior either knew, or consciously disregarded information that clearly indicated that subordinates were committing or about to commit such crimes."[127]

Since 2000, other "hybrid" tribunals combining international and national aspects have been created to hold violators accountable for war crimes and human rights violations including in Sierra Leone, East Timor, Bosnia, Kosovo, and Cambodia. The founding documents for these tribunals include provisions for superior responsibility parallel to those of the ICTY and the ICTR, adopting the "effective control" and "knew or had reason to know" standards.[128] Although enacted after the ICC's Rome Statute, the statutes and resolutions for the courts that followed the ICC did not include an explicit distinction between civilian and military superiors.

The 2002 Statute for the Special Court for Sierra Leone illustrates this common language that there may be superior responsibility for 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 "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 to punish the perpetrators thereof."[129] The Sierra Leone statute also provides that the court may order defendants to pay fines, forfeitures including restitution, rehabilitation, and compensation.[130]

This area of international "black letter" law established to criminally prosecute superior officers, has reached a consensus on the principle of potential liability for corporate officers where the superior exercised "effective control" over the subordinate and failed to take steps to prevent or punish acts of genocide, war crimes, or crimes against humanity by their subordinates. All of these sources of law provide for superior responsibility for private as well as state actors. On the mens rea elements of superior responsibility, there have been some distinctions between the standard of whether a superior "knew or had reason to know" or

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127 Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 3 ¶ 2 (May 30, 2007) [hereinafter Lebanon Statute].

128 *See*, *for example*, Statute of the Special Court for Sierra Leone, S.C. Res. 1315, art. 6 ¶ 3 (Aug. 16, 2000), https://perma.cc/P7R3-98EL [hereinafter Sierra Leone Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29 (Oct. 27, 2004), https://perma.cc/R4FD-LN3B.

129 Sierra Leone Statute, *supra* note 128, art. 6 ¶ 3.

130 *See id.* at art. 19.

whether a superior showed "conscious disregard" for information about ongoing or imminent violations. In terms of numbers and trends, the dominant trend among the statutes for mens rea is to hold a superior accountable when he or she knew or had reason to know about a subordinate's violation. These international criminal law documents are not conclusive, however. Additional clarification by the criminal tribunals is still needed and it is necessary to delve into other sources of law, as the following Sections explore.

2. Additional sources of law for private actor responsibility.

In addition to documents that provide for the prosecution of superior officers, major international instruments offer further, longstanding support for the principle that private actors can be held responsible for their role in violations of international law, including when they are in a position of superior responsibility. This body of law includes international treaties and other sources focused on human rights, as well as sources that deal with other substantive issues, such as maritime law. Although many of these sources do not make specific reference to superior responsibility, they contain broad language that has been widely interpreted to include this form of liability. This body of law complements and strengthens the law codified by the founding documents of the international tribunals and is further strengthened by the cases that have interpreted these laws in international and domestic tribunals.

a) Sources of law that are explicit on both private actors and applicability of superior liability

One of the treaties that addresses both superior responsibility and culpability for private actors is the Convention on Enforced Disappearances, which provides that, States Parties "shall take the necessary measures to hold criminally responsible . . . [superiors] who (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution."[131] The Convention on Disappearances also noted that these provisions were "without prejudice to the higher standards of responsibility applicable under international law to a military commander or to a person effectively acting as a military commander."[132] There

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131 International Convention for the Protection of All Persons from Enforced Disappearances art. 6(b), *opened for signature* Feb. 6, 2007, 2716 U.N.T.S 48088 (entered into force Dec. 20, 2006), https://perma.cc/C2U2-QG3U.

132 *Id.* at art. 6(c).

is no requirement of state action in the definition of the norm: both governmental and non-state actors may be liable. An additional area of law that specifies that a superior may be liable is maritime law. For example, the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, provides that a carrier is liable for damage resulting from death or personal injury due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.[133]

b) Sources providing for private actor liability (which courts then apply to superior officers)

In addition to those sources of law that are explicit about the application of superior responsibility to private actors, there is a body of law that incorporates the legal obligations of private parties, and which courts have interpreted to be applicable to superior officers. These sources extend back almost two centuries.

For instance, specially established courts' ruling on the slave trade during the nineteenth century are an overlooked source of international law that addressed violations by private parties.[134] Between 1817 and 1871, the U.S., U.K., Netherlands, and Portugal entered into treaties that established international courts to suppress the slave trade; these courts seized the ships and divided the assets.[135]

In the twentieth century, a number of human rights treaties contained provisions that indicated that they applied to private actors. For example, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides, "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[136] Both U.S. and international courts have held that genocide violates international law when it is

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133 *See* Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea art. 3, (Dec. 13, 1974), 1463 U.N.T.S. 19; *See also* United Nations Convention on International Multimodal Transport of Goods art. 15, *opened for signature* Sept. 1, 1980, U.N. Doc. TD/MT/CONF/16 (stating that an operator is "liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own").

134 *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 552 (2008) ("Though all but forgotten today, these antislavery courts were the first international human rights courts").

135 *Id.* at 552.

136 Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

committed by state or non-state actors[137] and also includes those in positions of superior responsibility.[138]

The Convention against Torture (CAT) prohibits torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[139] Both public and private persons can be held accountable; the language is "any person," although there must be some state action by one of the participants in the torture. The Committee against Torture, the body of internationally renowned experts that the Convention established for its enforcement, discusses "acts of torture . . . committed by non-State officials or private actors."[140] CAT General Comment 3, on the Convention's Article 14, discusses the state responsibility for a right to redress, effective remedy, and reparations in situations in which "state authorities knew or have reasonable grounds to believe that acts of torture or ill-treatment had been committed by non-state officials or private actors and failed to exercise due diligence to prevent, investigate and punish, . . . the state bears responsibility to provide redress to the victims."[141]

A range of treaties specify that all categories of "persons" (natural and legal) are intended to be included by their provisions, including treaties on racial

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137 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 & n. 20 (2004) ("sufficient consensus . . . that genocide by private actors violate international law") (citing Kadic v. Karadzic, 70 F.3d 232, 239–41 (2d Cir. 1995)); Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. ¶ 398 (Feb. 26).

138 *See* Caroline Fournet, *The Universality of the Prohibition of Crime of Genocide, 1948–2008,* 19 INT'L CRIM. JUST. REV. 132, 144 (2009) (stating that the prohibition against genocide is jus cogens); *see generally* Tahlia Petrosian, *Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC,* 17 AUSTL. INT'L L. J. 29 (2010).

139 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1985).

140 Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties* ¶ 18, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

141 Committee against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, ¶ 7, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012).

discrimination,[142] apartheid,[143] environmental hazards,[144] and organized crime.[145] Other treaties with similarly general provisions include the International Covenant on Civil and Political Rights (ICCPR), which states that each state party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant";[146] the Convention for the Elimination of Racial Discrimination (CERD), which states that governments must "prohibit and bring to an end, by all appropriate means including legislation . . . racial discrimination by any persons, group or organization";[147] and the Convention for the Elimination of Discrimination Against Women (CEDAW), which states as its goal to "eliminate discrimination against women by any person, organization or enterprise."[148]

As discussed below, these sources of law, which provide for private liability, have been interpreted to cover superior officers and thus strengthen the international legal basis for corporate superior officer liability.

3. Due diligence in international business and human rights standards.

The due diligence concept in the core human rights documents has also been

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142 *See* International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195, 212; (entered into force Jan. 6, 1969) [hereinafter CERD]; Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 30, U.N. Doc. CERD/C/USA/CO/6 (Mar. 5, 2008).

143 *See* International Convention on the Suppression and Punishment of the Crime of Apartheid art. I(2), ¶ 2, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976) (declaring apartheid criminal).

144 *See* International Convention on Civil Liability for Oil Pollution Damage, *opened for signature* Nov. 29, 1969, 973 U.N.T.S. 3 (entered into force June 19, 1975); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *opened for signature* Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1992); Convention on Third Party Liability in the Field of Nuclear Energy, *opened for signature* July 29, 1960, 956 U.N.T.S. 251. (entered into force Apr. 1, 1968).

145 *See* United Nations Convention against Transnational Organized Crime, art. 10 ¶ 1, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) ("Each State Party shall adopt such measures as may be necessary consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.").

146 International Covenant on Civil and Political Rights, art 2 ¶ 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

147 CERD, *supra* note 136, art. 2 ¶ 1(d).

148 Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

a central aspect of the recent articulation of business and human rights standards in the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Labor Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the U.N. Guiding Principles on Business and Human Rights, and the Voluntary Principles on Security and Human Rights.

The due diligence principle in the U.N. Guiding Principles advocates for the implementation of "human rights" due diligence to identify, prevent, mitigate, and account for how to address business impacts on human rights.[149] These principles include the identification of key risks related to the type of business and the geographical area of operation, and the existence of a plan of action to prevent or mitigate risks. The latter are based on both technical data and consultations with potentially affected people and other relevant stakeholders, specific actions triggered once abuses are reported, and disclosure of specific policies and processes undertaken to identity and address key risks. Standards for business have also drawn increasing attention in regional bodies and within nation states. The Working Group on Human Rights and Business has made important headway in seeking common ground among sectors, encouraging businesses to move toward respect for human rights.[150]

Other sources of "soft," or non-binding, law such as U.N. declarations, also support the principles of private liability and superior responsibility for human rights violations. For instance, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, . . . irrespective of who may ultimately be the bearer of responsibility for the violation."[151]

These multiple sources of soft international law, especially detailed guides on business and human rights, flesh out the obligations and methodology for due diligence standards to protect, respect and remedy human rights violations.

C. World War II Tribunal Prosecutions of Non-State as Well as State Officials

This Section will go beyond the text of international instruments and examine the jurisprudence for corporate officers from the international tribunals

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149 *See What Are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, https://perma.cc/EJ9N-9LWZ.

150 *See* Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, at 2 (July 6, 2011).

151 G.A. Res. 60/147, ¶ 3(c) (Dec. 16, 2005).

established to try war criminals of the Second World War. The Nuremberg trials, the follow-up Allied Zone cases,[152] and the Tokyo ("Far East") tribunals all included "industrialists" as defendants, confirming that these early tribunals applied international law regardless of the status of the defendant (military, civilian governmental leader or private citizen); instead the test identified in the case law is conduct-focused—whether superiors demonstrated a culpable failure to take reasonable steps to prevent or punish international crimes of those under their control.

1. Nuremberg and Allied Zone Cases.

The Nuremberg tribunals broke new ground by holding individuals accountable for international law violations.[153] During World War II, the U.N. issued a number of statements indicating its intention to bring to trial those enemy personnel who were guilty of war crimes and these individuals included corporate defendants, or "industrialists." The underlying principle, that corporate structure did not provide a shield from prosecution, was stated by Justice Robert Jackson: "While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity."[154]

Superior responsibility doctrine was applied in the military tribunals set up by the four Allied Powers under Allied Control Council Law No. 10.[155] The cases most often cited for the development of the doctrine are *U.S. v. List and others* (*The Hostages Cases*) and *The High Command Case*. In both of these cases, German military officers were held liable because they were found to possess knowledge of their subordinates' abuses and had power to halt the abuses but failed to exercise the power that they had.[156] The *Hostages Cases* discussed the duties of the supervisor "for maintaining peace and order, and the prevention of crime" and the "should have known" standard: knowledge could be attributed to the commander because he ignored reports of "terrorism and intimidation being carried out by units of the

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152 The "Nuremberg Trials" include the Major War Criminals tried at the International Military Tribunal at Nuremberg (IMT) from 1945 to 1946 and the subsequent Nuremberg Military Tribunals (NMT) trials of lower-ranking Nazis conducted by the Americans in Nuremberg and by France, the United Kingdom and the Soviet Union in their respective zones of occupied Germany.

153 *See* Bazyler & Green, *supra* note 18, at 41.

154 *Id.* at 41.

155 *See* Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306; Levine, *supra* note 126 at 57; Bantekas, *supra* note 105, at 573; Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 388 (2000).

156 *See generally* 8 UN War Crimes Comm'n, Law Reports of Trials of War Criminals 70–82 (1949).

field."[157] It was the commander's duty to know: "Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."[158]

The Tribunal also held that there was a duty to condemn and punish and a "practical coercive deterrent" to high-ranking officials ordering or acquiescing in human rights violations. With regard to acts upon which he was on notice (in this case, the killings of innocent people): "Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility."[159]

The *Nuremberg* Military Tribunals (NMT) also found defendants liable where they did not have authoritative control over the state or military apparatus.[160] In one exemplary case, known as "The Medical Trial," sixteen medical doctors and officials were charged with responsibility for medical experiments including subjecting people held in concentration camps to extreme temperatures and infecting them with diseases including typhus.[161] The defendants included Siegfried Handloser, Chief of the Wehrmacht Medical Service. Handloser was convicted of responsibility for war crimes and crimes against humanity committed by subordinates because he knew of the abuses—including those that resulted in the deaths of prisoners, and that the abuses were likely to continue, and yet he failed to investigate, prevent, or punish the offenses or "exercise any proper degree of control over those conducting experiments within his *field of authority and competence*."[162] Mere awareness was not sufficient for conviction; other defendants who were aware of the experiments were acquitted because they did not have supervisory authority.[163] Analyzing this conviction and the acquittals together provides further evidence that the factors in culpability were knowledge and control over subordinates for a finding of superior responsibility.

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157 *Id.* at 69–70

158 *Id.* at 71.

159 *Id.* at 71.

160 *See* KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 266–71 (2011).

161 *See generally* 2 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, at 171, 199–206 (1949).

162 *Id.* at 206 (emphasis added).

163 *Id.* at 208–10. For a further discussion of the Medical Trials, see Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199, 236–42 (1996).

Nuremberg prosecutors were explicit about their ability to try civilian economic leaders.[164] One, Leo M. Drachsler, described Control Council Law No. 10 as extending to "industrialists . . . in their representative capacity, as officers of the leading German economic institutions, as corporate officials of their own organizations, and as individuals."[165] The Tribunals were clear that industrialists could be held liable for acts undertaken as supervisors. In one often cited case, *Government Commissioner v. Roechling*, the tribunal found senior officials in the Roechling firm responsible for abuse of laborers, who included prisoners of war, despite the fact that it was Gestapo soldiers who physically abused the laborers.[166] The Tribunal held that "Hermann Roechling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, *but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses.*"[167] Roechling's son-in-law was found to possess the authority "to obtain an alleviation in the treatment of these workers," but, despite this authority, he did not address the violations.[168] Therefore, the Tribunal found his son-in-law responsible. The standard applied to find these officials culpable had three elements defined in the statutes of the modern tribunals—effective control, knowledge of the abuse, and the ability to stop the abuse but the failure to do so.

In the *Pohl* case, the defendants before the NMT included Karl Mummenthey, a Waffen SS officer[169] who managed mining companies, factories, and quarries in the Nazi concentration camp. Mummenthey supervised laborers who were enslaved and presided over the administration of concentration camps. He attempted to evade liability by arguing that he was merely a "private businessman in no way associated with the sternness and rigor of SS discipline,

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164 *See* L.C. Green, *supra* note 92, at 333–40; Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 105 (2000); Kai Ambos, *Superior Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 828 (Antonio Cassese et al. eds., 2002).

165 Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1159 (2009) (quoting LEO M. DRACHSLER, INDICTMENT OF THE INDUSTRIALISTS 22 (Sept. 28, 1946), Gantt Collection in Towson University Archives, at box R).

166 *See* Gov't Comm'r of the Gen. Trib. of the Military Gov't for the French Zone of Occupation in Germany v. Roechling, Indictment, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 1061 Appendix B (1950) [hereinafter Roechling Case]. For a discussion of the Roechling Case, see Rehan Abeyratne, *Superior Responsibility and the Principle of Legality at the ECCC*, 44 GEO. WASH. INT'L L. REV. 39, 73–74 (2012).

167 *See id.* at 73 (quoting an appellate judgment on the case) (emphasis added).

168 *See id.* at 120 & n. 220.

169 Armed wing of the Nazi party's Schutzstaffel, SS, or "Protective Squadron."

and entirely detached from concentration camp routine."[170] The NMT did not accept this defense, finding that "[i]f excesses occurred in the industries under his control he was in a position not only to know about them, but to do something."[171] The Tribunal also rejected Mummenthey's claims of ignorance, stating that his "assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know."[172]

Between August 1947 and July 1948, the NMT in *United States v. Krauch* [Trial No. 6], put on trial twenty-four directors of I.G. Farben.[173] Farben supplied Zyklon B poison gas used in the German concentration camps to murder millions, conducted notorious medical experiments upon unwilling prisoners at Auschwitz, and operated a massive industrial complex next to Auschwitz that subjected prisoners to forced labor, most of whom died from hunger, disease, or exhaustion.[174]

Ten of the corporate officers were acquitted, with the remainder found guilty and receiving prison terms ranging from eight years to time already served (one and a half years).[175] The court was explicit about the responsibility of these corporate officers:

> [W]here *private individuals,* including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified . . . , is in violation of international law. . . . Similarly *where a* private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].[176]

Other prominent trials of industrialists include Alfried Krupp, as the sole owner of Krupp, was sentenced to twelve years imprisonment and ordered to forfeit all his property under Control Council Law No. 10.[177]

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170 U.S. Gov't Printing Off., 5 Trial of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 1052 (1950).

171 *Id.* at 1052.

172 *Id.* at 1055.

173 Records of the United States Nuremberg War Crimes Trials, United States v. Krauch (Case IV) (Aug. 14, 1947–July 30, 1948), *available at* https://perma.cc/PAZ2-VWSV.

174 *See id.* at 1–12, 23–24.

175 *See id.* at 30–63.

176 *Id.* at 44 (emphasis added).

177 United States v. Krupp (The Krupp Case), 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1449–50. (1950), *available at* https://perma.cc/L9Q7-DHBU.

2. The Pacific Region Cases.

In addition to the Nuremberg cases, another important source of jurisprudence on superior responsibility was the system set up to try war criminals in the Pacific region after the Second World War. Superior responsibility was named in the founding documents for the tribunals, one of the most cited cases (against General Yamashita) began here, and the Pacific Region tribunals also put industrialists on trial for war crimes.

The Chinese Law Governing the Trial of War Criminals (1946) specifically held superiors responsible for failing to prevent crimes of their subordinates and was stated in broad terms, applying to "persons" and including omissions: "Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals."[178]

Pursuant to the Tokyo Charter, which established tribunals to try war crimes in the Pacific region, the Japanese General Tomoyuki Yamashita was tried for atrocities committed by troops under his command in the Philippines in the closing days of the war.[179] The military commission found that "there was a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province and to devastate and destroy… more than 25,000 men, women, children, all unarmed noncombatant civilians were brutally mistreated and killed"[180] The Tribunal concluded "the crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused."[181] Yamashita could be held liable for the conduct of those under his command because a commander has a "duty to take such appropriate measures as are within his power to control the troops under his command," rather than those within his formal mandate or authority.[182] The decision was a controversial one, and two scholars commented that "in many ways, the evolution of command responsibility doctrine has

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178 Prosecutor v. Mucić et al., Case No. IT-96-21-T, Judgment, ¶ 337 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) https://perma.cc/BT86-GBWV (citing Art. IX of the Chinese Law of 24th October, 1946, Governing the Trial of War Criminals, *reprinted in* 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 88 (1948)) [hereinafter *Čelebici* Trial Judgment].

179 U.N. War Crimes Comm'n, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1949).

180 *Id.*; In re Yamashita, 327 U.S. 1, 14 (1946).

181 In re Yamashita, 327 U.S. at 15.

182 *Id.* at 15.

consisted of reactions and counter-reactions to *Yamashita*."[183] The criticisms included dissenting U.S. Supreme Court justices, which are discussed below.

Yamashita was not alone in addressing command responsibility for war crimes in the Pacific region during World War II, and the Far East tribunals included at least one case against officers of a corporation, the Kinkaseki Mine, operating in Taiwan from 1942–1945. Nine civilian Nippon employees were tried before the British War Crimes Court in Hong Kong in 1947 and charged with mistreating prisoners of war forced to work in the mines.[184] The defendants included the general manager, two production managers, a production supervisor and five foremen. Toda Mitsuga, the General Manager, was among those who were found guilty.[185]

The tribunal rejected Toda's arguments that the military was responsible for the treatment of Prisoners of War (POWs) at the mine. The rejection was based on Toda's testimony that POWs were paid by the company and that he received weekly or monthly reports from subordinate company officials about "the amount of work done, the amount of ore extracted, purchases of stones and expenditures."[186] Toda was found guilty, but the court provided no reasoning for its sentence.

The delineation of modes of responsibility in the Royal Warrant Regulation 8(ii) took a procedural approach that "where there was evidence that a war crime had been the result of concerted action upon the part of a unit or a group of men," it is "prima facie evidence of the responsibility of each member of that unit or group for that crime."[187] "[T]he Hong Kong indictments" have been interpreted "to include a nascent version of the doctrine of command responsibility."[188]

The tribunal concluded that the private mining company was responsible for the conditions and mistreatment, including forced labor, at the mine for prisoners of war who had been transferred to them by the Japanese Army.[189]

The tribunals established at the conclusion of the Second World War have been one of the most often cited bases in human rights law: the prosecution of

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183 Danner & Martinez, *supra* note 6, at 124.

184 *See* Suzannah Linton, *Rediscovering the War Crimes Trials in Hong Kong, 1946–48*, 13 MELB. J. INT'L L. 284, 328 (2012).

185 Yuma Totani, *The Prisoner of War Camp Trials*, *in* HONG KONG'S WAR CRIMES TRIALS 90–93 (Suzannah Linton ed., 2013).

186 *Id.* at 91.

187 Roger S. Clark, *Concluding Thoughts*, *in* HONG KONG'S WAR CRIMES TRIALS 206 (Suzannah Linton ed., 2013).

188 *Id.* at 207.

189 *See* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Example of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 117 (2002).

corporate officers in the "industrialist trials" in both Europe and the Pacific provide an important legal foundation for applying superior responsibility to corporate officers committing war crimes and crimes against humanity.

IV. Superior Responsibility in the Modern International Tribunals

For the past two decades, an additional source of legal standards on superior responsibility has been the jurisprudence of international tribunals that were created to address genocide, war crimes, and crimes against humanity in particular countries or regions; the most extensive jurisprudence to be developed so far has come out of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda. The statutes creating these tribunals are described above in Section III. In applying these legal standards, the tribunals have further developed the law on superior responsibility, including when it is applicable to private corporate officials. The tribunals focus on the conduct itself rather than the status of the individual responsible for the violation: the elements of the test are whether a superior (1) has "effective control" over subordinates, (2) knew or had reason to know about the alleged violation, and (3) failed to take measures to prevent the abuse or punish the perpetrator.

A. Affirming the Effective Control Standard for Private Actors: The International Criminal Tribunal for the Former Yugoslavia (ICTY)

As discussed in Section III, after the wave of atrocities in the early 1990s in the former Yugoslavia, the U.N. Security Council created an international criminal tribunal with jurisdiction to try individuals accused of war crimes, crimes against humanity, and genocide in the countries making up the former Yugoslavia: Bosnia-Herzegovina, Croatia, and Serbia. In the cases that came before them between the mid-1990s to the present, the ICTY issued a number of decisions that explained the elements of superior responsibility. Civilian superiors, including those who were not state officials, were among the defendants who came before the tribunals, and the ICTY issued important decisions making clear that civilians could be held responsible under a superior responsibility theory.

In 1998, the ICTY issued the first modern decision on the elements of superior responsibility. In the former Yugoslavia, a number of the defendants were non-state actors and in *Prosecutor v. Delalic, et al* (*Celebici)*, the ICTY ruled that "the applicability of the principle of superior responsibility in Article 7(3) extends

not only to military commanders but also to individuals in non-military positions of superior authority."[190]

In this analysis of the applicability of superior responsibility to civilian as well as military officials, the tribunal explained that the superior responsibility could apply whether or not there was a de jure hierarchical structure.[191] The *Celebici* Appeals Chamber confirmed that the necessary relationship between superior and subordinate was one of "effective control."[192] The ICTY looked to Nuremberg's *Pohl* case as a relevant precedent on superior responsibility and noted that information was available to put on notice for the need for further investigation.[193] The tribunal's reasoning states that command responsibility is not a form of strict liability. While not strict liability, the standard for superior liability was greater than ordinary negligence and recklessness.[194] In *Prosecutor v. Blaskic*, the ICTY explained that the "indicators of effective control are more a matter of evidence than of substantive law."[195] The elements of effective control identified in this decision were the power to prevent international crimes, punish perpetrators, to refer the offenders to appropriate authorities.[196]

The ICTY identified the sources of customary international law with respect to superior responsibility and its application to cases involving both international and internal armed conflict, and to both military and civilian superiors.[197] Its decisions repeated the elements of effective control between a superior and subordinate, whether the superior "knew or had reason to know about a forthcoming or past violation, and the failure to prevent a predicted violation or punish violations within the superior's knowledge."[198]

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190 *See Čelebici* Trial Judgment, at ¶ 376.

191 *See id.* at ¶ 354.

192 *See id.* at ¶ 376.

193 Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶¶ 192–93, 262–63 (Int'l Crim. Trib. For the Former Yugoslavia, July 29, 2004), https://perma.cc/Z8DM-MX56 (citing the Pohl decision for the fact that liability was based on de facto rather than de jure authority).

194 *See* Danner & Martinez, *supra* note 6, at 127–31.

195 Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgement, ¶ 69 (Int'l Crim. Trib. For the Former Yugoslavia July 29, 2004), https://perma.cc/L9VN-LWP6 [hereinafter Blaskic Appeal Judgment].

196 *See id.* at ¶ 69.

197 *See* Levine, *supra* note 126, at 76.

198 *See Čelebici* Trial Judgment, at ¶ 379–93.

B. Applying the Effective Control Standard to Corporate Superior Officers: The International Criminal Tribunal for Rwanda (ICTR)

The ICTR, created to address genocide, war crimes, and crimes against humanity for the atrocities in Rwanda in 1994, also clearly stated that superior responsibility applied to civilian as well as military officials. In one key case, the *Bagilishema* panel stated that, "[T]here can be no doubt, therefore, that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority."[199] Most relevant to this Article's analysis, the ICTR has found business leaders culpable under charges of superior responsibility where they had effective control over those committing the violations, where they knew or had reason to know about the crimes and the superior officer could have taken action to prevent or punish the violation, but failed to do so.

In one case against the director of the Gisovo Tea Factory, an ICTR Trial Chamber found Alfred Musema responsible as a superior officer because he "exercised de jure authority over [tea factory] employees" and because he "was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute."[200]

In another widely discussed case, *The Media Case*, an ICTR Appeals Chamber analyzed the legal standards for superiors in a private company running a Rwandan radio station and newspapers and held that superiors could be culpable for violations committed by their subordinates.[201] The Chamber ruled that corporate officials with effective control over their subordinates who "knew or had reason to know" subordinates were about to commit crimes and failed to prevent or punish acts inciting genocide, could be held criminally responsible for these violations.[202]

The Chamber upheld the conviction of Ferdinand Nahimana, the radio station's founder and manager, for his subordinates' acts of inciting genocide.[203]

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199 Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 42 (Int'l Crim. Trib. for Rwanda June 7, 2001).

200 Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶¶ 880, 894 (Int'l Crim. Trib. for Rwanda Jan. 27, 2000), https://perma.cc/S2CL-BAUM.

201 *See generally* Nahimana v. Prosecutor, Case No. ICTR 99-52-A, Appeals Judgment (Int'l Crim Trib. for Rwanda Nov. 28, 2007), https://perma.cc/VKG9-XKTB [hereinafter Media Case].

202 *Id.* at ¶¶ 589, 776, 822, 834, 840, 856, 942.

203 *See id.* at ¶¶ 849–50, 853.

An important aspect of the decision was its distinction between superior responsibility and direct instigation of genocide: the Appeals Chamber dismissed charges of direct instigation due to lack of evidence against Nahimana, despite its finding of his responsibility as a superior.[204] The Appeals Chamber also emphasized that that this was not a case in which the defendant was a de facto military commander and that the army was not even in control.[205] *The Media Case* allows for "double-derivative liability," finding that superior liability applies even when the subordinate is merely an accomplice to a third-party perpetrator (that is, failing to prevent or punish a subordinate who aids and abets or incites another in the commission of a crime).

In contrast, on the charges of superior responsibility inciting genocide, the Appeals Chamber found insufficient evidence against Jean-Bosco Barayagwiza, the radio station's co-founder, and Hassan Ngeze, who was held criminally responsible for personally inciting genocide in the newspaper he controlled. The Chamber concluded that Barayagwiza had effective control over his subordinates only at a time that was too distant from the genocide to hold him criminally responsible; during the period of genocidal incitement at the radio station, he did not have effective control over his subordinates.[206] Although Hassan Ngeze published "criminal statements" in his newspaper and the Appeals Chamber upheld his conviction for personally inciting genocide, the Chamber concluded that it could not uphold the conviction for superior responsibility because he did not have effective control over his subordinates. [207]

The nuanced approach demonstrated by the ICTR shows the careful application of the multi-pronged test of superior responsibility: if there is evidence of effective control of subordinates, private actors, including corporate officers, have been held accountable for human rights violations that they were found to have known about and failed to attempt to prevent or punish.

C. The Hybrid Tribunals

As mentioned above, in addition to the international tribunals created to address genocide and other violations in the former Yugoslavia and Rwanda, tribunals combining international and national laws and procedural aspects were created to address other patterns of atrocities across the world. As these tribunals

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204 *Id.*

205 *See id.* at ¶ 63.

206 *Id.* at ¶¶ 635–36, 725, 858, 1003.

207 *Id.* at ¶¶ 410, 886 (conviction under ICTR Statute Art. 6(1) because Ngeze was found to have "planned, instigated, ordered, committed . . . in execution of ICTR Statute violation"; no conviction under ICTR Statute Art. 6(3) for superior responsibility).

move forward, they are adopting theories of superior responsibility for corporate officials.

One case that has been heard by the Special Tribunal for Lebanon has addressed corporate individuals. In the first such Hybrid Tribunal case to address corporate officers, the Lebanon Tribunal proceeded against a private corporate official, Ms. Karma Mohamed Tahsin Al Khayat, for publishing the names of "purported confidential witnesses."[208] In that case on contempt charges, the court convicted Ms. Khayat, who authorized the broadcasts on Al Jadeed TV and then authorized the transfer of the broadcasts onto Al Jadeed's website and Youtube page.[209] She further had the authority to remove these broadcasts. In exercising her authority, she acted on behalf of Al Jadeed TV.[210]

The modern tribunals, ICTY, ICTR and hybrid tribunals, have given careful attention to legal standards and the application to particular cases of private actors, finding that business officials as well as military and civilian government officials can be found liable for human rights violations. These tribunals have applied the multiple prongs of the test of superior responsibility to limit the application to those officials who had effective control over the subordinates who physically committed the violations.

V. SUPERIOR RESPONSIBILITY CASES IN NATIONAL LEGAL SYSTEMS

The development of superior responsibility cases in international human rights cases in U.S. and other national courts ran a parallel course to the developments in the international tribunals: the first cases focused on military superiority, and then expanded to civilian leaders and corporate officials. Because of its central role in human rights cases in U.S. courts, this Section begins with the case against General Yamashita for war crimes in Asia during World War II, which is commonly cited for the test of the superior-subordinate relationship as one of "effective control" and for the "knew or should have known" and "failed to take action" standards. The Section then examines the development of ATS and TVPA cases that were brought against military commanders, developing to civilian government and then private corporate officers under a theory of superior responsibility. This Section concludes by exploring parallel standards in U.S. corporate officer cases under statutes besides the ATS and TVPA, and then turns to compare standards in other national jurisdictions.

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208 In the Case against N.T.V. Karma Mohamed Thasin Al Khavat, Case No. STL-14-05/T/CJ, Public Redacted Version of Judgment, ¶ 7 (Special Trib. For Lebanon, Sept. 18, 2015).

209 *Id.*

210 *Id.* (Ultimately, she was convicted only of contempt of court rather than the underlying crimes.).

A. The United States: The *Yamashita* Case

The Yamashita military commission ruling discussed above was appealed to the U.S. Supreme Court.[211] While controversial, the Supreme Court's ruling endorsed important principles of superior responsibility that have been repeatedly cited by later courts and tribunals in human rights and humanitarian law cases.[212]

One central point was the use of the "effective control" test in the *Yamashita* case; this test remains the core for the analysis between superior and subordinate that international tribunals and national courts rely on to this day.[213] The majority also focused much of its opinion on the deterrence purpose of holding commanders responsible, stating that the goal of protecting the civilian population "would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection."[214]

A strong dissent by Justice Murphy disputed the majority's conclusion that Yamashita had effective control over his subordinates.[215] Justice Murphy focused on facts which indicated that Yamashita could not have known of the abuses, emphasizing his dismay that Yamashita did not have information because opposing forces had destroyed the communication system and describing the chaos of war created by allied forces.[216] Notably, the bulk of Justice Murphy's opinion focused on what he saw as due process violations of the U.S. Constitution's Fifth Amendment by the military commission.[217] He also expressed his concern that the majority standard was not based on law in place at the time of the trial.[218] Another dissent by Justice Rutledge addressed the lack of fair trial and criticized military commissions.[219] However, neither dissenting Justice disregarded the principle of command responsibility, and Justice Murphy wrote

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211 *See* Yamashita, 327 U.S. at 1.

212 *Id.* at 15.

213 *See* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Operations*, 164 MIL. L. REV. 155, 180 (2000).

214 *Yamashita*, 327 U.S. at 15.

215 *See id.* at 26–41 (Murphy, J., dissenting).

216 *Id.*

217 *See id.* at 27–28 (Murphy, J., dissenting) (noting that defendant was "rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged").

218 *See id.* at 35 (Murphy, J., dissenting) ("Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force.").

219 *Id.* at 41–81 (Rutledge, J., dissenting).

that a military commander could be punished for "clear and unlawful failures to prevent atrocities."[220]

The *Yamashita* case continued to be a central part of U.S. courts' analysis, and was applied in tort cases in the ATS and TVPA cases, described below.

B. 28 U.S.C. § 1350 Cases Alleging International Human Rights Violations

To understand how domestic tort law and international human rights law intersect for the examination of corporate officer liability, it is necessary to begin with a brief introduction to the statutes where the question arises. In U.S. courts, two of these statutes are the ATS and the TVPA. The development of the case law on superior responsibility for defendants under the ATS has broadened from military and civilian government commanders in the 1980s and 1990s to include non-governmental actors beginning in 1995.[221] These cases have continued to the present, along with cases brought under the TVPA.[222] A number of cases have been brought under both statutes, with some bringing additional federal and state statutory claims.[223]

1. Legal framework for U.S. human rights cases.

a) Alien Tort Statute

The ATS is a provision of the Judiciary Act of 1789, and provides jurisdiction over tort claims by aliens that are either violations of a treaty or of the "law of nations."[224] The inclusion of human rights violations as violations of the law of nations, known today as "customary international law," was first analyzed by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*,[225] and endorsed in numerous cases, including by the Supreme Court in *Sosa v. Alvarez-Machain*.[226]

As far back as at least the last century, the U.S. Supreme Court held that customary international law "may be ascertained by consulting the works of

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220 *Id.* at 40 (Murphy, J., dissenting).

221 *See* STEPHENS, CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45, at 46, 311.

222 For summaries of ongoing cases, see, for example, Center for Constitutional Rights, www.ccrjustice.org; EarthRights International, www.earthrightsinternational.org; Center for Justice and Accountability, www.cja.org; The Business and Human Rights Resource Center, www.business-humanrights.org.

223 *Id.*

224 28 U.S.C. § 1350 (2016).

225 *See* Filartiga, 630 F.2d at 876.

226 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004).

jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."[227] In 2004, the Court endorsed this standard in *Sosa v. Alvarez-Machain*.[228] The multiple sources of customary international law are also reflected in Article 38 of the Statute of the International Court of Justice[229] and the Restatement (Third) of Foreign Relations Law of the United States,[230] which include the standards enacted by international bodies, general practice, and judicial decisions.[231] Oppenheim's *International Law* further elaborates the sources of customary law to include external conduct between governments, domestic legislation, diplomatic dispatches, internal government memoranda, and ministerial statements.[232] This means that the framework for accountability draws from international treaties, civil/tort, and criminal law.

When examining a particular defendant's responsibility for the alleged violations (or to use international terminology, the "mode of liability"), courts have come to different conclusions about whether they look to international law or federal common law. Since federal common law includes international law, customary international law standards are arguably relevant regardless of which theory is accepted.[233] The split in opinion, however, is another reason that this Article examines the standards under both international law and U.S. federal law.

Looking to federal common law has been criticized as being too open-ended—inviting courts to use such a range of multiple sources of law including foreign jurisdictions makes it difficult to ascertain a definitive standard. Defendants in U.S. cases and scholars have sometimes argued that customary international law is subjective or in the eye of the beholder. However, this criticism

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227 U.S. v. Smith, 18 U.S. 153, 160–61 (1820).

228 Sosa, 542 U.S. at 734 (citing The Paquete Habana*,* 175 U.S. 677, 700 (1900)).

229 Statute of the International Court of Justice art. 38, Jun 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993, *quoted in* Filartiga, 630 F.2d at 881 & n. 8.

230 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, Reporters' Notes 2 (1987) ("[1] [V]irtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa; [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; [4] action by States to conform their national law or practice to standards or principles declared by international bodies . . . [and] [5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions[,] and other diplomatic communications.").

231 *See also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

232 *Id.*

233 *Id.* at 1561–62.

does not apply when there is a common analysis across multiple sources or a consistent definition over time. In the case of superior responsibility, there is a common core in the elements applied in both criminal and civil human rights cases. Another common denominator is that the doctrine can apply to those with military, civilian governmental, or private status.

b) The Torture Victim Protection Act

The TVPA, which provides jurisdiction over claims by individual defendants for torture and summary execution, has led to far fewer questions about the source of law defining superior responsibility. The TVPA legislative history explicitly refers to the command responsibility doctrine "under international law,"[234] and thus where plaintiffs have alleged under the TVPA that a defendant has command responsibility, courts examining whether plaintiffs have properly pled their claims look to the definitions as established by customary international law.

While the legislative history uses the term "command responsibility," it does not limit the application of this form of liability to military commanders and sets forth the following parameters: "a higher official need not have personally performed or ordered the abuses in order to be held liable"[235] and "responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them."[236] Plaintiffs may bring evidence of "a pervasive pattern and practice of torture, summary execution or disappearances."[237]

The Senate report cited the opinion of the Tokyo War Crimes tribunal in the *Yamashita* case, explaining the application of command responsibility: when "crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.'"[238] Underscoring the endorsement of ATS jurisprudence, the Senate report cited a 1980s ATS case, *Forti v. Suarez Mason,* as an example of liability where an official was liable for the actions of "personnel under his command 'acting pursuant to a "policy, pattern and practice" of the First Army Corps.'"[239]

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234 S. REP. NO. 102–249, at 9 (1991).

235 *Id.*

236 *Id.* (citing United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; Inter-American Convention to Prevent and Punish Torture art. 3, *opened for signature* Dec. 9, 1985, O.A.S.T.S. No. 67).

237 *Id.*

238 *Id.* at 9 & n. 18 (quoting the Tokyo War Crimes Trial, *reprinted in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1039 (L. Friedman ed., 1972)).

239 *Id.* at 9 (citing Forti v. Suarez-Mason, 672 F. Supp. 1531, 1537–38 (N.D. Cal. 1987)).

After the passage of the 1992 TVPA, many of the human rights cases brought under the ATS included TVPA claims, and the courts used common standards to assess superior responsibility for claims brought under the two statutes.

2. ATS and TVPA jurisprudence on the legal standard for superior responsibility.

The development of superior responsibility cases in international human rights cases in U.S. courts followed the pattern of the international tribunal cases, progressing from military command responsibility to the inclusion of civilian government officials.

Since the 1980s, judges have ruled that defendants could be liable under the theory of command responsibility in cases brought in U.S. courts under the ATS. The initial cases brought against military commanders applied the legal standard for command responsibility as developed in the *Yamashita* case as well as more recent developments in international law. The courts have wrestled with the types of acts for which a defendant can be found to have superior responsibility, and the collection of rulings provide a consistent, solid standard.

The first ATS case in which a court analyzed command responsibility was brought against Argentinian General Suarez-Mason, alleged to be responsible for disappearances and extrajudicial executions during Argentina's "Dirty War."[240] The court held that Suarez-Mason's superior responsibility was based on his position of authority and because he "authorized, approved, directed, and ratified" human rights violations,[241] he was held responsible for actions that were part of a "policy, pattern and practice" that he had endorsed.[242]

Cases continue to be brought against military leaders, and an important set of cases against a Salvadoran general are two commonly-cited cases in ATS jurisprudence.[243] The 2002 Eleventh Circuit decision *Ford v. Garcia*[244] began with an analysis of *In re Yamashita*, and then turned to the opinions on superior responsibility by the international tribunals of Rwanda and the former Yugoslavia, concluding that these decisions "provide insight into how the doctrine should be

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240 *See* Suarez-Mason, 672 F. Supp. at 1531.

241 *Id.* at 1538.

242 *Id.* at 1537 (quotation marks omitted).

243 *See, for example*, Todd v. Panjaitan, Civ. A. No. 92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (holding liable Indonesian military general who fled to Boston for attacks on protestors in East Timor).

244 Ford v. Garcia, 289 F.3d 1283, 1290 (11th Cir. 2002).

applied in TVPA cases."[245] The *Ford* court cited ICTY and ICTR decisions on the effective control test as including the elements of 1) a superior-subordinate relationship, 2) the superior knew or should have known, owing to the circumstances at the time, that his or her subordinates had committed, were committing, or planned to commit acts which violated the law of war, and 3) the superior failed to prevent the commission of the crimes or failed to punish the subordinates after the commission of the crimes.[246] In *Ford*, the jury acquitted the defendants, and plaintiffs appealed based on what have been criticized as erroneous jury instructions. The instructions shifted the burden to prove that defendants had effective control and had established the elements of command responsibility "by a preponderance of the evidence" that their "injuries were a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility."[247] In a second related case, *Romagoza v. Garcia*, the jury convicted the same defendants and issued a $50 million verdict.[248] In addition to the rulings on the legal standard for command responsibility, these two cases have also highlighted the questions of the necessary evidence and burden of proof for superior responsibility. The *Romagoza* jury instructions returned to standards familiar under international law and stated that the plaintiff must prove "by a preponderance of the evidence" that the defendant/military commander had the actual ability to control the person(s) accused of torturing the plaintiff.[249] The first element of superior responsibility there was "effective control."

A subsequent case, *Chavez v. Carranza*, also found the burden on the plaintiff to establish, by a preponderance of evidence, the elements of superior responsibility: "effective control" over the physical perpetrator(s) of torture, extrajudicial killing and/or crimes against humanity.[250] The *Carranza* jury instructions defined the "effective control requirement" as requiring that "the defendant had legal authority and practical ability to exert control over his subordinates."[251] The *Carranza* jury instructions also stated that defendants could not do an end run around liability: "The defendant cannot escape liability however

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245 *Id.*

246 *Id.* at 1290–91 (citing Delalic, Aleksovski, Blaskic, Kayishema, and Akayesu ICTY and ICTR decisions).

247 *Id.* at 1287 & n. 4.

248 Romagoza Arce v. Garcia, 434 F.3d 1254, 1259 (11th Cir. 2006).

249 Romagoza Jury Instructions at 7. *See also* Beth van Schaack, *Command Responsibility: An Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003).

250 Trial Proceedings Before the Honorable Jon Phipps McCalla, 1782-83 (Nov. 14, 2005). The Caranza jury instructions are available at https://perma.cc/2VL5-SQY8.

251 *Id.*

where his own action or inaction caused or significantly contributed to a lack of effective control over his subordinates."[252]

Thus, for military leaders, ATS and TVPA cases have focused on the "effective control" test. The same test was also applied to paramilitary leaders. For example, in a case against Emmanuel Constant, the 1990s paramilitary leader in Haiti, Constant was held responsible for a campaign of rape and other abuses against those supporting the government Constant opposed; Constant was held liable for crimes against humanity and torture.[253]

Superior responsibility was also applied to civilian government officials, beginning in a series of ATS cases against Ferdinand Marcos, the former dictator of the Philippines.[254] Marcos was held responsible for the actions of his subordinates. The question of whether Marcos could be held responsible for acts "merely" under his command came before the Ninth Circuit. He established a policy encouraging the repression of political activists, created a disciplinary structure that contributed to the patterns of abuse and a climate of impunity, and rewarded those who perpetrated atrocities.[255] The jury instructions for the *Marcos* trial stated that the test to be applied was whether Marcos "had knowledge that the Philippine military, paramilitary and/or intelligence forces tortured, summarily executed, caused the disappearance or arbitrary detention of plaintiffs and the class, and having the power failed to take effective measures to prevent the practice."[256] While the Marcos jury instructions use "knowledge" rather than "knew or had reason to know," this was the result of negotiation between the parties rather than a judicial determination on the content of customary international law.[257] These jury instructions did not address superior responsibility by omission.[258]

A 2004 case against another civilian official, Liu Qi, the mayor of Beijing, for human rights violations committed against Falun Gong practitioners, provided an analysis of plaintiffs' allegations of superior responsibility that discussed the widening net for liability for supervisory authority and the legal test applied in U.S. and international courts.[259] The *Liu Qi* court held that a superior-subordinate

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252 *Id.*

253 Doe v. Constant, 354 F. App'x 543, at *3–4 (2d Cir. 2009).

254 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

255 Steinhardt, *supra* note 114, at 65.

256 STEPHENS , CHOMSKY, GREEN, HOFFMAN, & RATNER, *supra* note 45 at 259 (citing In re Estate of Marcos Litigation, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995)).

257 *See generally* Steinhardt, *supra* note 114.

258 *Id.*

259 Doe v. Qi, 349 F. Supp.2d 1258, 1269 (N.D. Cal. 2004).

relationship was established where one defendant had supervisory authority over the perpetrators, and another defendant "played a major policy-making and supervisory role in the policies and practices that were carried out."[260] The court also extensively discussed the legislative history of the Torture Victim Protection Act, and noted that text and history of TVPA indicated that it was not limited to military officials.[261] The court held that the "Senate thus implicitly endorsed the application of command responsibility to acts of torture and extrajudicial killings whether committed by military or civilian forces. . . . [T]he text of the TVPA does not limit its applicability to acts of military officials or the context of war."[262]

The consistent standard developed in the line of ATS and TVPA cases, which applied to military, paramilitary, and civilian governmental officials, included clear common elements: superior-subordinate relationship of effective control (not limited by a particular status such as military or civilian government position), knowledge or duty to know, power to take action, and failure to do so. These elements are consistent with the standards endorsed by the international tribunals, as discussed above.

3. ATS/TVPA cases against non-state-actors-the shift in the 1990s.

Between 1980 and 1995, all substantial rulings in cases brought under the ATS and the TVPA addressed the liability of state actors—predominantly former government officials of foreign nations. As for many other aspects of the question of corporate accountability in ATS cases in U.S. courts, the opinion bridging cases brought against state officials and those brought against non-state actors was the Second Circuit's decision in *Kadic v. Karadzic*.[263]

In 1993, two cases alleging genocide, war crimes, and crimes against humanity were brought against Radovan Karadzic, the self-declared president of "Republika Srpska," a section of the territory of the former Yugoslavia that was not recognized as a State by the international legal system.[264] As the self-proclaimed head of an unrecognized State, Karadzic was a "non-state actor," and the U.S. District Court for the Southern District of New York initially dismissed the plaintiffs' claims because it held international human rights obligations only applied to those operating under official government authority or "state actors."[265]

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260 *Id.* at 1269, 1332.

261 *Id.* at 1330–31.

262 *Id.*

263 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

264 Doe v. Karadzic, 866 F. Supp. 734, 740 (S.D.N.Y. 1994), *rev'd sub nom.* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

265 *Id.*

On appeal, the U.S. Court of Appeals for the Second Circuit analyzed the question of whether state action was a necessary element to hold human rights violators accountable under the ATS and the TVPA.[266] The court found that it depended on the definition of the norm under international law—some violations such as genocide, war crimes, and crimes against humanity did not require state action as an element of the violation, and others such as torture and arbitrary detention did.[267] The court found that Karadzic had command responsibility for both the violations that did not require state action under international law and those that did.[268]

The case making the link between "non-state actors" and multinational corporations was a 1997 decision in *Doe v. Unocal Corp.*, in which the U.S. District Court for the Central District of California applied the Second Circuit's analysis in *Karadzic* to a case alleging complicity in forced labor and other human rights abuses in Burma against the Unocal Corporation, its joint venture partners, and two Unocal officers: President John Imle and Chief Executive Officer Roger Beach.[269] There were no final rulings on liability in these cases because the case settled in the midst of summary judgment proceedings in federal court and before the liability phase of the trial began in state court.[270] The court did not address superior liability but rather focused on the role of the corporation itself in the violations and plaintiffs' allegations that the corporation and its officers aided and abetted in the liability.[271] On these issues, the role of the President and CEO were key to the finding of the ruling to allow the case past summary judgment.[272]

In an ATS case on the Bhopal toxic gas disaster, *Bano v. Union Carbide Corp.*, the court found the potential of corporate superior officer liability, but applied New York rather than international law: "Under New York law, 'a corporate officer who commits or participates in a tort, even if it is in the course of his duties

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266 Kadic, 70 F.3d at 232.

267 *Id.* at 238–44.

268 *Id.* at 243–44.

269 Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

270 Statement of parties on settlement of case, www.ccrjustice.org, article on status of opinions.

271 Doe, 963 F. Supp. at 880; Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

272 Doe I, 395 F.3d at 938–941. A number of the facts could also have been used in superior responsibility theory of effective control, knowledge and failure to prevent or punish violations: a briefing book describing the number of villagers working as local helpers hired by military battalions, daily meetings with tactical military commander when Unocal's President and CEO visited the pipeline project, a meeting with activists in which President Imle stated that because "'people are threatening physical danger to the pipeline,' that, 'if you threaten the pipeline there's gonna be more military,' and that 'if forced labor goes hand and glove with the military yes there will be more forced labor.'" *Id.*

on behalf of the corporation, may be held individually liable.'"[273] The court then found that "the amended complaint asserts that Anderson exercised significant direct control over management of the Bhopal plant, including control over safety procedures."[274] The court then remanded for further consideration of the claims against Anderson. The applicability of these standards to Anderson was never addressed because the case was dismissed on unrelated grounds.[275]

A 2002 ruling also examined U.S. domestic standards for corporate officer liability, and this time compared them to international law standards and found them consistent. In *Wiwa v. Brian Anderson*, an unpublished decision of the Southern District of New York examined the history of the TVPA and held that the former Managing Director of Shell Petroleum Development Company of Nigeria could be liable on multiple forms of complicity, because the plain meaning of the TVPA provides for cases against those who "cause someone to undergo" torture or extrajudicial killing, as well as those who actually carry out the physical acts.[276]

Another case against Shell, *Kiobel v. Royal Dutch Petroleum,* landed in the Supreme Court.[277] At an earlier stage of the case, a little-known piece of this decision by the U.S. Court of Appeals for the Second Circuit concerned corporate officer liability.[278] Despite the majority's strenuous objection to corporate entity liability, they endorsed corporate officer liability in the context of aiding and abetting allegations in that case, noting that "nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and

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273 Bano v. Union Carbide Corp., 273 F.3d 120, 133 (2d Cir. 2001) (citing Lopresti v. Terwilliger, 126 F.3d 34, 42 (2d Cir. 1997) (citation and internal quotation marks omitted)).

274 Bano, 273 F.3d at 133.

275 *Id.* (The case was dismissed on statute of limitations grounds and because the court concluded that there was no property interest at stake).

276 Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *15 (S.D.N.Y. Feb. 28, 2002) (citing S. REP. NO. 102–249, at 9–10 (1991)) (quotations omitted)). In this case, the allegations against the defendant were for aiding and abetting liability and the court noted in a footnote that even if the TVPA did not support the legal analysis that a theory of aiding and abetting liability, this form of liability would follow the Restatement on Torts. *See also* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000), *aff'd in part, rev'd in part sub nom.* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005), and *opinion vacated, appeal dismissed sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (no requirement of active participation for corporate officer to be liable for aiding and abetting).

277 133 S. Ct. 1659 (2013).

278 Kiobel, *supra* note 2.

directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law."[279]

However, when it reviewed the Second Circuit's *Kiobel* decision, the Supreme Court did not address the question of corporate institutional or officer liability. Instead, the Court ordered reargument on the question of "whether and under what circumstances" the ATS applies to violations of the law of nations occurring outside U.S. territory."[280] After briefing and argument, the majority concluded that the ATS cases must "touch and concern" U.S. territory "with sufficient force to displace the presumption against extraterritorial application."[281]

In another case that reached the Supreme Court, *Mohamad v. Palestinian Authority,* the Court held that the TVPA's use of the term "individual" to describe defendants excluded corporations and other entities.[282] Corporate officers may be sued under this statute, including, for example, in a case against the Chiquita corporation for superior responsibility, aiding and abetting, and conspiracy.[283] On June 2, 2016, the U.S. District Court for the Southern District of Florida ruled that corporate officers may be sued under TVPA for aiding and abetting, and conspiracy; the court did not reach superior responsibility.[284]

4. *Drummond*: the first challenge to superior liability for corporate officers in an ATS/TVPA case.

Besides the *Kiobel* case discussed above, the only other circuit to address the question of superior responsibility for corporate officers is the U.S. Court of Appeals for the Eleventh Circuit, in a series of cases against the Drummond Corporation. In contrast to the indirect reference by the Second Circuit in *Kiobel*, the Eleventh Circuit directly addressed the question.

Beginning in 2003 and 2004, a series of four cases was brought under the ATS, TVPA, and the Colombian wrongful death law against the Drummond Corporation, two Drummond subsidiary corporations, and executives Augusto Jimenez, Garry Drummond, and James Michael Tracy.[285] At the trial court level in

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279 *Id.*

280 Kiobel, order for reargument, https://perma.cc/Y4V4-CB5H.

281 Kiobel *supra* note 2.

282 Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012). This ruling ignored multiple uses of the term "person" in the legislative history and the use in international law of individual to include both human beings and legal entities.

283 In re Chiquita Brands Int'l, Inc., No. 08-MD-01916-KAM, 2016 WL 3247913 (S.D. Fla. June 1, 2016).

284 *Id.*

285 Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011); Giraldo v. Drummond Co. Inc., No. 2:09-CV-1041-RDP, 2013

Giraldo v. Drummond, the U.S. District Court for the District of Alabama initially held that there was no superior liability for corporate officers. The claims in the case were brought by wives, parents, and children of people killed by a Colombian paramilitary organization who sued the Alabama-based coal company and officers for complicity with the paramilitary organization AUC (United Self Defense Forces), an organization that was designated as a terrorist organization by the U.S. State Department. The plaintiffs alleged that between 1996 and 2006, Augusto Jimenez, the President of Drummond, Ltd (DLTD)'s Colombian branch, supervised the development and implementation of Drummond security plans. The allegations stated that Jimenez was responsible for monitoring contractors and for causing an investigation to occur on allegation of any Drummond employee assisting paramilitaries; he was also charged with paying and conspiring with the AUC in the killings.[286]

In opposing the allegations of the complaint, Jimenez did not challenge the superior responsibility theory, but instead questioned whether plaintiffs had properly pled the claim. The second officer sued was Mike Tracy, who had been the DLTD president between 1992 and 1998. Plaintiffs charged that he formed and implemented Drummond Limited's security policies, made decisions to provide funds to Colombian military without restrictions, and allowed the military to use funds to contribute to the AUC.[287]

The district court rejected superior responsibility for these corporate officers because it held that the allegations were insufficient to implicate the defendants.[288] The court then made the sweeping statement that "no court, in any jurisdiction, has ever extended the doctrine of superior responsibility in ATS and/or TVPA cases to the corporate officers of private companies. That is because command responsibility is a military doctrine."[289] The court continued, "The theory has only

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WL 3873960, at *2 (N.D. Ala. July 25, 2013), *aff'd sub nom.* Doe v. Drummond Co. Inc., 782 F.3d 576 (11th Cir. 2015); Melo Penaloza v. Drummond Co., 2016 WL 5389280 (11th Cir. 2016).

286 Giraldo, 2013 WL 3873960, at *2, *aff'd sub nom.* Doe v. Drummond Co. Inc., 782 F.3d 576 (11th Cir. 2015).

287 Doe, 782 F.3d at 576. At a late stage the plaintiffs tried to add Garry Drummond and this motion was denied as untimely. *See* Giraldo, 2013 WL 3873960, at *3 & n. 2. Garry Drummond was later included in Melo v. Drummond. That case was recently reinstated by the Eleventh Circuit. Melo, v. Drummond, No. 16-10921, 11th Cir. (Sept. 27, 2016).

288 Giraldo, 2013 WL 3873978, at *4, *aff'd sub nom.* Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015).

289 Giraldo, 2013 WL 3873978, at *4, *aff'd sub nom* (citing Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002); Chavez v. Carranza, 559 F.3d 486, 499 (6th Cir. 2009); Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment (ICTY Feb. 20, 2001); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence (Jan. 27, 2000)).

been extended to civilians where those individuals had authoritative control over state-run military or public forces."[290]

On appeal, the U.S. Court of Appeals for the Eleventh Circuit upheld the dismissal of the case against the corporate officers because it found that plaintiffs had not pled sufficient facts linking the individual defendants to the alleged violations.[291] However, most significant for this analysis, the Eleventh Circuit rejected the district court's legal analysis and found international agreement on the superior responsibility standard for corporate officers.[292] The Eleventh Circuit stated, "[t]here is extensive support from international law and in the text, legislative history, and jurisprudence of the TVPA for civilian liability under the command responsibility doctrine."[293] The appellate court affirmed the common elements of the standard: "Thus, a civilian superior—including a civilian corporate officer—could *feasibly* be held liable under the doctrine provided the plaintiffs demonstrated a superior-subordinate relationship between the civilian and the perpetrator, averring that the civilian was in the requisite position of authority and control."[294] The Eleventh Circuit also held that plaintiffs are required to prove "that the superior has effective control over the persons committing the violations . . . that is, has the material ability to prevent the crimes and to punish the perpetrators thereof."[295]

In *Melo v. Drummond*, the last of this series of cases, the Eleventh Circuit rejected defendants' motion to dismiss the TVPA and Colombian law allegations against corporate officers and remanded the case for further consideration by the district court.[296]

The Eleventh Circuit's ruling on superior responsibility provides an important standard that future plaintiffs may follow.

5. The current state of the ATS and TVPA cases.

The end result of the twenty-plus years of cases in which courts ruled on the question of superior responsibility is a body of jurisprudence that has only begun

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290 Giraldo, 2013 WL 3873978, at *4, *aff'd sub nom* (citing Doe v. Qi, 349 F.Supp.2d 1258, 1329–30 (N.D. Cal. 2004)).

291 Doe v. Drummond, 782 F.3d 576 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 1168 (2016).

292 *Id.*

293 *Id.* at 609 & n. 46 ("[S]ince the doctrine is adopted from international law we turn thereto for guidance; both criminal and civil cases from international law may be persuasive."); Ford, 289 F.3d at 1289 & n. 6 (using criminal cases to interpret the doctrine in the absence of congressional intent for "courts to draw any distinction in their application of command responsibility in the civil arena").

294 Doe v. Drummond, 782 F.3d at 610 (11th Cir. 2015) (emphasis in original).

295 *Id.* (citing Ford, 289 F.3d at 1291, 1298).

296 Melo Penaloza v. Drummond Co., No. 16-10921, 11th Cir. (Sept. 27, 2016).

its application to corporate officers. The law has progressed from decisions on military and civilian government officials, and one circuit has recognized superior officer liability for corporate officials. The standards used in these decisions contribute to an international body of law imposing liability on superior officers, regardless of whether they are a state or non-state actor.

C. Superior Responsibility Standards under Federal Common Law and Analogous Torts in U.S. Domestic Law

This Section lays out the principles of superior liability under U.S. law focused on other areas besides international human rights. Contrary to a challenge that the application of international law subjects corporate officers to liability that does not exist under U.S. domestic law, comparable U.S. domestic tort law applies liability standards that are, if anything, stricter than those applied in international law. While there is some variation between jurisdictions, the common underlying principle holds corporate officers responsible for individual tortious conduct. Particular examples with parallel public interest concerns to human rights cases are trade practices, environmental harm, and health safety under laws such as those regulating the environment and product safety.

1. General principles of tort liability for corporate officers under U.S. law.

Tort liability arises where there is a personal duty owed by the director or officer.[297] Traditional doctrine provides that an officer is liable where he or she directs actions, participates or cooperates in an act, or has particular responsibilities.[298] In the context of duties by officers to third parties, courts have recognized that such a duty might arise where there is direct or foreseeable contact with the third party, including where the corporation has delegated this duty to the officer.[299] Omissions and commissions may create tort liability, but corporate officers are not generally liable merely because of their position in the corporation.[300] Statutory exceptions are discussed in the next section.

Corporate officers can be personally liable to non-shareholder third parties based on inadequate management or failure to supervise subordinates, including

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297 RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006); RESTATEMENT (SECOND) OF AGENCY §§ 343–44 (1957).

298 3A FLETCHER CYC. CORP. § 1137 (2016).

299 *See* RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006) (individual personally liable for torts, including where acted as agent or under direction of another).

300 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS §§ 6.07[1], 6–24 (8th ed., 2013).

"failure to stop misconduct they ought to know about."[301] Cases against directors and officers have been brought for decades for mass torts and products liability. For supervision and management torts committed against third parties, the majority of courts operate under a simple negligence standard.[302]

The Restatement (Second) on Torts (1965), section 402A defines the manufacturer's duty to encompass when "he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge" of possible harm through the use of the product.[303] The duty to supervise is common in medical liability jurisprudence.[304] Similar to the international law concept of "effective control," U.S. supervisory responsibility is limited to when an individual is legally obliged to exercise control over a subordinate.[305]

Theories of liability include a focus on a superior officer's participation in a tort, whether there was a breach of a duty, or a court pierces the corporate veil. [306] The first category includes cases in which a superior officer has "constructive knowledge of a tort" or "reasonably should have known that some hazardous condition or activity under their control could injure [a third party, but] they negligently failed to take or order appropriate action to avoid the harm."[307] A duty can be delegated by a corporation to a director or officer and then breached by officer conduct which causes injury to a third party; this liability can result from omissions such as failure to stop conduct the officer ought to know about.[308] Such duties to third parties, or "external" duties stem in part from "moral hazard" considerations—the risk of personal liability deters misconduct.[309]

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301 *Id.* See also Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1662 & n. 1 (2010) (defining officer as a corporation's president, financial officer, chief accounting officers, vice presidents of principal business units and any person with significant "policy-making functions"; roughly tracking definition in Rules and Regulation Under Securities Exchange Act of 1934, 17 C.F.R. § 240.16a-1).

302 A minority of states, such as North Carolina, require gross negligence. Shareholder actions and other claims around fiduciary duties (internal duties of the officer to the corporation) have protections for officers such as the business judgment rule.

303 RESTATEMENT (SECOND) OF TORTS § 402A, Cmt. j (1965). While the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2010) may have broadened the scope of duty to exercise reasonable care, the law is as yet undefined.

304 W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORT 383–85, 914–15 (5th ed., 1984).

305 *Id.* at 384.

306 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

307 Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573, 584 (Cal. 1986).

308 KNEPPER & BAILEY, *supra* note 300, at § 6.07, 6–23.

309 *See, for example*, KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 212–219 (1976).

The common law tort of negligent supervision has some variation across state jurisdictions. Courts have varied in their focuses on participation in the tortious conduct, breach of a personal duty, or whether they treat supervision claims as separate from other tort liability.[310]

The tort of negligent supervision is most used where there is a pattern and the officer "had the opportunity to discover the wrongful acts,"[311] or where they are "negligent in failing to learn of and prevent torts by employees."[312] Courts have held that officers were potentially liable for lack of reasonable diligence in the control and supervision of a business which resulted in a death caused by a warehouse explosion[313] or a death resulting from failure to properly train a machine operator or company officers who decreased security measures to increase profits could be personally liable to a customer shot at a shopping mall.[314]

An officer has a common law duty not to injure third parties.[315] "[A] director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible."[316] As mentioned above, in one ATS case, the court referenced U.S. domestic standards.[317] In *Bano v. Union Carbide*, the Second Circuit stated, "Under New York law, 'a corporate officer who commits or participates in a tort, even if it is in the course of his duties on behalf of the corporation may be held individually liable.'"[318]

The general standards of tort liability for corporate superior officers under U.S. law, which include negligence, would in fact allow a greater range of claims than the criminal international law standards. The next Section turns to one specific application of the responsibility of superior officers, the Responsible Corporate Officer Doctrine.

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310 Petrin, *supra* note 301, at 1676 & n. 79–80 (citing cases from VT, MO, NY, PA, WV).

311 *Id.* at 1678 (citing Lowell Hoit & Co. v. Detig, 50 N.E.2d 602, 603 (Ill. App. Ct. 1943); Air Traffic Conference of Am. V. Marina Travel, Inc., 316 S.E.2d 642, 645 (N.C. Ct. App. 1984)).

312 *Id.* at 1678 (citing Avery v. Solargizer Int'l, Inc., 427 N.W.2d 675, 681 (Minn. Ct. App. 1988); Preston-Thomas Const., Inc. v. Cent. Leasing Corp., 518 P.2d 1125, 1127 (Okla. Ct. App. 1973)).

313 Cameron v. Kenyon-Connel Commercial Co., 56 P. 358, 361 (Mont. 1899)*; but see* Moak v. Link-Belt Co., 242 So. 2d 515 (La. 1970) (no negligence so no liability).

314 Haire v. Bonelli, 870 N.Y.S.2d 591, 593 (N.Y. App. Div. 3d Dept. 2008).

315 Frances T., 723 P.2d at 581–82 (intentional conduct will result in personal liability; joint liability when corporate officer participates with corporation).

316 *Id.* at 581.

317 Bano v. Union Carbide, 273 F.3d 120, 133 (2d Cir. 2001).

318 *Id.* (citing Lopresti v. Terwilliger, 126 F.3d 34, 42 (2d Cir. 1997)).

2. Responsible Corporate Officer Doctrine.

The Responsible Corporate Officer (RCO) doctrine provides liability for an officer as well as a corporation if the officer participates in wrongful conduct or knowingly approves that conduct.[319] If there are joint participants they can each be held liable. RCO liability requires the following elements to hold an officer liable: (1) the officer's position must allow influence on corporate policies or activities, (2) there must have been a nexus between the officer and the violation, and (3) the defendant's actions or inactions facilitated the violations.[320]

The doctrine was initially developed for "public welfare" statutes, and now includes statutes such as the Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act, the Food, Drug and Cosmetic Act, and the Sherman Anti-Trust Act.[321] The common understanding is that these are "public welfare statutes" enacted to prevent harm to the general public. In seeking to maximize deterrence, these statutes have turned to individual corporate officer liability.[322] The similarity in both the types of actions, and the shared goal of deterrence, points to these statutes as important for comparison with human rights cases.

The RCO doctrine is not new—it developed in the 1920s, based on English cases from the nineteenth century.[323] In *United States v. Dotterweich*,[324] the president of a pharmaceutical company was criminally convicted for shipping misbranded and adulterated drugs in interstate commerce. The court held that all those who had a "responsible share" in the conduct could be held liable for corporate

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319 3A FLETCHER CYC. CORP. § 1135.

320 Marco Quazzo, *Officers and Directors Face Personal Liability under the Responsible Corporate Officer Doctrine*, 11 CORP. ACCOUNTABILITY REP. (BNA) 841 (Aug. 9, 2013) (RCO doctrine applied in civil cases); Petrin, *supra* note 301, at 1675; Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29, 29–31 (1988); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 329–30 (1992) (general principles of corporate law doctrine for CERCLA violations).

321 Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1970); Clean Water Act, 33 U.S.C. § 1251 et seq. (1972); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75 (2016); Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399d (2011); Sherman Anti-Trust Act, 15 U.S.C §§ 1–7 (2011).

322 Noël Wise, Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases, 21 STAN. ENVTL. L.J. 283 (2002).

323 *Id.* at 298.

324 U.S. v. Dotterweich, 320 U.S. 277, 283–84 (1943).

violations of the law.[325] The court required "foresight" and "vigilance" that "individuals who executed the corporate mission" would implement measures to prevent violations.[326] Justice Frankfurter's opinion stated that the Food, Drug and Cosmetic Act "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[327]

In 1975, in *United States v. Park*,[328] a chief executive officer was held responsible for a national grocery chain's food storage conditions that violated federal law: "individuals who execute the corporate mission" have a "positive duty to seek out and remedy violations of [the Federal Food, Drug and Cosmetic Act] when they occur" and "a duty to implement measures that will insure that violations will not occur."[329] The public has a "right to expect [foresight and vigilance] of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."[330]

In what has been labeled a "resurgence" of the RCO doctrine, in 2007, the Department of Justice brought charges against three officers for the misbranding and fraudulent marketing of OxyContin.[331] The executives pled guilty to misdemeanors and agreed to pay $634,525,475 in fines.[332] In another important deterrent, the Office of the Inspector General (OIG) debarred the three executives from participation in federal healthcare programs for 12 years,[333] and the exclusion was upheld by the U.S. Court of Appeals for the District of Columbia.[334] A 2009 case against four executives of a medical device manufacturer resulted in prison terms and $100,000 in fines.[335]

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325 *Id.* at 284.

326 U.S. v. Park, 421 U.S. 658, 672 (1975).

327 Dotterweich, 320 U.S. at 281 (citing United States v. Balint, 258 U.S. 250, 252 (1922)).

328 Park, 421 U.S. at 658.

329 *Id.* at 672.

330 *Id.*

331 Thomas J. Mortell & Michelle Gustavson, *The Resurgence of the Corporate Officer Doctrine*, 55 ADVOCATE 32 (2012) (citing United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 573 (W.D. Va. 2007)).

332 Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Milliion*, N.Y. TIMES (May 10, 2007) http://www.nytimes.com/2007/05/10/business/11drug-web.html.

333 Mortell & Gustavson, *supra* note 332, at 33.

334 Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012) (remanded for reconsideration of length of exclusion).

335 United States v. Norian Corp., No. 09-cr-403-LDD (E.D. Pa. 2009), Sentencing Nov. 21, 2011.

The RCO doctrine was first applied in a civil case in 1985. In *United States v. Hodges X-Ray*,[336] defendants attempted to distinguish prior decisions on criminal liability, but the court rejected those arguments, saying that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved."[337] In the 1990s, the doctrine was used for civil penalties in cases on a wide range of environmental statutes, including CERCLA, the Clean Air Act, and the Federal Hazardous Substances Act.[338]

The RCO doctrine has been labeled a strict liability standard.[339] "The primary unique feature of the responsible corporate officer doctrine is that it does not matter that such officer did not participate in or have knowledge of the alleged violation."[340] One of the important bases of the doctrine is that personal liability promotes responsible conduct.[341] The arguments against applying the RCO strict liability standard include that holding a superior responsible for genocide, war crimes, crimes against humanity, torture, or other serious human rights violations leads to more severe punishment than RCO cases, reputational harm, and for acts sucas genocide, include elements such as specific intent.[342] An argument in favor of applying such a standard to human rights violations is that a strict liability standard would demonstrate a zero-tolerance policy, and that human rights violations should be treated as violations of the same level of severity as the conduct regulated by U.S. public welfare statutes.

There is also an argument that the critique of unfair responsibilities is less applicable in the corporate context than it is for those in government service. Where a corporate officer has power and responsibility and when the end goal is the creation of profits, the situation is arguably different from the assumption of power in a military position or to serve a civilian government.[343] Another

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336 United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985).

337 *Id.*

338 Wise, *supra* note 322, at 313.

339 Wu & Kang, *supra* note 9.

340 Kai Peters, *The Corporate Responsibility Doctrine: Handling Matters When Corporate Executives Are Involved in Criminal or Civil Matters*, *in* PROTECTING CORPORATIONS AGAINST MANAGEMENT LIABILITY CLAIMS: LEADING LAWYERS ON ANALYZING DEVELOPMENTS IN EMPLOYMENT REGULATIONS, INVESTIGATING AND RESPONDING TO ALLEGATIONS, AND CREATING EFFECTIVE COMPLIANCE STRATEGIES 7 (2013). *See also* Dotterweich, 320 U.S. at 284; Park, 421 U.S. at 670–72 (all those who had a "responsible share" in conduct could be held liable for corporate violations of the law).

341 Wise, *supra* note 322, at 340.

342 Wu & Kang, *supra* note 9, at 281.

343 *Id.* at n. 39 ("[T]here is a sense in which the superior has not assumed the risks in the same way that a corporate officer has, because he is not involved in an intrinsically profit-making enterprise. The

important distinction is the difference between the consequences of a criminal conviction and a tort verdict against a corporate superior officer. Further, liability is limited by what is feasible, notably by the "objective impossibility defense": a defendant may claim that he or she was "powerless to prevent or correct a violation."[344] The defendant's duty "does not require that which is objectively impossible," although it does require the highest standard of foresight and vigilance.[345]

The standards in U.S. tort law for superior officer liability track with the standards under international law. One comparable doctrine, the Responsible Officer Doctrine, may in fact have a higher standard of liability than has been imposed by any of the international tribunals to date.

D. Examples from Other National Jurisdictions

This Section illustrates that the development of the doctrine of superior responsibility liability is not limited to U.S. law. Legal systems around the world have recognized superior responsibility liability and a duty of care for corporate officers, although, similar to the U.S., these legal provisions have rarely been used to apply to human rights allegations against corporate officers. This Section highlights some examples of different types of legal provisions and cases applying these laws.

Parallel to the discussion of the developments in the international criminal tribunals, an important starting point in the assessment of national legal systems is an important study by the ICRC, considered one of the authoritative interpretive agencies of humanitarian law. The ICRC assessed legal systems around the world as they addressed violations in the context of armed conflicts. This exhaustive study made clear that superior responsibility is applicable to both civilian and military leaders who fail to take "necessary and reasonable measures in their power" to prevent or punish subordinates.[346] There is no requirement that the source of their authority be military or governmental.[347]

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raison d'être of organizations such as the army, the civil service and the government is not primarily financial gain, although agents of these organizations do receive compensation for their work. Therefore, if the moral force of the assumption of risk argument is that agents must bear responsibility for activities that they initiate for personal gain, then it is attenuated with respect to command responsibility.").

344 *Id.* at 296.

345 *Id.* (quoting U.S. v. Park, 421 U.S. 658, 673 (1975)).

346 *Customary Law*, 87 INT'L REV. OF THE RED CROSS 211 (2005), https://perma.cc/VN8E-7RQJ; INT'L COMM. OF THE RED CROSS, CUSTOMARY INT'L HUMANITARIAN L., *Practice Relating to Rule 151, Individual Responsibility, Section B. Individual Civil Liability,* https://perma.cc/B8AW-SSQM.

347 *Id.*

Systems of tort law do vary, reflecting "the different ideas, attitudes, trust, and beliefs that people in society hold with regard to litigation, institutions and social relationships in general."[348] George Fletcher concludes that all western industrialized systems break down tort systems into intentional torts, negligence, and strict liability.[349] The "traditional view" of duty-creating provisions for corporate officers "inflicts liability on directors and senior officers if the corporation acted wrongfully and/or inflicted harm on their watch."[350]

All jurisdictions include remedial mechanisms for violations of "life, liberty, dignity, and physical and mental integrity."[351] Most if not all legal systems include some form of explicit tort law (or delicts); none exempts corporate conduct as a category from superior liability.[352] In countries around the world, corporate officers can be criminally prosecuted and victims are provided compensation for wrongs by corporate officers. These legal actions also allow the submission of evidence of customary international law. In some jurisdictions, it is less common to impose liability on a corporate officer, instead holding the entity itself liable.

As discussed above, the means of incorporation varies, but there remains a core of commonality across jurisdictions. General categories of types of implementation are direct provision in law; one example is Belgian law, which allows tort remedies for Belgian residents.[353] Some states incorporate international law through constitutional torts.[354] In numerous European countries, bringing

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348 Mauro Bussani & Marta Infantino, *The Many Cultures of Tort Liability*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES 13 (Mauro Bussani & Anthony J. Sebok eds., 2015).

349 GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 53–54 (2008).

350 Harry Glasbeek, *Looking for Responsibility in the Corporate* World, *in* DIRECTORS' PERSONAL LIABILITY FOR CORPORATE FAULT: A COMPARATIVE ANALYSIS 26 (Helen Anderson ed., 2008) (noting that some countries are now imposing a "more wide-sweeping" duty independent of the corporation requiring that the officer or director "take steps to ensure that wrongfully inflicted harm by the corporation does not materialize").

351 International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes: Volume 3 (Civil Remedies) 4 (2008), https://perma.cc/Q94M-FPZY [hereinafter ICJ Report].

352 Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies: A Report Prepared for the Office of the UN High Commissioner for Human Rights*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (2014), https://perma.cc/3ZSS-EDPD. Some countries, such as Germany, do not allow corporate institutional liability.

353 INT'L COMM. OF THE RED CROSS, CUSTOMARY INT'L HUMANITARIAN L., *Belgium*: *Practice Relating to Rule 157: Jurisdiction over War Crimes*, https://perma.cc/6UYY-5LMR.

354 *See, for example*, 1 CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS 553–97 (1998); ICJ Report, *supra* note 353, at 7–8 & n. 12 (citing laws from Argentina, Brazil, Ireland, and Nigeria for broad provisions).

human rights principles into private law is described as the "indirect third party effect:"[355] The public laws have indirect persuasive authority, create the general framework, and are intended to be enforceable by private persons against other private persons.[356] Another common model is for the law of tort and non-contractual obligations to be the primary bases for civil claims.[357] In yet another model, compensation and other remedies for victims are linked to criminal codes, as in Spain, France (action civile),[358] and the People's Republic of China.[359]

One recent study found that "[i]n the majority of jurisdictions, despite differences in terminology, for the purposes of civil liability an actor will often be considered to have acted intentionally if it voluntarily undertook a course of conduct knowing that it was more than likely to result in harm."[360] Common elements leading to liability are that a defendant knew or had reason to know about risk[361] and that the defendant failed to prevent the harm from occurring.[362] This can include omissions, remaining silent, or failure to take precautionary measures.[363]

Like the U.S., other common law countries have an RCO doctrine. As discussed above, the initial RCO cases in the U.S. followed English law. Under the laws of England, it is well-established that a person may be liable for authorizing or inducing a tort committed by another.[364] English common law

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355 BENEDETTO CONFORTI & FRANCESCO FRANCIONI, ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (1997).

356 Eric A. Engle, *Tort Law and Human Rights*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES 70, at 73 (Mauro Bussani & Anthony J. Sebok eds., 2015); Int'l Comm'n of Jurists, Access to Justice: Human Rights Abuses Involving Corporations — India, 17 (2011), https://perma.cc/8KGH-BZLQ (Indian courts use international law principles when interpreting constitutional law).

357 ICJ Report, *supra* note 353, at 13.

358 CODE DE PROCEDURE PÉNALE [C. PR. PÉN.], art. 2 (French victim of an international tort can obtain remedy in France).

359 Zhonghua Renmin Gongheguo Xingfa [Criminal Law of the People's Republic of China] (promulgated by Order No. 83 of the President of the People's Republic of China, Mar. 14, 1997, effective Oct. 1, 1997), art. 36, P.R.C. LAWS, https://perma.cc/ZT5U-2QLY (creating private claim for damages linked to criminal cause of action).

360 ICJ Report, *supra* note 353, at 13 (citing INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, TORT at 31).

361 *Id.* at 16 (citing German Civil Code, laws of England Wales, and France, and Principles of European Tort law, www.egtl.org).

362 *Id.* at 19 (citing The Principles of European Tort Law, https://perma.cc/RF9K-GUVC).

363 *Id.* at 19–20.

364 JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 226 (2006).

364 *Id.* at 146 & n. 870.

roots of the RCO doctrine go back to the nineteenth century.[365] In 1846, in *The Queen v. Woodrow*, a tobacco dealer was charged with possession of adulterated tobacco. The court determined that with regard to "any matter that affected public health, persons could be required to act prudently in order to guard against injury to the public."[366] Australia applies RCO liability to environmental and health and safety legislation.[367]

The U.K. also has civil nationality jurisdiction for genocide, crimes against humanity, torture, war crimes, residence of offender and territorial jurisdiction. In *Chandler v. Cape PLC* and *Guerrero v. Monterrico Metals PLC*, the English high court ruled that a parent company's Chief Executive Officer was in frequent contact with a local mine manager, so the parent company had the duty to take reasonable care to avoid foreseeable harm to the protestors.[368] At English law, for offenses requiring criminal intent, corporate liability attributes through the identification principle, which requires that the natural person committing the offense is a director or otherwise entrusted with powers of company.

Some countries have stepped into the void of confronting violations committed during their own past. In Argentina, business executives were sued for their responsibility for abduction, detention, and murder during the country's "Dirty War" against dissidents between 1976 and 1983.[369] In Argentina's Civil Code, Articles 43 and 1113 together provide for liability of persons for damage caused by their dependents; dependents has been interpreted to include a company's employees, agents, and other representatives who act under the instructions or direction of the company.[370] The corporate veil is not a defense when corporate shares are used to breach the law, public order or good faith, or rights of third parties. In a case in Colombia against the Urapalma palm oil company, Colombian corporate officers were ordered to pay compensation to each victim of dislocation caused by their actions (the compensation accompanied prison sentences).[371]

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365 Wise, *supra* note 322 (discussing The Queen v. Woodrow (1846) and Queen v. Stephens (1866)).

366 Queen v. Woodrow, (1846) 153 Eng. Rep. 907, 912.

367 See Karen Wheelwright, *Australia*, *in* DIRECTORS' PERSONAL LIABILITY FOR CORPORATE FAULT 54 (Helen Anderson ed., 2008); Occupational Health and Safety Act 2004 (Vic) § 144, https://perma.cc/7LCM-559R.

368 Guerrero v. Monterrico Metals PLC, [2010] EWHC 3228 (Q.B.) (Eng.).

369 Payne & Pereira, *supra* note 80.

370 Cod. Rev. art. 43, 1113 (Arg.).

371 Leigh A. Payne & Gabriel Pereira, *Corporate Complicity in International Human Rights Violations*, 12 ANN. REV. L. SOC. SCI (2016).

Other important examples come from jurisdictions across the globe. German law provides criminal and civil jurisdiction for individual officers and executives.[372] In two recent cases, the manager of a Danzer Group subsidiary was alleged to have used security forces in the Congo when he should have foreseen violence due to his role as a member of the governing board of the subsidiary and head of the African Management Team for the Danzer Group.[373] Under German law, senior managers may have criminal responsibility arising from a duty of care toward those affected by the actions of their employees.[374] In the Danzer case, the European Center for Constitutional and Human Rights ultimately filed a criminal complaint with the public prosecutor's office that charged the Danzer Group senior manager with failure to issue clear directions. The complaint charged that the manager should have directed employees of the Siforco company (a Danzer subsidiary) that security forces must not be called in to deal with conflicts with the local population. The complaint stated that the call for security forces must be postponed until the results of any outgoing negotiations are clear; in addition, a precondition to the use of security forces is that those forces must agree that no human rights violations will be committed. The complaint further charged that security forces must only receive payments if they commit no human rights violations.[375]

Japanese law could provide individual liability for gross human rights abuses.[376] Article 709 of the Japanese Civil Code establishes tort liability and Article 715 provides for superior liability for a person who supervises the business or "employs others."[377] Dr. Jennifer Zerk found in 2014 that while no

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372 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] Jan. 2, 2002, § 831, ¶ 1, *translation at* https://perma.cc/P24U-FSY8 (Ger.) ("A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed . . . , or if the damage would have occurred even if this care had been exercised.").

373 *See No Investigations Against Danzer Manager Over Human Rights Abuses Against Community in DRC*, EUROPEAN CENTER FOR CONSTITUTIONAL & HUMAN RIGHTS, https://perma.cc/P33M-X97N.

374 German jurisprudence provides for the liability of leading employees of a company (*Geschaftsherrenhaftung*).

375 *Special Newsletter: Criminal Complaint against Senior Manager of Danzer: Accountability for Human Rights Violations in the Democratic Republic of Congo*, EUROPEAN CENTER FOR CONSTITUTIONAL & HUMAN RIGHTS (Apr. 25, 2013), https://perma.cc/26CW-57UV; Peter Muchlinski & Virginie Rouas, *Foreign Direct-Liability Litigation: Toward the Transnationalization of Corporate Legal Responsibility*, *in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS 357–91 (Lara Blecher et al. eds., 2014).

376 Bussani & Infantino, *supra* note 56, at 14.

377 MINPŌ [MINPŌ] [CIV. C.] arts. 709 (tort liability), and 715 (superior liability). [Companies Act], Companies Act, Part II, Chapter 4, Section 11 (Liability for Damages of Officer to Third Parties)

international law violations had been brought as torts, these violations could satisfy the Civil Code's requirement of "illegality" or "infringement of rights."[378] The Japanese Companies Act, Part III, Section 11 on Liability for Damages of Officers to Third Parties, provides that officers "with knowledge or grossly negligent in performing their duties" may be liable to a third party for resulting damages.[379]

In a Korean case against Shinhan Bank directors, the court found that a chief executive officer has a duty to monitor[380] the actions of subordinates.[381] In order for corporate directors to be liable to third parties as provided in Article 401(1) of the Commercial Code, they must have neglected to perform their duties willfully or by gross negligence. If directors have neglected to perform their "duty to monitor" willfully or by gross negligence, they can be found liable for the damages incurred by a third party.[382] The Indonesian Civil Code is similar, providing that a person is not only responsible for the damages caused by his own deed, but also for damages "caused by the acts of the individuals for whom he is responsible, or caused by matters which are under his supervision."[383]

In the Netherlands, a corporate director is liable if he "made a sufficiently serious mistake."[384] One example of an attempt to hold officers liable is in a case against the Trafigura company, which was domiciled in Netherlands and sued for the dumping of toxic waste off of the Ivory Coast that resulted in an estimated twelve deaths and thousands sickened; civil and criminal litigation was brought in the Ivory Coast, the Netherlands and the U.K.[385] In 2012, the Amsterdam Court of Appeal ruled that Claude Dauphin, founder and director of the Dutch company Trafigura, could be prosecuted.[386] In November of that year, the company publicly

(amended 2015), https://perma.cc/SF3F-XH8H).

378 ZERK, *supra* note 354, at 45.

379 Kaisha–hō [Companies Act], Act No. 86 of 2005, Part III § 11.

380 Supreme Court [S. Ct.], 2006Da68636, Sept. 11, 2008, https://perma.cc/RC9M-EF7X (S. Kor.).

381 Shinhan Bank Corporation v. Kim Woo-Jjoong and Ten Others, 2006Da6838, (S. Kor.).

382 *Id.*

383 Indonesian Civil Code, art. 1367.

384 Bastian F. Assink, *Secondary Director Liability*, THE DEFINING TENSION (Feb. 12, 2009), https://perma.cc/E9JU-8PFF.

385 Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands*, 33 BROOK J. INT'L L. 833 (2008); *Case Profile: Trafigura Lawsuits*, BUS. HUM. RTS. RESOURCE CENTRE, https://perma.cc/L8QM-CK6W. The ship's captain and another employee were also convicted of criminal charges. *Id.*

386 *Trafigura Reaches Toxic Waste Settlement With Dutch,* REUTERS (Nov. 16, 2012), https://perma.cc/QRE8-NG7J.

denied culpability but paid 1.3 million pounds in an out of court settlement in exchange for withdrawal of the charges against Dauphin.[387]

Over the past several decades, a widening range of defendants have faced civil claims in human rights cases. Those defendants have included those who were complicit in, but did not physically commit, acts such as torture, war crimes, and genocide. The types of action include ordering the abuse, which is not challenged in its inclusion in the category of "direct" liability. Other types of "indirect" involvement include those who knew or had reason to know about the abuse but failed to take action to prevent or punish the violations. The examples from other national jurisdictions illustrate the underlying agreement in principle and the potential for greater use of superior corporate officer liability for human rights violations.

VI. DETERRENCE, PUNISHMENT, AND THE RELATIONSHIP BETWEEN CORPORATE OFFICER RESPONSIBILITY AND CORPORATE INSTITUTIONAL RESPONSIBILITY

This Section turns back to the questions that have been raised about the content and applicability of superior responsibility doctrines to corporate officers and addresses the value of this theory of liability. The purpose is to synthesize the elements identified in the multiple sources of law detailed above and concludes that there is a consensus on the liability of superior corporate officers in international and U.S. domestic law as well as other national jurisdictions. While there may be some variation in the mens rea element with regard to selected documents, the central question about enforcement of this standard is whether there is agreement on the duty of superior officers. Sources of law across international and national systems include duties for corporate superior officers to prevent and punish violations. Guidance from tort law further emphasizes the possibility of holding superior corporate officers liable. This standard is particularly relevant to human rights claims and serves an important function of providing remedies to human rights victims, punishing violators, and building a legal system that deters future violations. This Section returns to two of the normative concerns underlying the question of whether there is an enforceable standard for corporate officer superior responsibility: 1) what is the value of this type of liability, and 2) how does it relate to the liability for the corporate entity?

International tribunals have commented on the efficacy of command responsibility: "Command responsibility is the most effective method by which

387 *Id.*

international criminal law can enforce responsible command."[388] In certain contexts, this applies to tort standards as well.

International tribunals also have focused on due process considerations, and defense attorneys and scholars have addressed whether superior responsibility is a standard which is fair to the defendant and whether corporate officers are simply being made a scapegoat for widespread corporate policy.[389] The multipronged focus on corporate accountability described above has included references to corporate officers, although the different forms of accountability for officers and the corporations themselves have not been systematically examined together. The focus on corporate liability has been on the entity itself; the liability of officers is sometimes assumed (the acts are carried out through the officers). Often, the focus of the liability is on the corporation because no individual officers are readily identifiable or each officer did not act alone and did not individually perform sufficient acts to render them liable.

Corporate officer and corporate institutional liability may serve the similar purposes of compensating the victim, punishing the responsible party, and deterring future abuses. In some cases, both the officer and the corporation may be held liable for a tort. But there are also differences. At times, action may be collective,[390] and the corporation itself must be the focus of liability for punitive actions to deter future violations; the company itself has breached its duty of care.[391] When an officer is acting as the "alter ego" of the corporation and carrying out corporate policy, it is the corporation that bears responsibility (under the traditional theory of vicarious liability). On other occasions, individual officers

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388 Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 16, Int'l Crim. Trib. For the Former Yugoslavia (July 16, 2003), https://perma.cc/N62U-TYBZ.

389 In addition to the due process issues with such an approach, there is the danger that a few officers might be selected to "take the fall" for the organization, and the organization might avoid both responsibility and any change in practice. *See* GRAHAME F. THOMPSON, THE CONSTITUTIONALIZATION OF THE GLOBAL CORPORATE SPHERE?, 119 (2012); James Fanto, *Organizational Liability*, 19 J. L. & POL'Y 45, 49 (2010).

390 Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005) (mass atrocities are collective actions).

391 *See* George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: the Problem of Collective Guilt*, 111 YALE L.J. 1499, 1514 (2002) ("[C]rimes that now constitute the core of international criminal law . . . are deeds that by their very nature are committed by groups and typically against individuals as members of groups."); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011) (identifying conditions for agency including ability to make a normatively significant choice, judgmental capacity and control to choose between options); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 (1994) (four modes of corporate culpability); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (corporate form shields individual officers and directors and other agents).

bear singular responsibility for abuses under their watch, and the most appropriate form of accountability and deterrence is to focus on the corporate officers.

Holding the corporation accountable has been addressed as both an international and domestic obligation. Internationally, the role of the collective arises when particular human beings have not taken sufficient action for responsibility to be allocated to any particular individual,[392] or where there is a responsibility on the corporation itself.[393] There may be tactical reasons for actions against a corporation; some studies have shown that corporations are more likely to be held liable for negligent actions than are individuals.[394] Further, activities of a corporate group may be closely integrated so that it may be difficult to pinpoint individual responsibilities and/or formal separation between functions and subdivisions should be disregarded and liability imposed on a parent company.[395]

Corporate officer liability has a specific deterrent effect. In pursuing and accepting positions of leadership, corporate officers also assume positions of responsibility. Superior officers have an important vantage point and the authority to change conduct throughout an organization. This authority contains an affirmative duty to punish and prevent wrongs by subordinates.[396] These actions serve both the individual harmed and, more widely, deter future wrongs against the community.

When a particular officer has taken action that meets the standards for liability, that officer should be identified and his or her actions, or failure to fulfill a duty, should be held up to public scrutiny and held to account in the legal system. Corporate officers may be more worried about individual liability rather than the liability of the corporation itself; a common belief is that corporate liability is just

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392 PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984) (collective entities may have separate personality); Brent Fisse & John Braitwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988).

393 Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004) ("If corporations have rights under international law, by parity of reasoning, they must have duties as well."); Burt Neuborne, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769 (2012) ("the corporate fiction does—and should—serve as an enforcement agent (and enforcement target) for the rights and duties of the human beings who constitute the corporation."); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009) (cases against individuals may be inadequate to deal with collective action).

394 Pammela Q. Saunders, *Rethinking Corporate Human Rights Accountability,* 89 TULANE L. REV. 603, 637 (2015) (citing VALERIE P HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 114 (2000)).

395 HANS, *supra* note 412, at n. 756.

396 Danner & Martinez, *supra* note 6, at 121.

passed along to shareholders.[397] Where the decisions may negatively impact individual corporate officers, the officers are more risk averse than when a decision affects third parties.[398] Suits against individuals also have heavier litigation costs in terms of time and potential reputational harm than suits against corporate entities.[399]

Allison Danner and Jenny Martinez have discussed the law and economics category of "least-cost avoiders" as applied to the criminal prosecution of superior officers—high-level officials are better placed to form policy and implement it.[400] Danner and Martinez also discuss the moral duties when a government or military official assumes command, arguing that these leaders "are not like everyone else" and "have affirmative obligations related to the governance of society, such as monitoring persons under their control to ensure that they comply with certain standards of conduct."[401] The same is true for corporate officers.

Looking to psychological literature on group dynamics in general reveals that individuals acting in groups are more likely to accept hazardous risks than are individuals acting for themselves.[402] A variable reducing risk-taking in groups is the presence of a powerful member of the group who is risk-averse.[403] Holding a superior responsible for the actions of a subordinate could enhance the ability of a group to avoid hazardous risks; this follows the RCO doctrine developed in the U.K. and the U.S., and other tort regimes applying the precautionary principle.

While a corporate officer has moral and legal duties to monitor subordinates and prevent and punish violations, a system should not be created or reinforced that allows certain individuals to be the sacrificial lambs for more widespread corporate behavior when the corporation as a whole that must be held accountable.[404] The principle of vicarious liability holds that corporations are ultimately responsible for acts taken in the course of an officer's corporate duties,

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397 CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS (2015); Wise, *supra* note 322, at 283.

398 *See* Robert J. Rhee, *Tort Arbitrage,* 60 FLA L. REV. 125, 152 (2008).

399 *Id.*

400 Danner & Martinez, *supra* note 6, at 148.

401 *Id.*

402 Saunders, *supra* note 419.

403 *Id.* at 650 (citing IRVING L. JANIS & LEON MANN, DECISION-MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT 423 (1977)).

404 *See* James G. Stewart, *The End of Modes of Liability for International Crimes*, 25 LEIDEN J. INT'L L. 165, 188-190 (2012).

and many law and economics analyses find that limited liability is a more efficient means of allocating responsibility and costs.[405]

Singling out individuals to hold them responsible is not a task to be undertaken lightly. A determination must be made about the control that the officer had over subordinates and whether the officer possessed the knowledge to allow prevention or punishment of the violation. The question of superior officer liability must first address the duty the officer has. In the context of a tort, there is also the question of foreseeability[406] and the duty of reasonable care.[407] Tied into these questions is the question of notice—the standard must be consistent and clear so as to give notice to any potential offenders. As this Article has discussed, there is such a clear standard for superior responsibility for corporate officers.

The standard of superior responsibility does not undercut corporate institutional liability. Together, these two forms of potential liability form important complementary pieces of a legal structure that can provide greater accountability for corporate violators and deter future violations.

VII. CONCLUSION

This Article demonstrates that the important doctrine of superior responsibility is fully applicable to corporate officials, and can make an important contribution to corporate accountability for human rights violations. Holding corporate officials responsible under a theory of supervisory responsibility is common to human rights law, international criminal law, and domestic tort law, which suggests that it could serve as a more important tool for corporate accountability. The use of this doctrine on a more systematic basis could increase the efficacy of tort remedies as steps toward the goals of accountability, transparency, compensation for past abuses, and deterrence of ongoing or future human rights violations.

Under international law and domestic law, corporate officers can and should be held liable for torts and related civil wrongs under a superior responsibility

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405 *See* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL L. REV 1345 (1982); Alan O. Sykes, *The Economics of Vicarious Liability,* 93 YALE L.J. 1231 (1984) (exploring efficiency rationale of vicarious liability).

406 RESTATEMENT (THIRD) OF TORTS: Foreseeability is jury issue on defendant breach of duty; Learned Hand: probability multiplied by gravity of harm; Prosser incorporating Hand: if risk is an appreciable one and the possible consequences are serious; intent is defined as the desire to act with knowledge to substantial certainty more likely than not; John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs,* 88 TEX. L. REV. 917 (2010) (ordinary care; reasonable under the circumstances).

407 Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928) (citing NY Firestone decision and sources cited).

standard. Using this form of accountability complements efforts to hold corporations themselves liable when they are complicit in human rights violations. Strengthening superior officer liability is a part of a robust and comprehensive legal regime to compensate victims of and prevent and punish human rights violations. Superior officer liability needs to be fully utilized for an effective legal system for the enforcement of international human rights law on corporate human rights violations.