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Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of ‘Effective Control’

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WHY CRIMINAL CULPABILITY SHOULD FOLLOW THE CRITICAL PATH: REFRAMING THE THEORY OF 'EFFECTIVE CONTROL'¹

Michael A. Newton² and Casey Kuhlman³

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Abstract

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1. INTRODUCTION

The jurisprudential conception of effective control is rooted in outmoded conceptions of hierarchical organizational structure. By extension, the current template for evaluating effective control poses an increasing risk that culpable commanders will escape liability by exploiting the lacunae in current case law. This article proposes that jurists should analyze command/superior responsibility cases with full cognizance of modern command and control theory in order to sustain its viability as a practical prosecutorial tool to regulate the crimes committed by loosely knit groups and non-state actors conducting atrocities in chaotic circumstances. The Composite Theory proposed herein would support liability for the acts of subordinates on the theory that commanders who field fighting organizations without the proper methods for enforcing compliance with the laws and customs of war assume the risk of criminal sanction where criminal violations occur by their subordinates, regardless of the nature of the organization.

Despite its broad acceptance and frequent regurgitation in jurisprudence, the doctrine of effective control drawn from the essence of the leader's authority is increasingly inapplicable to non-state actors who conduct hostilities in non-traditional conflicts. The independent emergence of the principle that the commander's orders operate with the force of law to limit the application of violence in widely disparate cultures and historical periods suggests that it is more than just a legal technicality, but instead is fundamental to the nature of warfare itself. Commanders have the most at stake in the success of the mission both personally and professionally. Military forces operating under the sovereign authority of states around the world are almost uniformly bound by domestic statutes that assign criminal liability to commanders based on the incorporation of crimes defined by international law into the domestic criminal code of the state.⁴ On the other hand, perpe-

4. See J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. II: Practice (Cambridge, CUP 2005) pp. 3718-3722, 3745-3751; enumerating examples of national legislation providing for command responsibility for violations of international humanitarian law from: Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Belgium, Burundi, Cambodia, Canada, Costa Rica, Egypt, El Salvador, Ethiopia, Estonia, France, Germany, Iraq, Italy, Jordan, Lebanon, Luxembourg, Mexico, Netherlands, Nicaragua, Russia, Rwanda, Spain, Sweden, Switzerland, Ukraine, United States, and Yemen. Most examples in the ICRC study that are drawn from the period following the drafting of the Rome Statute adopt language from the Rome Statute: e.g., the German *Law Introducing the International Crimes Code* (2002). *Ibid.*, at p. 3748. Examples from the ICRC study that illustrate the clear incorporation of international norms prior to the date of the Rome Statute include: Bangladesh, *International Crimes (Tribunal) Act* (1973) § 4(2): 'Any commander or superior officer ... who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of persons under his command or his subordinates, whereby such persons commit any [humanitarian crimes as recognized under international law], or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes'; Luxembourg, *Law on the Punishment of Grave Breaches* (1985) Art. 6: 'the following may

trators who commit war crimes in the context of non-state military and para-military organizations are not bound by the same formalized military codes and regulations applicable to professionalized state actors. Thus, the jurisprudential focus on the ability of the superior to exercise punitive authority over the subordinate is increasingly misplaced. Is the law currently situated such that a rebel warlord, a terrorist leader or an outsourced intelligence operator evades superior responsibility simply because of how his fighting organization is structured or by the manner in which communications flow in a decentralized organization? If the theory of command responsibility is not rehabilitated, it will atrophy, and the answer will be yes.

The concept of the commander's legal responsibility became embedded in the positivist law of international treaties for the first time in the 1907 Hague Regulations.⁵ The formalization of the principle of command responsibility was in a sense superfluous because the absence of any kind of organizing authority makes the conduct of effective hostilities something of an oxymoron. State practice has since integrated superior responsibility as a viable form of individual criminal responsibility for offenses committed by subordinates and for which the authority figure failed to take remedial or preventive.⁶ The ICRC notes that it is 'uncontroversial' that this long-standing rule applies to both international and non-international conflicts.⁷ The implicit conclusion is that there can be no armed force without the organizing and centralizing influence of a responsible leader, who by definition is empowered to exercise control over the conduct of hostilities. This principle marks the difference between an organized force and an anarchic mob of criminals. Thus, the very act of organizing an armed force and using it to perpetrate criminal acts should be the *sina qua non* of command responsibility. Non state actors who do so

be charged, according to the circumstances, as co-authors or as accomplices in the crimes [of grave breaches of the 1949 Geneva Conventions]: superiors in rank who have tolerated the criminal activities of their subordinates ...'; Sweden, *Penal Code as amended* (1962) Ch. 22, § 6: 'if a crime against international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it'. *Ibid.*, pp. 3746, 3749, 3751.

5. See Annex IV to the Convention Regulations Respecting the Laws and Customs of War on Land, Art. 3 1907 entered into force 26 January 1910, reprinted in A. Roberts and R. Guelff, eds., *Documents on the Laws of War*, 3rd edn. (Oxford, OUP 2000) p. 73: 'A belligerent party which violates the provisions of the said Regulations 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.'

6. J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, International Committee of the Red Cross Volume I: Rules, (Cambridge, CUP 2005) p. 558: 'Rule 153: Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.'

7. Henckaerts and Doswald-Beck, *supra* n. 4, pp. 559-560.

should be responsible for the crimes committed by units operating under their loose authority because state practice accepts that the principles of command responsibility that originated in highly organized and disciplined forces apply *mutatis mutandis* to non-state actors.

The basis for this conception of command accountability is as old as war itself. The laws and customs of war originated from the quest for commanders to inculcate a disciplined professionalism that facilitated the accomplishment of a military mission. As early as 500 B.C., Sun Tzu wrote that commanders have a duty to ensure that their subordinates conduct themselves in a civilized manner during armed conflict.⁸ Writing in 1625, Hugo Grotius documented the Roman practice that ‘it is not right for one who is not a soldier to fight with an enemy’, because ‘one who had fought an enemy outside the ranks and without the command of the general was understood to have disobeyed orders’, which offense ‘should be punished with death’.⁹ The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders’ ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence.¹⁰ The independent emergence of the principle that the commander’s orders operate with the force of law to limit the application of violence in widely disparate cultures and historical periods suggests that it is more than just a legal technicality, but instead is fundamental to the nature of warfare itself.

The responsibility of commanders is a necessary implication of the command relationship, independent of the geographical context or the inter-sovereign nature of the hostilities. Hence, it was no accident that the legal right to conduct hostilities was premised on the command of a ‘person responsible for his subordinates’.¹¹

8. Brandy Womack, ‘The Development and Recent Application of the Doctrine of Command Responsibility: With Particular Reference to the Mens Rea Requirement’, 1 *International Crime and Punishment: Selected Issues* (2003) pp. 101, 113.

9. H. Grotius, *De Jure Belli ac Pacis* (1625) Vol. III, Chap. XIIII, at <<http://www.lonang.com/exlibris/grotius/gro-318.htm>>. Grotius explained the necessity for such rigid discipline as follows: ‘The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned, or, with the increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided.’

10. See D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 3rd edn (Dordrecht, Nijhoff 1988) vii.

11. See Annex IV to the Convention Regulations Respecting the Laws and Customs of War on Land, Art. 1 1907 entered into force 26 January 1910, *supra* n. 5 (which mirrors the language of Art. 1 of the 1899): ‘[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war’, The Hague Regulations embodied this legal regime as follows: Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the

The conceptual basis of the laws and customs of war as deriving from the unyielding demands of military discipline under the authority of the commander or king whose orders must be obeyed explains the later development that the right to conduct hostilities as a lawful combatant was restricted to those under the authority of a sovereign state.¹² As a logical corollary, the US Supreme Court found in 1946, 'the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates'.¹³ The responsibility of commanders is a necessary implication of the command relationship, independent of the geographical context or the inter-sovereign nature of the hostilities. In effect, the laws and customs of war form the professional ethos that can fulfill their intended purposes only where commanders bear operational and legal responsibility. Extrapolating this principle to the law applicable in non-international armed conflicts,¹⁴ the ICTY panel in *Hadzihasanovic* reached the same conclusion, finding command responsibility inherent in the threshold requirement of a 'responsible command'.¹⁵

In contrast to most criminal statutes that lay out the required elements beginning with the *actus reus* and *mens rea*, a conviction based on a theory of command responsibility begins with the predicate finding that is wholly circumstantial: the

army, or form part of it, they are included under the denomination 'army'. For a side by side comparison of the evolution from the 1899 language to the 1907 multilateral text, see J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edn. (New York, Oxford University Press 1918) pp. 100-127.

12. This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. See 1907 Hague Regulations, *supra* n. 5, Art. 3: '[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.'

13. In *re Yamashita*, 327 U.S. 1, 15 (1946).

14. The legal term derives from Article 3 Common to the 1949 Geneva Conventions – 'Armed conflicts not of an international character.' The specific law applicable to non-international armed conflicts has been expanded and refined in the 1977 Additional Protocol II to the 1949 Geneva Conventions, as well as other relevant treaties such as the Rome Statute of the International Criminal Court, Art. 8. In *Hamdan v. Rumsfeld*, 548 U.S.557 (2006), a fractured United States Supreme Court found in dicta that the armed conflict between Al Qaeda and the United States constitutes a conflict governed by the norms of Common Article 3 as a matter of treaty law. *Hamdan* at 2790. The Israeli Supreme Court, on the other hand, determined that the conflict between Israel and terrorist fighters constitutes an international armed conflict because it 'crosses the borders of the state.' This conclusion is unsupported by any example of state practice and represents the only example in which the legal character of a conflict has been made by reference to the geographic boundary rather than the identity of the participants. *Pub. Comm. against Torture in Israel v. Gov't of Israel*, HCJ 769/02, para. 18, at <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf>.

15. *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 15-18.

existence of a superior / subordinate relationship between the defendant and the direct perpetrator(s) of a serious crime. Because command responsibility is intended to apply in situations where the accused holds a hierarchically superior relationship over the perpetrator(s), it is typically charged in situations in which the command structure is discernible.¹⁶ The existence of such a relationship is a threshold issue which, if unproven, precludes a court from considering the remaining elements of the substantive offenses. Recognizing that there exists a practical limit below which a superior does not have enough influence over a subordinate to be logically responsible for that subordinate's actions, courts have developed the concept of *effective control* as the test of the sufficiency of this relationship.¹⁷ Command authority that falls short of effective control is insufficient to support criminal accountability.¹⁸ The ICTY has explained that '[t]he indicators of effective control are more a matter of evidence than of substantive law', and must show that the superior had the power to prevent or punish the perpetrators, or to refer their actions to the appropriate authorities.¹⁹ Similarly, though it springs from the same conceptual soil, civilian superiors can be held liable for the acts of subordinates despite that fact that '[C]ivilian leaders need not be vested with prerogatives similar to those of military commanders in order to incur such responsibility under Article 6(3) of the Statute: it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with 'excessive powers' similar to those of public authorities.'²⁰

16. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 396: 'A superior-subordinate relationship must exist for the recognition of [CR]. However, such a relationship cannot be determined by reference to formal status alone. Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person's *de facto*, as well as *de jure*, position as a commander.'

17. *Prosecutor v. Delalic*, Case No. IT-96-21, Trial Chamber Judgement, 20 February 2001, para. 256.

18. *Ibid.*, at paras. 258-266.

19. *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Chamber Judgement, 29 July 2004, para. 69. See also *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36-T, Trial Chamber Judgement, 1 September 2004, para. 276: 'A Superior vested with *de jure* authority who does not actually have effective control over his or her subordinates would not incur criminal responsibility pursuant to the doctrine of superior responsibility; whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of the offenses might incur criminal responsibility.'

20. *Nahimana, Barayagwiza and Ngeze*, Case No. 99-52-A, Appeals Chamber Judgement, 28 November 2007, para. 785. See also para. 605: '[T]he case-law of the *ad hoc* Tribunals affirms that there is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander in order to incur superior responsibility:

Nevertheless, current applications of the doctrine may allow non-state actors to escape criminal culpability because the judicially created evidentiary tests and understandings have become unwieldy and often inapplicable. Those who should factually face criminal culpability are increasingly sheltered by legal technicality in the evidence assessed by courts to determine effective control. To be more precise, courts are construing the doctrine of effective control through a formulaic filter that makes convictions increasingly difficult. The principles of command responsibility [and its counterpart applicable to civilian superiors]²¹ should be reconceptualized to focus criminal responsibility more squarely on individuals based solely on their role in forcing followers to participate in conflicts. The superior who organizes that application of violence is morally responsible for the resulting carnage, and should face accompanying legal responsibility.

Section 2 describes in greater detail the growing disconnect between the judicial theory and the operational realities that this article seeks to address, while Section 3 reviews the current jurisprudential baseline. Section 4 analyzes the relevant treaty law that provides the framework from which the current jurisprudence evolved, and which serves as the platform for further evolution of the principle of effective control. Section 5 takes a closer examination of three recent cases that are representative of how conflicts are likely to unfold in the foreseeable future. Section 6 briefly highlights the organizational and psychological constraints that are the necessary predicate for the conduct of hostilities and relates them to the normative framework supporting the judicial application of command responsibility.

The penultimate part provides practitioners with a coherent theory of superior responsibility appropriate to the evolving face of modern conflicts and more reflective of the inherent nature of authentic command. The Composite Theory proposed in Section 7 represents a vital reframing of existing law that would have far-reaching implications in theory and practice. Prosecutorial trends toward charging joint criminal enterprises and other new theories of individual responsibility fail to understand the essence of the criminality at issue for all fighting organizations – that it is the fielding of the fighting organization without the proper safeguards that in many cases is the causal factor for mass atrocities.

every civilian superior exercising effective control over his subordinates, that is, having the material ability to prevent or punish the subordinates' criminal conduct, can be held responsible under Art. 6(3) of the Statute. The Appeals Chamber further considers it worth recalling that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof".

21. *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement, 2 September 1998, para. 148: 'The Chamber finds that the definition of individual criminal responsibility, as provided under Art. 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors.'

In contrast, the Theory proposed herein would support liability for the acts of subordinates on the grounds that commanders who field fighting organizations without the proper methods for enforcing compliance with the laws and customs of war assume the risk of criminal sanction where criminal violations occur by their subordinates, regardless of the nature of the organization. In other words, a modern understanding of effective control imputes responsibility to any commander/civilian superior who organizes a collective entity with the intent of conducting hostilities and thereafter fails to create a climate of compliance with the laws and customs of war. This approach will permit the extension of liability to commanders who organize cellular units that operate on the basis of primary loyalty to a local leader and with little/no tactical control by the hierarchy, such as the tactics seen in Iraq, Afghanistan, and a number of modern non-international armed conflicts.

2. FRAMING THE PROBLEM

The very existence of superior responsibility as a form of vicarious liability is predicated on the necessity for controlling the lethal application of violence. Thus, the criminal responsibility of commanders and others in authority is ‘ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine.’²² The genesis of superior responsibility is therefore grounded in the notion that commanders on the battlefield are most properly vested with the primary enforcement of the laws and customs of war. This is supported by the normative notion that those who are responsible for releasing the violence are those individuals who should control the violence and by the pragmatic notion that commanders on the battlefield who control their fighters are in reality the only individuals who will be able to suppress violations of the laws of war either proactively by proper training or reactively by proper disciplining. As such, the person responsible for coordinating the violence, i.e., the commander (or civilian superior) has always been closely aligned with operational realities that

22. *Čelebići Trial Judgement*, paras. 340, 377 (The Delalić case was the first was the first litigation to involve superior responsibility since World War II and resulted in the acquittal of Zejnil Delalić who had been charged with 11 counts of grave breaches of the 1949 Geneva Conventions and violation of the laws and customs of war on the basis of his alleged command over the Čelebići prison-camp at the relevant time. The Trial Chamber found that Mr. Delalić did not have command and control over the Čelebići prison-camp and over the guards who worked there, such as to entail his criminal responsibility for their actions.); see also *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgement, 21 May 1999, para. 202.

the fighters are actually experiencing. This reality warrants the consequential caveat that the responsible leader also bears potential criminal liability for violations committed by their subordinates.²³ All three of these ideas have traditionally carried the weight of compliance with the laws and customs of war by vesting commanders with the responsibility of compliance combined with the threat of criminal sanction for a lack of compliance.

In contrast to the neatly delineated professionalized hierarchies under state control from which the precepts of command responsibility emerged, the modern battlefield is predominately a non-linear kaleidoscope of personalities orchestrating non-traditional hostilities that frequently transcend national boundaries. Such non-state organizations fight by training fighters and sending them in a general direction with little other coordination or consultation. Such groups frequently permit the recruitment of child soldiers who are subject only to the authority of the on-scene tactical leader. In many areas, war lords will control groups of fighters and will switch allegiances rather than submit to a hierarchy of increasingly responsible authorities.

By systematizing chaos in this manner, a commander in many cases is indirectly responsible for systematizing atrocities because the restraining influence of wiser individuals who hold the respect of younger, impetuous persons is absent. This, of course, is often the precise objective of the perpetrator. The modern jurisprudence is clear that responsibility can be imputed irrespective of whether the effective control derived from a *de jure* or a *de facto* position of authority.²⁴ To be clear, the development of a more flexible concept of *de facto* authority represented the jurisprudential attempt to adjust to the evolution of armed conflict away from the westernized hierarchical structures predominant in the past. However, the very structure of decentralized fighting forces strongly mitigates the criminal responsibility of superiors due in large part to their very organization and the absence of any formal punitive mechanisms or even clear processes for transmitting orders in a hierarchical manner.²⁵ In fact, the very randomness of violence can, in itself, serve to terror-

23. See M.A. Newton, 'Modern Military Necessity: The Role and Relevance of Military Lawyers', 12 *Roger Williams University Law Review* (2007) pp. 877, 885: 'The modern law of armed conflict is really nothing more than a web of interlocking protections and specific legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. In short, the law serves as the firebreak between being a hero in the service of your nation and a criminal who brings disgrace to your nation, dishonor to the unit, and disruption to the military mission.'

24. See *infra* nn. 69 to 81 and accompanying text.

25. M.J. Osiel, *Obeying Orders* (Piscataway NJ, Transaction Publishers 1999) pp. 173-199: discussing situations in which commanders can sometimes deliberately create the impression of having 'unintentionally' lost control of their troops, in order to evade responsibility for the latter's misconduct.

ize the civilians which creates a perceived incentive on the part of the non-state actor that random violence could lead to the political objectives of the organization. When a commander institutes a corporate culture of violence unaccompanied by restraint mechanisms that can properly channel the violence and suppress atrocities (i.e., prevent and/or punish the commission of war crimes), the commander should be subject to criminal sanction on the basis of that organization and overarching authority alone.

In practice, some defendants exercising authority in non-traditional units have escaped criminal responsibility because the *ad hoc* Tribunals have at times adopted a rigid and highly technical approach to the law of superior responsibility.²⁶ In light of the reality that warfare is increasingly conducted by irregular forces, or dominated by non-state actors, such as warlords, paramilitary elements and terrorists, the precepts of command responsibility must evolve to ‘ensure continued compliance with basic requirements of international humanitarian law’.²⁷ However, if the doctrine of ‘effective control’ is not reconceived in the jurisprudential landscape and a rigid series of evidentiary factors ossifies there will be a very distinct enforcement gap. The simplest solution to the enforcement problems raised by the emergence of non-state actors as a dominant feature in the campaigns of criminality during modern conflicts is to adapt a universalized conception of superior responsibility. In other words, courts should treat non-state actors with the heightened responsibility attributable to the commanders in formalized military organizations precisely *because* they bear primary responsibility for the initiation of violence. At present, non-state actors are increasingly able to escape criminal sanction simply by their mode of organization and control of their subordinates. Superior responsibility must reclaim the flexibility to extend criminal sanction to all commanders who fail to suppress atrocities and have the requisite *mens rea*.

Indeed, an extrapolation of current jurisprudential trends shows an uneven application of the tenets in the context of non-state actors.²⁸ A very simplified example will illustrate this point. Country A insists on very stringent control of subordinate units. This country is run by a dictator who insists on strident control of every aspect of his society. Saddam Hussein, for example, interrupted a defense line of argument that questioned whether formal control also constituted real control for the purposes of imposing criminal responsibility for the acts of subordinates in and around the town of al-Dujail by standing up in the dock and exclaiming that ‘[t]he

26. *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Appeals Chamber Judgement, 16 October 2007; *Prosecutor v. Ignace Bagilishima*, Case No. ICTR-95-1A-A, Appeals Chamber Judgement, 3 July 2002.

27. G. Mettraux, *The Law of Command Responsibility* (Oxford, OUP 2009) p. 122.

28. *Ibid.*, n. 26, pp. 163-171: concisely summarizing the wide range of evidentiary indicators and often contradictory assertions used by various courts in assessing command culpability.

Iraqi Army is without a single Iraqi plane that could fly without my order.²⁹ The commander of our hypothetical country A has made it clear that he will retain control of every man on the battlefield. If a subordinate ever loses radio contact he has been given a standing order to stop fighting, to stop moving his unit and to retreat to a place where he can regain contact with his superior. The tribunal established to try all war crimes for this hypothetical nation, acting in good faith and applying existing jurisprudence, would likely establish a multifactor test for assessing whether the midlevel commander had effective control over his subordinate units.

Under this scenario, the liability of the midlevel commander on trial for war crimes perpetrated under a theory of command responsibility might well depend almost entirely on whether he maintained radio contact with his subordinates at all times, or at least on whether the alternate means of communication were available. Where the court found that he did not maintain contact he would likely be deemed to not have maintained effective control over his subordinates. While this may seem to be a far-fetched example, the ICTR Appeals Chamber based its finding that a political official exercised '*de facto* effective control over the *Interahamwe* as a civilian' in large part because the assailants 'reported back daily to the Appellant on what had been achieved.'³⁰ While the concept of *de facto* authority is intended by courts to provide a flexible template for case by case analysis, the facts must demonstrate a sufficient linkage between the political or military official and subordinates who commit a particular crime(s) in a particular place under particular circumstances. Such evidence may often be lacking, as in fact a number of *ad hoc* tribunal cases have shown. In practice, non traditional actors may be set loose under the express overall guidance of a non-state actor commander to conduct uncoordinated atrocities and therefore enjoy impunity by falling completely through the jurisprudential matrix.

Assuming that a contemporaneous conflict is underway in Country B, another tribunal might well apply the same standard of assessing effective control in assessing superior liability. Country B, on the other hand, is a very small, homogenous country. Its fighters come from a long line of warriors. Their fathers fought alongside each other, their grandfathers fought alongside each other. The modern fighters have known each other since birth and have played sports together their

29. M.A. Newton and M.P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (New York, St. Martin's Press 2008) p. 168.

30. *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Appeals Chamber Judgment, 23 May 2005, paras. 90-91: 'upholding the conviction of the former Bourgmestre of Mukingo. Kajelijeli was a member of MRND (Mouvement Révolutionnaire National pour le Développement) and he was also a founder and leader of Interahamwe in the Mukingo commune from 1991 to 1994', at <http://www1.umn.edu/humanrts/instree/ICTR/KAJELIJELI_ICTR-98-44A/KAJELIJELI_ICTR-98-44A-A.html>.

entire lives. They know each other so well that they make football passes blindly because they always know where the other players will be. The authorities of Country B use informal and often shifting lines of allegiance to control the actions of the commanders in the conflict. At the same time, there is an undercurrent of mysticism and belief in the spiritual unity of the tribe that serves to enforce obedience by subordinates rather than any punishment authority vested in commanders. Country B maintains that radio silence during operations is the ultimate manifestation of unit cohesion, mutual trust, and operational camaraderie; indeed if a commander used his radio during combat operations, it would be interpreted by others as a sign either that that commander was too dense to understand the operation at hand or did not trust his brothers in arms, either of which would bring a sanction of enforced social exile for life. A subsequent judicial evaluation of these actions would be hard pressed to apply the same multifactor test developed over the years of jurisprudence of its sister tribunal who was trying Country A. The midlevel commanders of Country B might well all be acquitted as Tribunal B routinely cited the lack of radio contact between subordinates and the lack of a systematized basis for enforcing discipline as indicia that there was no effective control over the acts of subordinates.

The law of command responsibility should not be permitted to wither away into textbook theory in the face of changing operational realities and asymmetric hostilities conducted by non-state actors. Though many scholars, jurists and military professionals have lamented the intellectual challenge of creating additional incentives for non-state actors to comply with the laws and customs of war,³¹ creating disincentives for commanders to retain tight and effective control over the crimes committed by subordinates surely cannot advance the humanitarian principles of the law. Doctrines of command and superior responsibility can retain utility as a compliance inducing norms only if they remain aligned with the modern military practices.

One potential solution to this modern dilemma may be to create a broadened conceptual framework for individual responsibility. Indeed, some courts have imposed criminal liability simply based on the participation of the accused in an armed militia acting with a common purpose, even though the credible evidence at trial and the reasonable inferences to be drawn that evidence did not permit a finding beyond a reasonable doubt that the defendants participated directly or indirectly in the charged offenses.³² Early ICC cases implicitly illustrate the challenge that this

31. See e.g., M. Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors', 98 *Journal of Criminal Law & Criminology* (2008) p. 711.

32. *Deputy General Prosecutor for Serious Crimes v. Sisto Barros aka Xisto Barros and Cesar Mendonca*, The Democratic Republic of Timor-Leste, Dili District Court, The Special Panels for Serious Crimes, Case No. 0112004, 12 May 2005, para. 120 (copy on file with the authors).

article seeks to address as the Prosecutor and Pre-Trial Chambers have displayed a remarkable reticence to employ the doctrine of command responsibility against non-state actors. In the *Lubanga* case, Pre-Trial Chamber I found that there are reasonable grounds to believe that the perpetrator founded the military organization and served as its Commander-in-Chief throughout the relevant time period. Remarkably, the provision of the Rome Statute applying the precepts of command responsibility was avoided both by the Prosecution and the Pre-Trial Chamber despite its patent applicability.³³ In lieu of extending the principles of command accountability onto a non-traditional, non-linear battlefield in which the commanders utilized fluid mechanisms of control in the midst of rapidly evolving operations, the Pre-Trial Chamber resorted to a theory of individual responsibility known as 'co-perpetratorship.' This development is even more notable given the recent rejection of the theory by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia on the basis that 'co-perpetratorship' as promulgated by the Trial Chamber 'does not have support in customary international law or in the settled jurisprudence of this Tribunal.'³⁴

It seems clear that the Pre-Trial Chamber of the ICC has strained to avoid invocation of the precepts of command in favor of resuscitating an outmoded and arcane theory. By applying Roxin's organizational analysis drawn from the Eichmann trial in 1962, the ICC generated a wholly new category of individual responsibility in which both superiors and subordinates in military organizations are held responsible as co-perpetrators, acting through an organizational apparatus.³⁵ Such an approach even in cases where the evidence would otherwise support a finding of effective control is a major shift from the precepts of individual responsibility that embodies a regrettable 'recollectivation of responsibility'³⁶ because of the broader

33. W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd. edn. (Cambridge, CUP 2007) pp. 212-213. See also Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, at <<http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF>> (adopting the same theory of liability).

34. *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Appeals Chamber Judgement, 22 March 2006, para. 62.

35. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras. 327-367, at <<http://www2.icc-cpi.int/iccdocs/doc/doc266175.PDF>>; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras. 477-518; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-14-tENG para. 78 (incorporating Claus Roxin's interpretation of the Eichmann judgement into international jurisprudence and eschewing traditional principles of command responsibility).

36. See M. Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 6, 2006, p. 36, 'noting that a policy of imputing criminal responsibility to every member of the organization by virtue of membership in an organization that participates in crimes creates a disincentive to compliance with international humanitarian law that "should be avoided"'. Sassoli points out that it "remains

conception of the entire military organization as a unified criminal activity. Moreover, the Roxin theory ‘assumes the existence of a rigidly formal bureaucracy’ patterned on the model of the Prussian organizational model in which authority is channeled into defined hierarchical structures in which compliance is assured based on uniformity of expectations and goals.³⁷ The twin ironies of the ICC approach are that the ICC has melded Roxin’s theory into a non-linear battlefield that operates in precisely the opposite manner as a westernized military hierarchy; secondly the ill fated marriage, almost by definition, helps ensure acquittal of the perpetrators because defense counsel need only demonstrate a lack of power ‘to replace sullen juniors with more enthusiastic drones’.³⁸

Finally, the current ICC approach is likely to prove irreducibly flawed in the end because any organization united under the authority of a superior will, by definition, exist with a common purpose. That is the very essence of authority and command. In the abstract, the law is clear that superiors cannot be convicted on the basis of strict liability by virtue of their position alone.³⁹ The pathway chosen by the ICC endangers the foundations of individual responsibility because superimposing an extended version of joint responsibility onto a non-state organizational structure leads to a system of strict liability, and simultaneously creates corresponding uncertainty regarding the appropriate scope of liability under established theories of JCE theory in the absence of an organized military structure.

Though *ad hoc* readjustments of theories of the theories of individual responsibility may provide a result oriented mechanism for affixing criminal responsibility, they fail to understand the essence of the criminality at issue for all fighting organizations – that it is the fielding of the fighting organization without the proper safeguards that is the root of the criminal behavior. Any military or para-military organization seeks to use ‘deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives’.⁴⁰ Given

of utmost importance to be able to reward the armed group member who respects IHL in order to increase our ability to encourage compliance with IHL and, thus, protect victims”.

37. M. Osiel, *Making Sense of Mass Atrocity* (Cambridge, CUP 2009) p. 100.

38. *Ibid.*, at p. 101.

39. *Prosecutor v. Laurent Semanza*, Case No. ICTR-87-20-T, Trial Chamber Judgement, 15 May 2003, para. 404, at <<http://69.94.11.53/ENGLISH/cases/Semanza/judgement/1.htm>>: ‘Criminal liability based on superior responsibility will not attach on the basis of strict liability simply because an individual is in a chain of command with authority over a given geographic area. While the individual’s position in the command hierarchy is considered a significant indicator that the superior knew or had reason to know about the actions of his subordinates, knowledge will not be presumed from the status alone.’

40. M. Howard, ‘Temperamenta Belli: Can War Be Controlled?’, in M. Howard, ed. *Restraints on War* (Oxford, OUP 1979). D. Galula, *Counterinsurgency Warfare: Theory and Practice* (Westport CT, Praeger Security International 2006) p. 12; ‘The first basic need for an insurgent who aims at more than simply making trouble is an attractive cause, particularly in view of the risks involved and in view

that reality, a 'highly articulated structure of control' is necessary, even in insurgencies or guerilla operations, to prevent purposeless and indiscriminate violence that in effect detracts from the larger political purpose of the conflict.⁴¹ International law therefore places a heightened responsibility on commanders who field a fighting organization and requires that they do so at their own risk.

This article postulates a much-needed reconceptualization of the concept of effective control that will sustain prosecution and conviction of the perpetrators responsible for the majority of atrocity crimes in the modern world. Compliance with the laws and customs of war is the *raison d'être* for the 'effective control' framework, and the potential for its increasing obsolescence ought to invigorate exploration of viable theories for preserving its utility as a potential deterrent to criminal acts during conflict. Without the proper internal enforcement of the laws and customs of warfare, the commander becomes liable to external enforcement. Hence, it follows that commanders [or civilian superiors] who organize forces and initiate campaigns of atrocity against civilized society should face punishment for the misuse of their authority. Such a refocused conception of the principles of command responsibility will reinforce the tenet that authority must be used to prevent atrocity in order to validate its proper purpose.

3. AN ABBREVIATED HISTORY OF COMMAND/SUPERIOR RESPONSIBILITY

The doctrine of superior responsibility flows from the very nature of the laws and customs of war. Historically and legally, the entire conception of military structures around the world is premised on some sort of hierarchical notion, which explains why the principle of Unity of Command emerged as one of the universally recognized Principles of War.⁴² Commanders have the most at stake in the success of the mission both personally and professionally. The legal norms define the boundary between being welcomed as a hero in the service of your nation and being relegated to a lifetime of castigation as an internationally condemned criminal subject to the universalized jurisdiction of states across the globe. The Great Swedish King and soldier, Gustavus Adolphus recognized this essential truth with the man-

of the fact that the early supporters and the active supporters – not necessarily the same- have to be recruited by persuasion. With a cause, the insurgent has a formidable, if intangible, asset that he can progressively transform into concrete strength.'

41. Ibid.

42. The Principles of War crystallized as military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity. J. Whiteclay Chambers II, ed., *The Oxford Companion to American Military History* (Oxford, OUP 1999) p. 557.

date during the 100 Years' War that 'no Colonel or Captain shall command his soldiers to do any unlawful thing; which so does, shall be punished according to the discretion of the Judge'.⁴³

Commanders must command, and their failure to control the acts of their subordinates creates indiscipline that undermines the military mission as well as the professional ethos of the units. Compare Charles VII of France's declaration in 1439 to the modern doctrine as described in the next section of this article:

'The king orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself and shall be punished in the same way as the offender would have.'⁴⁴

The concept of the commander's legal responsibility became embedded in the positivist law of international treaties for the first time in the 1907 Hague Regulations.⁴⁵ The formalization of the principle of command responsibility was in a sense superfluous because the absence of any kind of organizing authority makes the conduct of effective hostilities something of an oxymoron. State practice has since integrated superior responsibility as a viable form of individual criminal responsibility for offenses committed by subordinates and for which the authority figure failed to take remedial or preventive.⁴⁶ The ICRC notes that it is 'uncontroversial' that this long-standing rule applies to both international and non-international conflicts.⁴⁷ The scope of the duty, as defined by state practice, is on its face extraordi-

43. G. Adolphus, 'Articles of Military Laws to be Observed in the Wars (1621)', quoted in M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 2nd edn. (The Hague, Kluwer 1999) p. 59. The 150 Articles regulating military conduct were a groundbreaking attempt to establish a professional code grounded in legal formulations and were promulgated as Swedish forces moved toward battle with Russian forces.

44. Quoted in M.L. Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations', 164 *Mil. LR* (2000) p. 155, n. 55.

45. 1907 Hague Regulations, *supra* n. 5, Art. 3, 'A belligerent party which violates the provisions of the said Regulations 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.'

46. Henckaerts and Doswald-Beck, *supra* n. 4, p. 558, 'Rule 153: Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.'

47. *Ibid.*, pp. 559-560.

narily broad: of the 42 military manuals or state legislation excerpted in the ICRC Customary International Humanitarian Law study only 6 had any effective control language: France, Britain, Bangladesh, Cambodia, Canada, Germany, and five more had some sort of a scope of command requirement.⁴⁸

The implicit conclusion is that there can be no armed force without the organizing and centralizing influence of a responsible leader, who by definition is empowered to exercise control over the conduct of hostilities. This principle marks the difference between an organized force and an anarchic mob of criminals. Thus, the very act of organizing an armed force and using it to perpetrate criminal acts is the *sina qua non* of command responsibility. Non state actors who do so should be responsible for the crimes committed by units operating under their loose authority because state practice accepts that the principles of command responsibility that originated in highly organized and disciplined forces apply *mutatis mutandis* to non-state actors.

3.1 Post WWII Jurisprudence

Although the doctrine of superior responsibility was not encapsulated in the London Charter, the Far East Charters or Control Council Law No. 10, it was developed in the case law of the tribunals and applied both to individuals with formal military authority and to civilian officials who exercised authority over military operations.⁴⁹ Similar to modern tribunal case law, the post-WWII tribunals seemed to struggle with two issues: (1) how much notice is sufficient notice that a criminal intention may properly be inferred, and (2) which subordinate perpetrators may be imputed to the superior?

The International Military Tribunal at Nuremberg implicitly relied on the doctrine of command responsibility in prosecuting several civilian officers. In the case of Wilhelm Frick, Nazi Germany's Minister of the Interior, the Nuremberg tribunal's judgment rested on the determination that Frick knew of the systematic murder of mentally handicapped and sick people, disregarded complaints regarding these crimes, and allowed them to continue.⁵⁰ Likewise, the tribunal found that Fritz Sauckel, the Plenipotentiary General for the Utilization of Labor, had been aware of and supported the slave labor program employed by the Nazis.⁵¹ Despite

48. *Ibid.*, Vol. II, pp. 3738-3751.

49. *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Judgement, paras. 419-424; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4, Judgement, 2 September 1998, para. 148, 'The Chamber finds that the definition of individual criminal responsibility, as provided under Art. 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors'.

50. Judgement against Wilhelm Frick, Trial of the Major War Criminals Before the International Military Tribunal, at <http://www.yale.edu/lawweb/avalon/imt/proc/judfrick.htm>.

51. Judgement against Fritz Sauckel, Trial of the Major War Criminals Before the International Military Tribunal, at <http://www.yale.edu/lawweb/avalon/imt/proc/judsauk.htm>.

Sauckel's claim that he had not been responsible for the way the slave laborers were obtained and treated, the tribunal found that he had overall responsibility for the slave labor program and was aware and vigorously supported the ruthless methods that were used to obtain laborers.⁵² The Frick and Sauckel decisions accepted the proposition that *nullem crimen sine lege* supported liability over even civilian officials whose authority promulgated and sustained subsequent criminal acts committed by subordinates.⁵³

In the *High Command* case the trial chamber struggled to define the scope of offenses imputable to the superior:

'Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility ... A high commander cannot keep completely informed of the details of military operations of subordinates ... There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence ... Modern war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates ... He has a right to assume that details entrusted to responsible subordinates will be legally executed ... Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination.'⁵⁴

Likewise, *The Hostages* case forced the trial chamber to struggle with the notice element:

'We desire to point out that the German Wehrmacht was a well equipped, well trained and well disciplined army ... The evidence shows ... that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and

52. Ibid.

53. As described, Frick and Sauckel were both civilian officials. Additionally, the Nuremberg statute provided that command responsibility could not be avoided by reference to holding an official government position. Stating that: '[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment', the statute eliminated an important potential defense to command responsibility. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union Of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex (known as the London Charter), 8 August 1945, Art. 7, at <<http://avalon.law.yale.edu/imt/imtconst.asp>>.

54. *United States v. Von Leeb*, 11 *TWC* (1948) p. 543; and 12 *Law Reports of Trials of War Criminals*, pp. 1, 73-76, (High Command).

evening ... Any army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit ... It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime.⁵⁵

The International Military Tribunal for the Far East (the Tokyo Tribunal) also applied the doctrine of command responsibility to political leaders. In the case of Kuniaki Koiso, who became Prime Minister of Japan in 1944, the tribunal found that Koiso must have known of crimes committed by Japanese troops simply because these crimes were so widespread and infamous.⁵⁶ Moreover, Koiso had attended a meeting of the Supreme Council for the Direction of the War at which the Foreign Minister requested the issuance of a directive to stop the mistreatment of prisoners of war.⁵⁷ Despite these clear indications that Japanese troops committed war crimes, Koiso took no action, which led the tribunal to find 'a deliberate disregard of his duty'.⁵⁸ This judgment required that superiors – including civilian leaders such as Koiso – are under a duty to intervene against crimes committed by subordinates, the key premise of command responsibility.

These cases began to craft the contours of what later became the modern doctrine of superior responsibility; the *Yamashita* case is the true genesis of the modern conception of the normative idea that a commander assumes affirmative responsibility to control subordinates. The United States Supreme Court succinctly (and not without some controversy) summarized the legal question at issue at hand:

'[T]he gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and

55. List at 11 *Trials of War Criminals* pp. 757, 1256, (Hostage Case). 11 *TWC* (1948) pp. 757, 1259-1260.

56. International Military Tribunal for the Far East, The Tokyo War Crimes Trial, reprinted in L. Friedman, ed., *The Law of War: A Documentary History*, Vol. II (Westport CT, Greenwood Press 1972) p. 1141; the tribunal finding that: 'When Koiso became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theater of war had become so notorious that it is improbable that a man in Koiso's position would not have been well-informed [of them].'

57. *Ibid.*

58. *Ibid.*

whether he may be charged with personal responsibility for his failure to take such measures when violations result.⁵⁹

The Court held that once the *jus in bello* is applicable at the onset of armed conflict, then the commander on both sides of the battlefield is under an affirmative obligation to ‘take such measures as were within his power and appropriate in the circumstances’ to uphold and enforce the laws.⁶⁰ The requirement for actual or constructive notice was subsequently endorsed by the US Military Tribunals at Nuremberg convened under Control Council Law 10.⁶¹ The baseline for the entire doctrine, which later took on the force of treaty law, is that both pillars of the *jus in bello* at the time – both the Hague Conventions and the Geneva Conventions – required that the individual responsible for the enforcement of those norms was to be the military commander.

3.2 The Post World War II treaty regime

The 1949 Geneva Conventions did not expressly outline the parameters of the doctrine of superior responsibility, though as noted above the requirement of a commander was an essential requirement for the recognition of combatant status for irregular forces. The ICRC convened a conference of government lawyers in 1971 and 1972 to consider two draft Protocols ostensibly designed to ‘reaffirm and develop’ the corpus of the laws and customs of war.⁶² Article 43 of the 1977 Addi-

59. 327 US 1, 14-15; Endorsing the same normative baseline that resonated through the centuries of military organization, the Court concluded that: ‘It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates ... These provisions [The Hague and Geneva Laws] plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals...

60. 327 US 1, 16 n. 3.

61. See e.g., Trial of Field Marshal Erhard Milch quoted in Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Case No. 21, Trial of General Yamashita, Notes on the Case (hereinafter Notes on Yamashita); ‘But certainly he had no opportunity to prevent or stop, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative ... In view of the above findings, it is obvious that the defendant never became *particeps criminis* and accessory in the low-pressure experiments set forth in the second count of the indictment.’

62. Roberts and Guelff, *supra* n. 5.

tional Protocol I added an affirmative obligation on those who field fighting organizations to subject their fighting organizations to 'internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'⁶³ This seemingly retains the commander as the primary enforcer maxim of superior responsibility developed after World War II – at least for an international conflict.

The Additional Protocols retained the organizational predicate for the applicability of *jus in bello* that had been noted in all of the Post-WWII cases. There must be a fighting organization with a responsible commander for the laws and customs of war to even be applicable to a given situation, and the responsible commander is the person vested with the primary enforcement capacity of the laws themselves:

'The term "organized" is obviously rather flexible, as there are a large number of degrees of organization. In the first place, this should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training. A "responsible" command cannot be conceived of without the persons who make up the command structure being familiar with the law applicable in armed conflict ... All armed forces, groups and units are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations. In other words, all of them are subordinate to a command and to a Party to the conflict, without exception, for it is not permissible for any group to wage a private war.'⁶⁴

The Commentaries to the Protocol note that the inclusion of the 'disciplinary system' in Article 43 does more than vest commanders with the primary enforcement; it also mandates the disciplinary system be included into the very definition of whether there is an armed force to the conflict at all.

'This was already the view of the drafters of Hague Convention IV of 1907, when they provided in Article 1 of this Convention that "the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention". This requirement is rendered here with the expression "internal disciplinary system", which covers the field of military disciplinary law as well as that of military penal law. The modern trend is to regard violations of rules of the Protocol and of other

63. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Art. 43, 8 June 1977, 1125 *UNTS* 3 [hereinafter Additional Protocol I].

64. ICRC, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts Art. 43, para. 1672 (Yvez Sandoz, et al., ed., 1987).

rules of international law as matters primarily of military penal law. The principle of the inclusion of this rule in the Protocol was from the beginning unanimously approved, as it is clearly impossible to comply with the requirements of the Protocol without discipline.⁶⁵

Restating the requirements embedded in the 1949 Geneva Conventions, the Commentary notes that for an armed force to be a party to the international conflict, only four requirements must be met: (1) ‘subordination to a “Party to the conflict” which represents a collective entity which is, at least in part, a subject of international law’; (2) ‘an organization of a military character’; (3) ‘a responsible command exercising effective control over the members of the organization’; (4) ‘respect for the rules of international law applicable in armed conflict’.⁶⁶

Article 86 of Protocol I was a major development in the field as it gave textual formulation to the historically developed doctrine of superior responsibility. Paragraph 2 of Article 86 includes the three main criteria for which there is little debate; in order for a superior to be criminally liable for the crimes of a subordinate three criteria must be fulfilled: (1) senior-subordinate relationship; (2) actual or constructive notice; (3) failure to take measures to prevent the crimes.⁶⁷ The commentaries do give credence to some form of a control test similar to that subsequently implemented by the Tribunals to establish the presence of the relationship. ‘[I]t should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed ... The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.’⁶⁸

The scope of the commander’s duty was expanded in Article 87 to extend an affirmative obligation to restrain ‘members of the armed forces under their command and *other persons under their control*.’[emphasis added]⁶⁹ This operative provision supplied the basis for the ICTY judgment in *Prosecutor v. Kordić and*

65. *Ibid.*, para. 1675.

66. *Ibid.*, para. 1681.

67. Additional Protocol I, *supra* n. 63, Art. 86(2); ‘The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.’; see also Commentary to Protocol I, *supra* n. 64, Art. 86, para. 3543. For the modern articulation of these precepts in the body of the Rome Statute of the International Criminal Court, see *infra* n. 107 and accompanying text.

68. Commentary to Protocol I, *supra* n. 64, Art. 86, para. 3544; see also ‘The German High Command Trial’, *ibid.*, p. 76, 12 Law Reports; ‘Trial of General Tomoyuki Yamashita’, *supra* n. 61, pp. 35, 87; 4 Law Reports.

69. Additional Protocol I, *supra* n. 63, Art. 87(1) [emphasis added].

Čerkez, in which the tribunal found military officers liable for the crimes committed by local townspeople during a period of hostile occupation.⁷⁰ Article 87 reflects and reinforces the historic commitment to the commander as the primary enforcer of the *jus in bello*.⁷¹ While its text says, essentially, that commanders are vested with responsibility to suppress violations of the laws and customs of war, the commentaries go much further, developing many aspects of a commander's duties all with an eye towards pragmatic realities of actually command.

On the other hand, the commander does not fulfill his obligations under the laws and customs of war by simply organizing along hierarchical lines while imposing some system of disciplinary measures on subordinates.⁷² More is required. The Commentaries, and practical experience, indicate that commanders are the operational lynchpin. The state as an entity has the authority to enter into a conflict, but the state only wages this conflict through its commanders.⁷³ The commanders, however, are not the individuals pulling triggers or detonating bombs, the individual service members subordinate to the commanders are performing those tasks. The commanders, as conductors of an orchestra of violence are vested under the applicable *jus in bello* with the responsibility of training their players to know on their own when to ratchet up and when to ratchet down the violence, even if no crescendo or decrescendo signal comes from the conductor himself. This is a very important point for scholars and jurists to understand. Because commanders are vested with vast responsibilities and powers by the laws and customs of war, they are also vested with the obligation to fulfill those duties in a lawful manner.

Commanders, to a large extent, fulfill their duties to suppress *jus in bello* violations not by being everywhere on the battlefield at the same time, nor by maintaining stringent control of every single subordinate (both of which would obviously

70. *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Trial Chamber Judgement, 26 February 2001, para. 415.

71. Additional Protocol I, *supra* n. 63, Art. 87(2); 'In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.'

72. See Commentary to Protocol I, *supra* n. 68, Art. 87, para. 3552; 'This paragraph obliges the Contracting Parties and the Parties to the conflict to make the control of the application of the Conventions and the Protocol part of the duties of military commanders. For this purpose the text lists a series of measures which commanders are obliged to take, namely, to prevent breaches from being committed, to suppress them when they have been committed, and to report them to the competent authorities.'

73. *Ibid.*, para. 3550; 'In fact the role of commanders is decisive. Whether they are concerned with the theatre of military operations, occupied territories or places of internment, the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided. At this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective.'

be pragmatically impossible). Commanders have an affirmative duty to train their subordinates prior to battle to comply with the mandates of the *jus in bello* requirements without anyone telling them when and when not to take a given action. It is almost axiomatic that the commander sets the command climate within which the ‘brothers of the close fight’ function as either a disciplined force or an armed band filled with bloodlust. The conductor is unable to play every instrument in the orchestra and cannot mandate every single decision taken by the individual players during the recital – for that is not the conductor’s job. Just as the exacting standards of musical excellence can be met only with meticulous application by the entire entity focused on the common task, an efficient fighting force depends on the commander’s presence and participation, but only in the commander’s role. The conductor/commander’s job is twofold: to prepare subordinates for the performance based on his or her experience and best judgment and then to guide and control them during the performance/conflict. An effective commander issues plans and guidance prior to the onset of operations, and sets a command climate of professionalism in which he/she empowers subordinates as the conflict unfolds.⁷⁴ Once in the midst of the battle, the commander can only supervise subordinates intermittently, the gaps must be filled by trusting that the commander has prepared them in the most efficacious manner.

The duties of a commander to ensure compliance with *jus in bello* by training and proper supervision on the battlefield are integral to the preeminent duty of a commander: to exercise command of his subordinates.⁷⁵ This aspect of leadership is the quintessential core of the commander’s professional responsibility, and may well be seen as its highest moral and legal manifestation.⁷⁶ Although the scope of the duty may differ depending on the individual commander and the size of the unit, essentially, the duty is the same: to prepare the subordinates under one’s control for battle and to prepare them in a way which respects the laws and customs of

74. Ibid., para. 3550 (‘Undoubtedly the development of a battle may not permit a commander to exercise control over his troops all the time; but in this case he must impose discipline to a sufficient degree, to enforce compliance with the rules of the Conventions and the Protocol, even when he may momentarily lose sight of his troops.’).

75. Ibid., para. 3562; ‘The object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provisions of the Conventions and the Protocol, and with regard to other rules of the army to which [p. 1023] they belong. Such powers exist in all armies. They may concern, at any level, informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, or intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence.’

76. R. Puckett, *Words for Warriors: A Professional Soldier’s Notebook* (Tucson AZ, Wheatmark Press 2007) p. 112; ‘As commanders we are responsible for instilling a strong moral compass in our troops. We begin the day we take command. We cannot stop until we are no longer in command. We develop this moral compass in training before our Soldiers are subjected to the pressures of combat.’

war and ensures that the tenets held in those laws are not violated.⁷⁷ This obligation remains constant even if irregular troops without a proper training are attached to a given commander.⁷⁸ The essence of command is the general duty to maintain discipline, but also the inherent duty to function within an organized structure, which of necessity means informing higher commanders of what is happening within one's unit. By logical extension, any commander who seeks to maintain a high degree of unit cohesion should never intentionally disregard the duty to prevent subordinates from committing war crimes because they would then logically assume that he had possessed no *a priori* intent to punish such violations. These duties would be integral to the general command authority whether or not they were embedded in the applicable *jus in bello*. All of these requirements that the *jus in bello* places upon a commander are actually helpful requirements to a commander who is focused on maintaining sufficient discipline to accomplish a military mission.⁷⁹ The obligation to prevent and punish violations is not properly seen as an unwieldy distraction superimposed by external actors because it is an essential component of a viable command structure focused on lawfully achieving military success. In this sense the text of the law recognizes the art of command by requiring a modicum of training in the laws and war, a certain amount of supervision of one's troops and maintaining lines of communication open to higher commanders.

The application of centuries old theory of command is no less important in non-international armed conflicts. Protocol II relaxes the requirements of a military hierarchy, but importantly retains the requirements of an orders process and an internal disciplinary system. The orders process is a requirement in order to maintain the organization. Without any amount of top-down control of the organization, there is simply a mass of people operating in the same general manner, yet some top-down control in the form of an orders process is essential for the formation of a fighting organization. Nothing in Protocol II indicates that this is varied for non-state actors in a non-international conflict. In fact, the Commentary points out that:

'The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and car-

77. See Commentary to Protocol I, *supra* n. 68, Art. 87, para. 3558; 'If, as in many armies, the commander of a unit is responsible for the instruction of his men, it will be up to him to ensure, primarily through the commissioned and non-commissioned officers under his command, that his unit gets proper training. He will ensure that this is done either periodically or expressly before an engagement.'

78. See *ibid.*, para. 3554.

79. See generally, *ibid.*, para. 3563.

rying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.’⁸⁰

Though Article 1 in Protocol II is the analog to Article 43 of Protocol I, there is no corresponding articles that rephrase Articles 86 and 87 of Protocol I for non-state actors in the context of non-international armed conflicts. The jurisprudence of the *ad hoc* tribunals has filled these *lacunae* through the evolution of the effective control test as noted below.

4. LEX LATA OF SUPERIOR RESPONSIBILITY

The doctrine of superior responsibility is unique from other modes of liability in that it is predicated on an active omission which violates a duty to act.⁸¹ The doctrine of responsible command vests commanders with an ongoing duty to restrain their subordinates from committing war crimes.⁸² This precept flows from the customs of war, has achieved customary international status, and has been in place for centuries.⁸³

80. See *ibid.*, Art. 1 para. 4463.

81. *Čelebići* Trial Judgement, para. 334; ‘[T]he criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act ... [B]y Article 87 [AP I], international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.’; *Kordić* Trial Judgement, para. 369; *Halilović* Trial Judgement, para. 38.

82. See *Delalić* Trial Judgement para. 340; ‘The concomitant principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise this duty is formulated in Article 86.’; see also *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Judgement, 20 June 2006, para. 326; ‘superior criminal responsibility presupposes a duty of the superior the purpose of which is, first and foremost, the prevention of crimes of subordinates that are about to be committed, and in the second place, the punishment of subordinates who have already committed crimes.’ (footnotes and citations omitted); *Hadžihasanović* Case No. IT-01-47, 16 July 2003, para. 14, In the view of the Appeals Chamber, the matter rests on the dual principle of responsible command and its corollary command responsibility.’

83. See e.g., *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, *supra* n. 15, para. 16 (16 July 2003); ‘Thus, whether Article 3 of the Statute is referring to war crimes committed in the course of international armed conflict or to war crimes committed in the course of internal armed conflict under Article 3 common to the Geneva Conventions, it assumes that there is an organized military force. It is evident that there cannot be an organized military force save on the basis of responsible command. It is also reasonable to hold that it is responsible command which leads to command responsibility. Command responsibility is the most effective method by which international criminal law can enforce responsible command.’

'[W]herever customary international law recognizes that a war crime can be committed by a member of an organised military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate. Customary international law recognizes that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes.'⁸⁴

Though for much of history, command responsibility has been limited strictly to military commanders who were responsible for subordinates to commit war crimes, the recent explosion of the corpus of international criminal law has extended the form of liability to civilian superiors who satisfy the requisite elements.⁸⁵ In modern jurisprudence, the status of the perpetrator either as a military or a civilian superior is immaterial.⁸⁶ However, a military commander or civilian superior may be held responsible only for the actions of subordinates over whom the evidence demonstrates a degree of control sufficient to generate individual responsibility on the part of the superior.⁸⁷ Courts therefore make detailed factual determinations

84. *Hadžihasanović*, *supra* n. 15, para. 18.

85. *Prosecutor v. Delalić, et al.*, Case No. IT-96-21, 20 February 2001, para. 195-197. See also *Orić* Trial Judgement, *supra* n. 82, para. 308; '[T]he scope of Article 7(3) of the Statute extends beyond classical 'command responsibility' to a truly 'superior criminal responsibility', and does not only include military commanders within its scope of liability, but also political leaders and other civilian superiors in possession of authority.' The doctrine applies equally to both internationalized and non-internationalized conflicts. *Hadžihasanović*, *supra* n. 15, para. 20; 'Thus, the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander.'

86. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 227. The Chamber held that it is 'under a duty ... to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*'. 'The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.' The Chamber must 'be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility'. The Chamber noted that concentrating upon the *de jure* powers of the accused would improperly represent the situation at the time, and could prejudice either side by improperly representing the authority of the accused. 'Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to [find] command responsibility.' See also *Orić* Trial Judgement, *supra* n. 82, para. 309, 'Although formal appointment within a hierarchical structure of command may still prove to be the best basis for incurring individual criminal responsibility as a superior, the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid.'

87. Trial Chambers have been careful to note that this determination is not a simple ability to 'generally influence' behavior of subordinates, but rather the relationship must be more specific, in

that the superior was able to control the actions of the subordinates who committed the crimes; thus it is immaterial whether the claim of superior authority is based upon *de jure* or *de facto* control over the subordinates.⁸⁸

Rather than relying on formalistic determinations of the legal state of the fighting organization and the superior, the superior must be shown to have effective control over the subordinates to satisfy this element of the superior responsibility.⁸⁹ Yet, the notion that the superior-subordinate relationship element turns on the effective control of the subordinates by the superior is a misnomer since the effective control contains a further test.⁹⁰ The essential element in the effective control test is whether the superior possessed ‘the material ability to prevent or punish the commission of the principal crimes’.⁹¹ However, this ability does not necessarily have to come in the form of a *legal* authority to prevent or punish. Under the doctrine of command responsibility, a superior who lacks the *legal* authority to punish may be held liable if the superior could have initiated the investigation of a subordinate by reporting to appropriate authorities.⁹² This recognizes that formal-

certain circumstances even ‘substantial influence’ by itself has not been sufficient. *Semanza* Trial Judgement, para. 402; *Čelebići* Appeal Judgement, para. 266; *Kordić* Trial Judgement, para. 840; *Naletilić* Trial Judgement, para. 68; *Stakić* Trial Judgement, para. 459; *Brđanin* Trial Judgement, para. 276; *Blagojević* Trial Judgement, para. 791; *Ntagerura* Trial Judgement, para. 628; *Kayishem* Trial Judgement para. 202.

88. *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber Judgement, 7 July 2006, para. 143. ‘[The Trial Chamber’s] analysis focuses on the Appellant’s *de jure* authority – specifically, whether the ‘law’ placed him in power and whether he was ‘a superior within a formal administrative hierarchy.’ The Trial Chamber does not appear to have considered the Appellant’s *de facto* authority. This was an error. A superior ‘possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment.’ At <<http://69.94.11.53/default.htm>>.

89. See *Čelebići* Appeal Judgement, paras. 192 et seq., *Kayishema* Appeal Judgement, para. 294; *Bagilishema* Appeal Judgement, para. 50. For cases following *Čelebići* in principle but occasionally employing different terminology, see *Aleksovski* Trial Judgement, para. 76; *Prosecutor v. Blaskić*, Case No. IT-95-14, Trial Chamber Judgement, 3 May 2000, para. 301; *Kunarac* Trial Judgement, para. 396; *Kvočka* Trial Judgement, para. 315; *Stakić* Trial Judgement, para. 459; *Krnjelac* Trial Judgement, para. 93; *Naletilić* Trial Judgement, para. 67; *Galić* Trial Judgement, para. 173; *Brđanin* Trial Judgement, para. 276; *Blagojević* Trial Judgement, para. 791; *Strugar* Trial Judgement, para. 360; *Bagilishema* Trial Judgement, para. 39; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 (*Niyitegeka* Trial Judgement), para. 472; *Kajelijeli* Trial Judgement, para. 773.

90. *Čelebići* Appeals Chamber Judgement, paras. 192 et seq.

91. *Prosecutor v. Blaskić*, Case No. IT-95-14, Trial Chamber Judgement, 3 May 2000, para. 301; ‘[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.’ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Judgement, 17 December 2004, para. 840. *Orić* Trial Judgement, *supra* n. 82, para. 311.

92. *Prosecutor v. Blaskić*, Case No. IT-95-14, Trial Chamber Judgement, 3 May 2000, para. 302.

ized military systems may empower commanders to punish subordinates through disciplinary referral – an ability clearly showing a superior/subordinate relationship without individualized capacity to punish. Furthermore, where multiple superiors have effective control over a subordinate who perpetrates a crime, each may be held liable for the same underlying crime.⁹³

The *mens rea* requirement is firmly established as constructive or actual notice. This, admittedly, falls short of the intent elements that the direct modes of liability require. Courts have no conceptual barriers to lowering the *mens rea* requirement since the mode of liability is based upon a failure to act, and where there is a failure to act, at most a prosecutor will be able to prove knowledge.⁹⁴ As the ICTY observed in the *Orić* case (described in more detail below):

'[I]t appears no less misleading to require a mental standard tantamount to 'malicious intent'. By contenting itself with having had "reason to know" instead of requiring actual knowledge, superior criminal responsibility under Article 7(3) of the Statute obviously does not presuppose intent of the superior with regard to crimes of his subordinates, let alone a malicious one. What is required though, beyond solely negligent ignorance, is the superior's factual awareness of information which, due to his position, should have provided a reason to avail himself or herself of further knowledge. Without any such subjective requirement, the alternative basis of superior criminal responsibility by having had 'reason to know' would be diminished into a purely objective one and, thus, run the risk of transgressing the borderline to "strict liability". This is not the case, however, as soon as he or she has been put on notice by available information as described above.'⁹⁵

So, in practice, prosecutors must prove:

'[I]ndividual criminal responsibility under Article 7(3) requires no more than the superior either (a) having known or (b) having had reason to know that his subordinates were about to commit relevant criminal acts or had already done so. Whereas the former requires proof of actual knowledge, the latter requires proof only of some grounds which would have enabled the superior to become aware of the relevant crimes of his or her subordinates.'⁹⁶

93. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Trial Chamber Judgement, 25 June 1999, para. 106.

94. See *Prosecutor v. Orić*, *supra* n. 82, para. 317 (30 July 2006); 'By permitting the attribution of criminal responsibility to a superior for what is in actual fact a lack of due diligence in supervising the conduct of his subordinates, Article 7(3) in this respect sets itself apart by being satisfied with a *mens rea* falling short of the threshold requirement of intent under Article 7(1) of the Statute.'

95. *Ibid.*, para. 323.

96. *Ibid.*, para. 317; see also *Ntagurera* Trial Judgement para. 629; 'A superior will be found to have possessed or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility provided that: (i) the superior had actual knowledge, established through direct or circumstantial

Neither actual notice, nor constructive notice may be presumed solely from the position of the superior; however, notice may be inferred from the entirety of the circumstances.⁹⁷ There is no requirement that the superior read the information, simply that the information is available to the superior such to put him on notice and that it is specific enough to have put the superior on notice that crimes were either being committed or about to be committed.⁹⁸ Examples of information that has been deemed sufficient include: subordinates with a notoriously violent or unstable character; subordinates drinking prior to going on mission; but these are only indicative of notice if these ‘indications point to the same type of crimes as the superior was supposed to prevent or punish, as opposed to merely general criminal activity’.⁹⁹

The measures that a superior should take depend upon the temporal relationship between the notice and the crimes. If the notice comes before the crimes then the superior is vested with the responsibility to take measures to suppress or prevent the crimes from taking place; in this case a superior cannot cure a failure to prevent by punishing after the fact as that would defeat the entire purpose of vesting superiors with the capacity as primary enforcers of the laws and customs of warfare.¹⁰⁰ If the notice comes after the crimes then the superior is vested with the responsibility to take measures to prosecute those who committed the crimes.¹⁰¹ The duty to punish is triggered ‘only if, and when, the commission of a crime by a subordinate can be reasonably suspected’.¹⁰²

After there is notice to the superior that crimes are either being committed or have been committed a duty of vigilance is triggered. In order to be liable for

evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the statute; or (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates.’

97. See *Orić* Trial Judgement, *supra* n. 82, paras. 319, 321; see also *Baglishema* Trial Judgement para. 968; *Ntagurera* Trial Judgement para. 648; ‘In determining whether a superior, despite his pleas to the contrary, must have possessed the requisite knowledge of the offences, the following indicia are relevant: (a) the number of illegal acts; (b) the type of illegal acts; (c) the scope of illegal acts; (d) the time during which the illegal acts occurred; (e) the number and type of troops involved; (f) the logistics involved; (g) the geographical location of the acts; (h) the widespread occurrence of the acts; (i) the tactical tempo of the operations; (j) the *modus operandi* of similar illegal acts; (k) the officers and staff involved; and (l) the location of the commander at the time.’

98. *Orić* Trial Judgement, *supra* n. 82, para. 322.

99. *Ibid.*, para. 323.

100. *Ibid.*, para. 326; *Stakić* Trial Judgement, para. 461; *Brđjanin* Trial Judgement, para. 279; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement of the Trial Chamber, para. 72; *Blaškić* Appeal Judgement, para. 83; *Limaj* Trial Judgement, para. 527; *Hadžihasanović* Trial Judgement, paras. 125 et seq.

101. *Blaškić* Appeal Judgement, para. 83; *Halilović* Trial Judgement, *supra* n. 100, para. 93; *Limaj* Trial Judgement, para. 527; *Hadžihasanović* Trial Judgement, paras. 125 et seq.

102. *Orić* Trial Judgement, *supra* n. 82, para. 336.

failure to take measures a superior must be shown to have effective control over the subordinates both at the time the crimes were committed and when notice to the superior took place.¹⁰³ Ultimately the criminal liability of the superior stems not from the relationship with the subordinates, nor from the actual acts of the subordinates, nor from a failure to process available information about the subordinate's atrocities, it flows from the failure to take measures to suppress the subordinate's actions.¹⁰⁴ This formulaic approach creates a narrow lens that undervalues the role of the superior as the responsible authority for initiating acts of violence, even as it rewards those who avoid any direct supervisory involvement as the organization that they fielded commits crimes in the field.

5. FURTHER EVIDENCE OF A PENDING PROBLEM

5.1 Atrocity by connivance: the jurisprudential conflict

As theories of command and superior responsibility have evolved to embrace *de facto* lines of authority and been applied to crimes against humanity and genocide offenses, their pedigree remains rooted in the doctrine of responsible command arising from the conduct of hostilities.¹⁰⁵ As noted above, the *ad hoc* tribunals had begun to litigate the rough contours of superior responsibility by the time the Rome Statute was being negotiated. It appears from the diplomatic record that there was little haggling by states over the margins of the doctrine at the Rome Conference.¹⁰⁶ Significantly, the ICRC notes that there was no controversy in the ICC negotiations that the doctrine applies to non-international conflicts.¹⁰⁷ The delegates to the Rome

103. *Hadžihasanović* Jurisdiction Appeal Decision, paras. 37 et seq., 51.

104. *Ntagurera* Trial Judgement para. 630; 'A superior may incur responsibility only for having failed to take "necessary and reasonable measures" to prevent or punish a crime under the Statute committed by subordinates. The degree of the superior's effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates' crime.'; see also *Semanza* Trial Judgement para. 406

105. *Hadžihasanović*, *supra* n. 15, para. 29; 'The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In like manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts.'

106. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute*, Vol. 2 (Ardsley NY, Transnational Publishers 2005) pp. 210-214.

107. Henckaerts and Doswald Beck, *supra* n. 4, p. 560.

Conference did confirm that the doctrine was equally applicable to both military commanders and civilian leaders if the established predicates were met – the genesis of this notion was in ICTY and ICTR jurisprudence. The adoption by states in Article 28 of the Rome Statute widening the margins of the doctrine to embrace military commanders and those ‘effectively acting as a military commander’ as well as any other superior added legitimacy to the jurisprudence of the *ad hoc* tribunals by reinforcing the established understanding that *de facto* control was an equally viable basis to support the doctrine as *de jure* authority.¹⁰⁸ Article 28 did recognize the differentiation between military and civilian organizational hierarchies by requiring that the civilian supervisor either know or consciously disregard information about the commission of criminal acts by subordinates. This provision stands in sharp contrast to the military commander [or *de facto* commander] to whom knowledge may be imputed based on the inherent obligations and authority of the title commander. One other significant step taken by the states was a textual reaffirmation of Protocol I Article 87 by the addition of the word ‘repress’ into Article 28. The *ad hoc* tribunals did not include this word, though the 1977 Protocol had in Article 87, and by negotiating it back into the language of the Rome Statute the states at the Rome Conference seemed to reinvigorate the notion of suppression that is an integral component of command in its highest professional sense. However, the debates over Article 28 did little to clarify the conceptual basis for the responsibility of commanders and superiors that formed the basis of international consensus in the negotiations.

108. See Rome Statute of the International Criminal Court, UN Doc. A/CONF 183/9, 2187 UNTS 90, 37 *ILM* 1002, entered into force 1 July 2002, Art. 28 (1998)[hereinafter Rome Statute]. Responsibility of commanders and other superiors. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Thus, despite the historicity of the precepts of superior responsibility, modern judicial applications do not proceed from a commonality of understanding that was developed to address modern realities. It is not surprising that their application remains imprecise and often controversial, which in turn has led courts to make formulaic applications that can at times disregard the reality of military command. This problem is exacerbated with respect to nontraditional military forces and commanders who do not function in clean hierarchical channels. For example, the ICTY *Hadžihasanović* Interlocutory Appeal Decision is primarily understood to stand for the proposition that superior responsibility is a valid form of individual criminal responsibility in both internationalized and non-internationalized conflicts, but the other issue at bar in that appeal is equally interesting and important. How one thinks of superior responsibility on the philosophical level will largely determine how one comes out on the issue of the Second Ground of the Interlocutory Appeal: that the 'Trial Chamber erred in law when it concluded that "in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command".'¹⁰⁹

The majority of the Appeals Chamber overturned the holding by the Trial Chamber that a commander could be liable for crimes committed prior to the assumption of command.¹¹⁰ The majority rested its holding on *nullem crimen sine lege* grounds

109. *Prosecutor v. Enver Hadžihasanović, et al.*, Case No. IT-01-47-PT, 27 November 2002, para. 12, at <http://www.icty.org/x/cases/hadzhasanovic_kubura/ind/en/had-ai020111e.pdf>. At all times relevant to this indictment, Enver Hadžihanović, Mehmed Alagic, and Amir Kubura were required to abide by the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 1949 and the Additional Protocols thereto. Furthermore, Enver Hadžihanović, Mehmed Alagic, and Amir Kubura were responsible for ensuring that military units under their command and control respected and applied these rules of international law. Moreover, Enver Hadžihanović, Mehmed Alagic, and Amir Kubura were obliged by superior order to initiate proceedings for legal sanctions against individuals under their command and control who had violated the international law of war.

110. *Hadžihasanović*, *supra* n. 15, para. 51; 'Having examined the above authorities, the Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Appeals Chamber is aware that views on this issue may differ. However, the Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred.'; see also *ibid.*, para. 52 'Whether the principle of command responsibility extends to crimes committed prior to the assumption of command is a difficult legal question, and reasonable minds may certainly debate the point. To assert, as the dissenting Judges do, that such a dereliction clearly carries individual criminal liability under existing principle seems indefensible. It is trite to observe that in international criminal law, imposition of criminal liability must rest on a positive and solid foundation of a customary law principle. It falls to the distinguished dissenting Judges to show that such a foundation exists; it does not fall to the Appeals Chamber to demonstrate that it does not.' See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Appeals Chamber Judgement (3 July 2008); following the same rule as *Hadžihasanović* with strong separate opinions from Judges Shahabuddeen, Liu, and Schomburg, at <<http://www.icty.org/x/cases/>

by ruling that the issue was a debatable point and that it must hold in a manner most favorable to the accused. The majority held that ‘[i]n this particular case, no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander’s assumption of command over that subordinate.’¹¹¹ However, when superiors are viewed as the primary enforcers of the laws and customs of war then situations may present themselves which militate against this bright line rule. In dissent, Judge Shahabuddeen implicitly understood that superior responsibility – when viewed through the more historically accurate lens of military professionalism and the philosophy of command authority – could, at times, extend to crimes committed before the commander assumed command.¹¹² Moreover, the policy goal of crafting legal norms that facilitate the prevention and punishment of those who violate the laws and customs of war mitigates for the broadest application of command responsibility. Thus, a rule with no *per se* temporal restraints and one that is equally applicable to state and non-state actors would have been the most desirable.

The bright line rule drawn by the Appeals Chamber is convenient and at first blush seems to be the logical and appropriate answer that can satisfy *nullem crimen sine lege* standard for imposing accountability. Yet, the matter becomes more muddled when one considers that the individual criminal responsibility of a leader is based on a violation of a superior’s ever-present duty to suppress or punish stemming from the laws and customs of war vesting superiors with the primary enforcement capacity. Correctly stated, the commander has the legal obligation to prevent and/or punish violations committed by subordinate units.¹¹³ Command is an active verb, and carries with it a high degree of inherent moral and legal responsibility.

oric/acjug/en/080703.pdf>; following the same rule as *Hadžihasanović* with strong separate opinions from Judges Shahabuddeen, Liu, and Schomburg.

111. *Hadžihasanović*, *supra* n. 15, para. 52.

112. *Ibid.*, at para. 1 (Shahabuddeen, J. dissenting).

113. *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (New York Human Rights Watch 2006) p. 484 n. 51. As to whether there is a duty to ‘prevent or punish’ or ‘prevent and punish’ the formulation could be considered to be as follows. If the commander has taken reasonable steps to prevent the commission of the crime and has succeeded, there is no obligation to punish since no crime occurred and the word ‘or’ is appropriate. If the commander has taken reasonable steps to prevent the commission of the crime but failed, the commander has an obligation to punish the perpetrators, which would absolve the commander of criminal responsibility. If, the commander has taken no reasonable steps to prevent a crime, a violation has already occurred; however, the commander still has a continuing obligation to punish the perpetrators of the crime. In these latter instances, the word ‘and’ is appropriate. If only one word is used, it seems preferable to use ‘and’, because the word ‘or’ fails to reflect that there are two distinct legal obligations. See ‘there are two distinct legal obligations’, Section (VI)(c)(iii)(1), ICTY Digest. Given that the ICTY Statute uses the term ‘or,’ the ‘and/or’ formulation is a possible solution.

Since the 1970s it has become clear that the permission and guidance of an authority figure is the primary enabling mechanism which moves groups of men from a peaceful collectivity to an organized group of fighters.¹¹⁴ History is replete with examples of leaders whose personal influence became the essential element leading to military operational effectiveness.¹¹⁵ Empirical data is beginning to clearly point to authority figures as a major factor in the success or failure of a given military operation, and the importance of the authority figure is inflated in an asymmetric conflict. The United States doctrine for counterinsurgency operations expressly highlights this point as follows: 'Movement leaders provide strategic direction to the insurgency. They are the "idea people" and the planners. They usually exercise leadership through force of personality, the power of revolutionary ideas, and personal charisma. In some instances, they may hold their position through religious, clan, or tribal authority.'¹¹⁶

Soldiers in combat are looking to have someone else make decisions for them, and in fact are under legal duties to obey the orders of superiors.¹¹⁷ The commander's role is to *lead* men to act in ways that contravene their internal instinct to survive. The motivational force of an authority figure is often the essential element in determining whether a military mission succeeds or fails because the subordinates' fear or anger clouds their ability to make decisions due to an inability to retain forebrain cognizance. In such situations, the group dynamic takes over to make individual fighters act as one based on the course of conduct marked as desirable by the commander. This notion has been around forever. Much as the farmer must move a group of animals to serve his purposes, the commander must issue guidance and enforce behavioral norms when that guidance is disregarded or

114. D. Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Boston, Little Brown 1995) p. 143; 'Someone who has not studied the matter would underestimate the influence of leadership in enabling killing on the battlefield but those who have been there know better. A 1973 study by Kranss, Kaplan, and Kranss investigated the factors that make a soldier fire. They found that the individuals who had no combat experience assumed that "being fired upon" would be the critical factor in making them fire. However, veterans listed "being told to fire" as the most critical factor.'

115. See J. Keegan, *The Face of Battle* (Harmondsworth, Penguin Books 1983) p. 114; 'For the English [at Agincourt], the presence of the King would also have provided what present-day soldiers call a 'moral factor' of great importance. The personal bond between leader and follower lies at the root of all explanations of what does and does not happen in battle: and that bond is always strongest in martial societies.'; see also at p. 277, noting that Commanders were the most important human factor in willing the masses to fight in the First World War.'

116. Department of the Army, Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5, Counterinsurgency 1-61 (15 December 2006) at <<http://usacac.army.mil/CAC/Repository/Materials/COIN-FM3-24.pdf>>.

117. See generally L.C. Green, 'Superior Orders and the Reasonable Man', in *Essays on the Modern Law of War* 2nd edn. (Ardsey NY, Transnational Publishers 1999) p. 245, 'discussing the scope of the duty to obey and recounting the national legislation reinforcing such a duty.'

disobeyed. That is the essence of military leadership. By extension, if the commander ignores grievous crimes committed prior to the assumption of command, the message is clear and the approval of that course of conduct is apparent. This reality is distinct from the legal truism that there can be no lawful defense for criminal activity during conflict based on the receipt of superior orders (or, as is often the case, the perceived authority for violations.)¹¹⁸ In such an instance, there often is no express order to commit atrocities because it is unnecessary. In that manner, a direct individual responsibility by the commander may be easily avoided, even as the climate fosters continued illegal acts.

Acceptance of previous criminal conduct by the authority figure represents an acquiescence that creates a command climate which conveys that future crimes will not be penalized. As famed historian S.L.A. Marshall noted, ‘when an officer winks at any depredation by his men, it is no different than if he had committed the act’.¹¹⁹ The implicit permission given by a present authority figure by acquiescence and silent approbation has been labeled ‘atrocities by connivance’.¹²⁰ The difficulties of proof become obvious for a prosecutor trapped by the formula. In the absence of orders or the personal involvement of the leader, impunity may very well result based on a finding that there was no effective control over those subordinates at that time in that place for those crimes. Units will predictably continue to commit atrocities outside direct supervision, and the commander will avoid the technical reach of the law by ensuring that he remains unaware of precise operations or specific atrocities. In irregular units and non-traditional lines of command, this tendency is arguably the norm. The climate of impunity in the rebel band is matched by the impunity in the courtroom *because* of the legal matrix used to evaluate effective control.

The most troubling permutations of the majority decision in *Hadižhasanović* are apparent in a scenario where a commander is vested with *de jure* authority over subordinates and thereafter receives actual notice that crimes were committed.¹²¹ Yet another scenario is equally troubling to jurists who believe that commanders are vested with both the opportunities and the responsibilities of commanding and controlling their subordinates. When there is a change of commander what happens when crimes are committed by subordinates during the few days that it often takes to functionally change the commander?¹²² This temporal problem may be

118. Rome Statute, *supra* n. 108, Art. 33.

119. Gen. S.L.A. Marshall, *The Officer as Leader* (Harrisburg PA, Stackpole Books 1966) p. 274.

120. Osiel, *supra* n. 25, at p. 189.

121. Shahabuddeen also believes that criminality would flow even where there was constructive notice. *Supra* n. 112, para. 14, ‘Thus approached, there appears to be force in the argument that the responsibilities of a new commander extend to dealing with crimes committed by subordinates before he assumes command if he knows or has reason to know of the crimes.’

122. Although commands in industrialized armed forces are hardly ever without a *de jure* superior, even in these units changing the command takes longer than a simple ceremony. It is likely that for

exacerbated during the kind of non-international armed conflicts with uncertain and shifting command structures that are the norm in modern conflicts. Judge Shahabuddeen framed the problem this way: 'such crimes could fall between two stools. The crimes might have been committed very shortly before the assumption of duty of the new commander – possibly, the day before, when all those in previous command authority disappeared.'¹²³

Judge Shahabuddeen argued in dissent that the silence of Article 28 of the Rome Statute with respect to retrospective application should not be taken as dispositive evidence of the correct state of customary international law. Indeed, in his view 'if [a particular] situation is omitted from the texts in question, it does not follow that it is not penalized under customary international law'.¹²⁴ He ultimately concluded in his dissent that the notion, that a commander is categorically not responsible for crimes committed before the assumption of command, is incompatible with the theories of responsible command that are inextricably intertwined with superior responsibility and both flow from customary international law and treaty law.¹²⁵ The notion of a continual responsible command over the fighting organization requires an objective, continual, ever-present duty to suppress future crimes and punish past crimes.¹²⁶ Shahabuddeen opined that all that is required by the ICTY Statute is that there was effective control of subordinates when the new commander received notice of prior criminal acts.¹²⁷ Finally, and likely the most compelling argument, is the basis for superior responsibility rests on that fact that a superior is liable for his actions in failing to suppress or punish future or past criminal behavior, not the imputed action of the subordinates; where there is a failure to properly suppress¹²⁸ or punish then criminal liability must follow no matter when the crimes were committed if they were committed by a given superior's subordinates and the superior had notice then he is under an independent duty to punish those subordinates.¹²⁹

a few days on either side of that ceremony there would be no commander who maintains de facto control over the subordinates and the subordinates are likely left to their own devices.

123. *Hadžihasanović*, *supra* n. 15, para. 14 (Shahabuddeen dissenting).

124. *Ibid.*, para. 20 n. 63 (Shahabuddeen dissenting).

125. *Ibid.*

126. *Ibid.*, paras. 20 and 25 (Shahabuddeen dissenting).

127. *Ibid.*, para. 29 (Shahabuddeen dissenting); 'This would let in cases in which the subordinate "had committed crimes" even before that relationship began; in other words, the commission of the crime need not be contemporaneous with the existence of the superior /subordinate relationship.'

128. Or, in the language of Article 28 of the Rome Statute, 'repress such violations'.

129. *Hadžihasanović*, *supra* n. 15, para. 32 (Shahabuddeen dissenting); 'The position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable mens rea nor had any involvement whatsoever in the actus reus". 27 No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective

Therefore the duty to suppress or punish must extend beyond the assumption of command if the other predicates of superior responsibility are established.

In a modern world of asymmetric warfare that may see something of a revolving door of command as warlords rise and fall, or young child soldiers are replaced by more aggressive peers, the majority opinion runs the risk of creating a zone of impunity within the quasi-military organization in a non-international armed conflict. On the other hand, the duty to suppress or punish is inherently a commander's duty and the benefits and perks of being in command also carry the responsibilities of primary enforcer of the laws and customs of war. This is an elemental truth, regardless of the nature of the conflict, and one that the majority ignored. The majority position seems to center on the formalities of the relationship rather than the inherent duties that flow from the commander, which is an understanding integral to Shahabuddeen's dissent. In the context of the modern application of command responsibility theory, the debate is important because the legal formula for establishing effective control utilized by the majority has the effect of narrowing the relevant band of evidence by limiting the relevant timeline for assessing culpability to a particular place and time. This all must be evaluated from the perspective of what is feasible within the limits of what may well be a shifting and uncertain chain of authority and operations carried out across many miles and in often impassable terrain. In fact, this test, if applied to its logical extreme, means that any commander who assumes command and simply does not inquire into the previous operations of the force may be able to gain impunity under the legal framework itself. In sharp contrast, Judge Shahabuddeen's approach affixes a clear temporal line of authority that flows directly to the time that the authority figure assumed command. The responsibility both to prevent future conduct and to ameliorate past misconduct flows to the commander at that time and is inherent in the duty to control the application of violence. It cannot be avoided by resort to legal technicalities or the vagaries of different fact finders in judicial proceedings. The investigation and punishment of alleged atrocities is an affirmative aspect of command from this perspective, and the relevant temporal period is not subject to debate – if the commander is in command, then the duty to establish a climate of compliance with humanitarian law attaches to him/her irrespective of when the acts were committed.

Thus, with a slight, but profoundly important and historically defensible, alteration of perspective about the nature and obligations incumbent due to the very position of command, the scales of the debate tip towards Shahabuddeen's position. The concept of effective control is therefore made concurrent with the nature

action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.'

of superior authority by refocusing from a temporally and geographically circumscribed dependence on the precise relationship between the commander and subordinate to an acceptance of the ever-present duty of the commander as the primary enforcement mechanism of the laws and customs of war. In other enforcement mechanisms a change of the primary enforcer does not relieve the new individual from the duty of diligence. No prosecutor on earth assuming his post would think that he was relieved of his duty to investigate crimes that occurred before he took his position. Similarly, strong commanders of units in standing fighting organizations – who correctly view themselves as the primary enforcer of the laws and customs of war – would rarely think that violations which occurred before they assumed command were not their responsibility. This view may change, however, when the analysis turns to irregular forces that tend to operate more under a cult of personality or the moral authority of an individual human or cause that is embodied in an individual human rather than under the guise of sovereignty. Even in those conflicts the requirement of *de facto* control when notice was gained by the superior is enough to properly contain the doctrine from unlawful expansions that could be argued to violate the *nullem crimen sine lege* principle. More to the point, the dissenting position presents the strongest likelihood of inducing compliance by creating an incentive structure for an incoming non-state actor to affirmatively investigate and enforce the laws and customs of war.

5.2 Recent applications

Three recent cases are illustrative of the jurisprudential trends that threaten to undermine a viable form of superior responsibility. These cases represent the closest approximation to the majority of cases that are likely to enter courts in the near future because of their similarities to those conflicts that have recently and are likely to continue to be waged. Each of these cases is from a different tribunal to cast a wide net over the jurisprudence. Each case is fairly recent to show an up-to-date picture of the jurisprudence. Factually, each of these cases present similar problems for the judges, each case is essentially a commander (or local leader) of a decentralized fighting organization that is charged with crimes committed by subordinates. The decentralized fighting organizations presented by the cases align with the fighting organizations that have generally developed over the last twenty years to fight non-internationalized conflicts and therefore present the most indicative picture of what future litigation will likely encapsulate.

5.2.1 *Musema*

Further expanding the applicability of command responsibility to civilians, the ICTR Trial Chamber, in *Musema*, applied command responsibility in an industrial set-

ting.¹³⁰ Musema was employed as the Director of the Gisovu Tea Factory and was convicted when the court found that he acted criminally as a commander-in-fact of tea factory workers by virtue of his official position as factory boss and his actual economic domination of those in his employ.¹³¹ The genocidal acts took place in and around the area of the tea factory and Musema's employees participated with a variety of other perpetrators in the genocide. After reviewing the facts, the court explicitly endorsed the principle that 'a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law'.¹³²

In *Musema*, the decisive determinant of the superior-subordinate relationship turned on a simple formulaic ability of the superior to prevent or punish the crime. The relationship of authority was deemed to run strictly along the lines of employer to employee. Although there are other subjective criteria that may be, and are, taken into account by trial chambers, the ultimate determination that there was or was not a relationship between the superior and the criminal subordinate depends on whether the superior possessed *the ability* to prevent or punish the crimes.¹³³ 'Proof of superior responsibility requires conclusive evidence of the actual exercise of command and control over an identifiable group of subordinates.'¹³⁴ Trial chambers have taken other criteria into account, but seemingly only as secondary determinations to bolster their findings on the ability to prevent or punish. These include: the formality of appointment of superior; the power of superior to issue orders; the positive effect of superior's orders (compliance history by subordinates); a showing of greater discipline by subordinates in presence of superior; the capacity to transmit reports up chain of command; a high public profile (evidenced by public appearances or statements, participation in peace negotiations).¹³⁵ The superior must be shown to have had effective control at the time the crimes were committed by the subordinate.¹³⁶

130. *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, paras. 880-882 (27 January 2000).

131. *Ibid.*, at paras. 873, 880.

132. *Ibid.*, at paras. 141, 148.

133. See e.g., *Blaškić* Appeal Judgement, para. 69; *Akayesu* Trial Judgement, para. 491; *Strugar* Trial Judgement, para. 366; *Halilović* Trial Judgement, para. 63; AFRC Trial Judgement para. 1653.

134. AFRC Trial Judgement para. 1659.

135. *Orić* Trial Judgement, *supra* n. 82, para. 312.

136. *Ntagurera* Trial Judgement para. 628; *Semanza* Trial Judgement paras. 402, 415; *Orić* Trial Judgement, *supra* n. 82, para. 314; see also AFRC Trial Judgement para. 1673; 'The crimes detailed in the factual findings were committed prior to the Accused Brima's assumption of command. The ICTY Appeals Chamber in *Hadžihasanović* held that there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to his or her assumption of command.'; citing *Hadžihasanović* Appeal Decision on Command Responsibility paras. 45-46. Superiors are also responsible when their subordinates commit crimes with any

Despite evidence introduced that Musema appeared to be the leader of groups of 'soldiers, guards, *Interahamwe*, tea factory workers who were wearing "Usine à thé Gisovu" caps, uniforms and tea leaves, and gendarmes who had come from Gisovu, Gishyita and Kibuye in array of vehicles including a green and a blue Daihatsu from the tea factory,'¹³⁷ Musema was held responsible only for the acts of his direct employees. The court ruled that:

'[I]n relation to other members of the population of Kibuye *Préfecture*, including the *villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.¹³⁸

5.2.2 Orić

Naser Orić was a former police officer charged by the ICTY Prosecutor with crimes amounting to murder and mistreatment of prisoners under his care and wanton destruction of civilian property not justified by military necessity by forces under his control.¹³⁹ This article will focus on the wanton destruction of property charges as they directly illustrate the jurisprudential problems associated with imposing command responsibility analysis using the current analytical templates. In the earlier *Halilović* judgment, the ICTY maintained a strong emphasis on the factual proof of effective control, requiring the acquittal of defendant commanders when it cannot be shown beyond a reasonable doubt that they had exercised effective control sufficient to establish the requisite superior/subordinate relationship.¹⁴⁰ The Srebrenica Armed Forces, which Orić eventually commanded, began as isolated pockets of armed groups that were eventually organized into a larger, more comprehensive group of Bosnian Muslim fighters known as the Drina Division.¹⁴¹

The Drina Division was eventually integrated fully into the 2nd Corps of the ABiH (the Army of Bosnia-Herzegovina).¹⁴² The fighters were engaged with Serbian forces from at least 1992, but full integration into the ABiH with clear hierar-

other valid 7.1 mode of liability, not only physical perpetration. *Orić* Trial Judgement, *supra* n. 82, para. 305.

137. *Musema* Trial Judgement, *supra* n. 130, para. 491.

138. *Ibid.*, para. 881.

139. *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT (Third Amended Indictment, 30 June 2005), at <<http://www.icty.org/x/cases/oric/ind/en/ori-3ai050630e.pdf>>.

140. *Halilović*, *supra* n. 100, para. 54 (16 November 2005); 'upholding the applicability of the principle of command responsibility, but finding that the prosecution did not meet its factual burden.'

141. *Orić* Trial Judgement, *supra* n. 82, para. 156.

142. *Ibid.*, para. 171.

chical lines going all the way to Sarejevo did not come about until January 1995.¹⁴³ The Trial Chamber notes that although there was eventual integration into the ABiH, the ‘independence of a number of these [local cell] leaders asserted in the early days of the conflict never weakened before demilitarization.’¹⁴⁴ Throughout this period the organizations were cellular, localized defense forces that were marginally integrated. Communications between these individual groups and to higher levels of the ABiH was infrequent.¹⁴⁵ Assistance was rarely supplied from one cell to another and there seems to have been no higher level involvement in the cell’s activities prior to March 1993.¹⁴⁶ Participation in the localized defense cells was voluntary, and most fighters resided with their families or in temporary accommodations.¹⁴⁷ The cells appeared to fulfill dual roles of localized defense against Serbian incursions as well as many duties traditionally associated with civilian police.¹⁴⁸

Orić, as nominal commander of these units spread throughout the villages surrounding Srebrenica, was charged with superior responsibility for their actions. The Trial Chamber began its legal analysis by giving credence to the most cited purpose for the doctrine: ‘it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty’.¹⁴⁹ The Trial Chamber found Orić guilty of superior responsibility for the maltreatment crimes, based upon the standard elements of superior responsibility.¹⁵⁰ For all the charged crimes, the chamber found that the superior-subordinate relationship was supported by the *de jure* authority.¹⁵¹ The problem for the ICTY Prosecutor was that the Chamber found that the Orić’s *de facto* control did not extend beyond the villages in the immediate vicinity of Srebrenica and therefore Orić was acquitted on the wanton destruction charges.¹⁵²

The Trial Chamber’s rationale for its conclusion that there was a lack of effective control which mitigated Orić’s *de jure* authority is very interesting and may have long-standing implications.¹⁵³ The main point of opacity in the Chamber’s decision is that it is not clear what evidence the Chamber relied on in finding that there was a lack of effective control as the Judgment documented many factors

143. Ibid., paras. 173, 181.

144. Ibid., para. 161.

145. Ibid., paras. 168, 171, 202.

146. Ibid.

147. Ibid., para. 138.

148. Ibid., para. 249.

149. Ibid., para. 301.

150. Ibid., para. 578.

151. Ibid., para. 528.

152. Ibid., paras. 528, 716.

153. Ibid., para. 699; see also Delalić Trial Judgement, paras. 188-195, ‘holding that the basis for the superior-subordinate relationship, whether *de jure* or *de facto* must be also supported by effective control over the particular subordinates who committed the crimes.’

from which Orić's effective control of many of the subordinate units might have been determined. The Chamber found that Orić 'issued orders, including appointments of leaders of local groups, and charged specific persons with a specific task.'¹⁵⁴ The attacks referred to by the Chamber were in fact executed and 'would not have been possible without a certain degree of co-ordination among local Bosnian Muslim fighting groups participating in the attacks.'¹⁵⁵ The Chamber also finds that there was limited communication between the cells; that Orić would travel freely to various parts of the district where he could hear fighting; that Orić maintained a wide sphere of command, and a high degree of respect; that Orić was elected by local leaders of the various defense cells; that Orić was responsible for communications with Serbians, with higher command; and that Orić held himself out as commander of all the forces in the area in local meetings, in public speeches, and in a book he wrote after the conflict.¹⁵⁶

Despite all of these factors the Chamber found that Orić's degree of effective control over the disparate local defence fighting groups was hit or miss and that the primary loyalty of all the fighters was to the cellular, local leader.¹⁵⁷ 'The picture that emerges from the evidence is not one of an organised army with a fully functioning command structure, but one of pockets of desperate men willing to fight, mainly to defend themselves, that grouped together around trusted leaders, who could provide them with a better chance of survival.'¹⁵⁸ Even when Orić was present during attacks, the Chamber was not willing to attribute effective control, they seem to insist on tactical level control over the subordinate units to be actually exercised by Orić before they were willing to find effective control: 'the Trial Chamber is not satisfied beyond reasonable doubt that his mere presence during the attack is indicative of effective control in the attack: there is no evidence that he was coordinating the attack or issuing orders'.¹⁵⁹

Scrutinizing the facts, the court found that while Orić held a technical title as military commander, some soldiers nominally beneath him in the command structure did not regard him as their actual commander-in-fact.¹⁶⁰ Fiercely loyal to their respective local commanders, these soldiers 'had to rely on local leaders, some of whom not only chose to act independently but considered [Orić] inexperienced

154. *Orić Trial Judgement*, *supra* n. 82, para. 700.

155. *Ibid.*

156. *Ibid.*, paras. 701-704.

157. *Ibid.*, para. 706, 'The Trial Chamber finds the Accused credible when he stated during his Interview that although he was elected commander, fighters were primarily loyal to their respective commanders, and he was thus unable to command all of the fighting groups in the field, especially since he was not always present during all the attacks.'

158. *Ibid.*, para. 707.

159. *Ibid.*, para. 712.

160. *Ibid.*, paras. 707, 770.

and scorned his authority.¹⁶¹ These two holdings – that primary loyalty to a local leader can cut against a higher commander’s effective control and that tactical level control should be exercised in order to support a finding of effective control – both present problems when combined with the realities of current and foreseeable conflicts. The tactics ascribed to the local forces around Srebrenica are reminiscent of those used by non-state actors, warlords, and neighborhood thugs in Iraq, Afghanistan, and many other current conflict zones. In order to evade a finding of superior responsibility all a commander needs to do is to organize his subordinate units in cells with primary loyalty to the cellular commanders and thereafter fail to exercise tactical level control beyond an initial planning and coordination of the attack. The failure of portions of the ICTY case against Naser Orić despite his high-level command position illustrates the difficulty of proving effective control over hierarchically distant relationships.¹⁶² Ultimately, the court engaged in a situation-by-situation analysis of the charges, acquitting Orić in those instances where, despite his efforts to assert authority, he did not possess effective control over the actual perpetrators, and thus the requisite superior/subordinate relationship was insufficiently established.¹⁶³

5.2.3 *The Armed Forces Revolutionary Council (AFRC)*

The AFRC Judgement from the Special Court for Sierra Leone is important for three reasons: it is one of the most recent pronouncements by a Tribunal on superior responsibility, it is the first Tribunal not under the authority of the combined ICTY/ICTR Appeals Chamber to rule on superior responsibility, and most importantly it is factually the most predictive of future conflicts that international jurists will confront. Although the AFRC began as a splinter of the Sierra Leonean Army, they adopted a looser organization more akin to the Revolutionary United Front. The AFRC operated as most standard guerilla forces do: with localized, isolated attacks on tactical positions to acquire supplies followed by a coordinated attack on a strategic target which is used to leverage for its peace dividend. The Chamber notes that ‘[t]he doctrine of effective control was traditionally applied to com-

161. *Ibid.*, para. 770.

162. *Ibid.*, paras. 696, 700.

163. *Ibid.*, paras. 706-782, ‘finding in one instance, ‘in spite of efforts to bring them together under an effective sole command, the local groups remained relatively independent and voluntary. The picture that emerges from the evidence is not one of an organised army with a fully functioning command structure, but one of pockets of desperate men willing to fight, mainly to defend themselves, that grouped together around trusted leaders, who could provide them with a better chance of survival.2000 There are indications that effective control was at times absent even within the various groups themselves.2001 Furthermore, most of the destruction was caused by the civilians who followed the fighters and who no one was able to control.

manders in regular armies, which tend to be highly structured and disciplined forces. The AFRC was less trained, resourced, organised and staffed than a regular army. However, it mimicked one.¹⁶⁴ The AFRC maintained a command structure as well as '[r]ules and systems facilitating the exercise of control'.¹⁶⁵ These rules were largely enforced not by *de jure* authority vested in a commander's position by a state, but rather by the force of personality of the individual commander in combination with the loyalty of subordinate commanders (which were often obtained and sustained by monetary means).¹⁶⁶

The Chamber adopted a unique approach to its analysis of superior responsibility. The Chamber seems to implicitly acknowledge the link between responsible command and command responsibility by imputing the analysis of whether the AFRC was a military organization (which seemingly hinged on whether there was a responsible command) into the individual criminal responsibility of the specific commanders. Although there is no explicit analysis of this linkage, as discussed above this is the most logical way to analyze the problem, especially in non-traditional conflicts. There was a battle of the experts between the prosecution military expert and the defence military expert in determining whether the AFRC was a military organization.¹⁶⁷ Each expert adopted its own criteria for the analysis that was based on their military history rather than on any legal criteria.¹⁶⁸ This produced a laundry list of factual elements for the Chamber to analyze.¹⁶⁹ Ultimately, however the court rejected the majority of the elements and settled on three criteria which, if satisfied, would mean that the AFRC was an organized military force – no matter that it was an irregular force – hence its commanders maintained a superior relationship over subordinate units sufficient to impute criminal accountability.¹⁷⁰

164. *Prosecutor v. Alex Tamba Brima, et al.*, Case No. SCSL-04-16-T, 20 June 2007, para. 539 (hereinafter AFRC Trial Judgement), at <<http://www.sc-sl.org/CASES/ArmedForcesRevolutionaryCouncilAFRCComplete/tabid/106/Default.aspx>>.

165. *Ibid.*, para. 539.

166. *Ibid.*, para. 539.

167. *Ibid.*, paras. 541-543.

168. *Ibid.*

169. *Ibid.*, para. 554. The experts also considered whether the characteristics typically present in a traditional army were exhibited by the AFRC. The characteristics which they discussed included the intelligence process; communications system; lessons learnt system; recruitment and training; system for promotions and appointments; logistic supply; repair and maintenance of equipment; medical system; pay or reward system for soldiers; religious welfare system and fundraising and finance system. In the Trial Chamber's view it is of doubtful value to examine some of these characteristics, since they are inapplicable to most irregular militaries. For instance, instead of a pay or reward system for soldiers, AFRC commander Johnny Paul Koroma announced 'Operation Pay Yourself' in February 1998, encouraging soldiers to loot civilian property since the AFRC could not pay them wages. Other characteristics – intelligence process, communications system, lessons learnt system, recruitment and training and medical system – were present in the AFRC only to a limited extent.

170. *Ibid.*, para. 556; Both experts ultimately agreed that the AFRC was an irregular military force, that is, not a traditional army. Neither Colonel Iron [Prosecution Military Expert] nor Major-

‘In the Trial Chamber’s view, three of the structural factors which the experts considered are generic features which are critical to facilitating control and may be equally present in irregular armed groups such as the AFRC. These factors are a functioning chain of command, a sufficiently developed planning and orders process, and a strong disciplinary system.’¹⁷¹

It is this three-prong test – functioning chain of command, orders and planning process, and the presence of a disciplinary system – that is the most workable test for effective control while being the most in line with the legal requirements of treaty law on superior responsibility.¹⁷² The one major caveat that the Chamber places on the finding of superior responsibility is a logical one, they say that ‘[p]roof of superior responsibility requires conclusive evidence of the actual exercise of command and control over an identifiable group of subordinates’.¹⁷³ Of course, the precise proof that the AFRC bench would require is that which proved insufficient for the ICTY in *Orić* due to the nature of the shifting command lines in that conflict. After proffering the test, the Chamber analyzed the facts in light of this specific test for superior-subordinate relationship throughout each phase of the conflict.¹⁷⁴ It is not clear from treaty law whether the relationship should be broken into phases of the conflict or whether a more appropriate analysis would be a more holistic analysis taking into account the general presence or absence of a superior-subordinate relationship.

Some of the difference between the holdings (primarily between *Orić* and the AFRC) may be that the AFRC Trial Chamber is just more willing to find guilt over the accused. While the *Orić* Chamber offers the loyalty of subordinates to localized leaders as almost a complete mitigation against a finding of effective control, the AFRC Chamber finds that the loyalty of subordinate commanders to higher commanders only raises the duty placed upon commanders to ensure that subordinates do not violate the laws and customs of war.¹⁷⁵ More importantly, the AFRC

General Prins [Defence Military Expert] are experts in irregular military conflict. However, an irregular force can also be an organised force, and it can act in a structured and co-ordinated way. The fact that the AFRC was not a traditional army does not per se permit inferences to be drawn regarding the ability of the AFRC commanders to effectively control their men. Insofar as a developed structure exists within an organisation, this is an important indicium of the superior’s ability to exercise effective control and weight must be given to it accordingly. The Trial Chamber therefore considers that the conclusion of the experts’ reports is the starting point for an analysis of the structure of the AFRC.’

171. *Ibid.*, para. 557.

172. Notably, the disciplinary system merely needs to be operational, it does not have to be used to suppress or punish criminal activity, ruling otherwise would be plainly illogical.

173. AFRC Trial Judgement, *supra* n. 164, para. 1659.

174. *Ibid.*, paras. 1723-1744.

175. *Ibid.*, para. 1886; ‘Evidence of a subordinate’s unpredictability or irresponsibility in no way vitiates a superior’s responsibility to exercise authority over that subordinate. Rather, it is exactly this type of situation to which a superior is under an obligation to respond by putting in place measures to

Chamber seems to align itself, whether purposely or by coincidence, almost precisely with the requirements of treaty law while accounting for modern battlefield realities.

5.3 The deceptive expediency of Joint Criminal Enterprise

Faced with the welter of opinions related to effective control, the modern evolution of Joint Criminal Enterprise (JCE) provides a tempting alternative to prosecutors and judges. JCE and Superior Responsibility represent the tectonic plates of individual responsibility, and the friction between them can create zones of impunity even for patently guilty commanders. Prosecutors at the ICTY have tended to avoid framing charges in terms of command/superior responsibility in favor of more far-reaching, but correspondingly more imprecise JCE theories.¹⁷⁶ Although Chambers have often upheld individual responsibility both for personal liability and for that inherent in a command position more precision in the charging decisions would be preferable.¹⁷⁷ The evidentiary basis for proving acts of omission is likely to be much weaker in a JCE case, whereas acts of omission are at the heart of superior responsibility analysis.¹⁷⁸

prevent the commission of crimes by a subordinate or to punish such a subordinate once such crimes have been committed.'

176. M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', 105 *Columbia LR* (2005) pp. 1751, 1774-1784.

177. *Celibići Appeals Chamber Judgement*, para. 743.

178. See *Prosecutor v. Jean Mpambara*, Case No, ICTR-01-65-T, Trial Chamber Judgement, 11 September 2006, paras. 25-27 (case charged as a joint criminal enterprise to commit genocide resulted in acquittal on all charges), at <<http://69.94.11.53/default.htm>>. 25. Liability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime. The culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the accused has a duty to prevent or punish. 26. The circumstances in which such a duty has been recognized in international criminal law are limited indeed. As stated by the Appeals Chamber in *Tadić*: 'The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)'. 27. Article 6 (3) of the Statute creates an exception to this principle in relation to a crime about to be, or which has been, committed by a subordinate. Where the superior knew or had reason to know of the crime, he or she must 'take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'. In *Blaskić*, the Appeals Chamber extended this liability by finding that a superior could also be liable under 6 (1) for the mistreatment by his subordinates of prisoners used as human shields, not because he had given an order to do so, but because, as commandant, he was under a direct 'legal duty ... to care for the persons under the control of [his] subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article [6 (1)] of the Statute in the absence of a positive act'. The Geneva Conventions were relied upon as imposing specific positive obligations on the accused.

Furthermore, the location of the accused within the chain of command of the perpetrating organization should be highly determinative of the appropriate charging decision. If the accused is at the pinnacle of the organization then it may be a more appropriate fulfillment of the Tribunal's narrative function to charge only superior responsibility for those crimes which there is a lack of proof that the defendant ordered, instigated or directly participated in the criminal activity. Perpetrators who are merely tangential to a larger organizational chart, such as specific politicians who are unlikely to exercise authoritative control over other perpetrators, might best be charged using a JCE theory. Finally there are likely times when dual charging is appropriate, for those in the middle such as high level commanders whose subordinates may have perpetrated part of the crime base but as a substantial contribution to a larger criminal element for which the commander was operating as part of a major JCE.

The middle of the spectrum does present problems if prosecutors are not careful to isolate which specifics of the crime base were perpetrated by the subordinates as a matter of superior responsibility and which specifics were perpetrated by co-commanders' subordinates (with a JCE form of participation). 'If ... a superior has functioned as a member of a collegiate body with authority shared among various members, the power or authority actually devolved on an accused may be assessed on a case-by-case basis, taking into account the cumulative effect of the accused's various functions.'¹⁷⁹

Charging decisions have shifted according to the rigidity of hierarchy within the perpetrating organization. The more the fighting organization looks like an organized westernized military, the more superior responsibility should be looked at by prosecutors. When the fighting organization is more akin to a cellular terrorist organization or non-state entity with little top-down organization or control, then JCE can be a much more attractive option for prosecutors. In this setting, an ill-advised decision to charge JCE in lieu of command responsibility may well result in acquittal by a court applying its principles in good faith. For example, the ICTY could not conclude from the available evidence that three key members of the Kosovo Liberation Army (KLA) participated in an ongoing Joint Criminal Enterprise to 'unlawfully remove and mistreat Serbian civilians or mistreat Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian forces or otherwise not supporting the KLA.'¹⁸⁰ The ICTR also acquitted Jean Mpambara following

179. *Orić* Trial Judgement, *supra* n. 82, para. 313; *Brdanin* Trial Judgement, para. 277, referencing *Bagilishema* Appeal Judgement, para. 51, endorsing the findings in *Musema* Trial Judgement, para. 135 and *Stakić* Trial Judgement, para. 494.

180. *Prosecutor v. Ramush Haradinaj, et al.*, Case No. IT-04-84-T, Judgement, para. 478 (3 April 2008).

the charges that he participated in a JCE to commit genocide.¹⁸¹ Analysis of these cases along the lines of command authority might well have produced differing results more in accordance with the expectations of the victims for justice.

JCE remains a popular method of charging high level leaders (presumably¹⁸² because of the lower mens rea requirements and the expansive crime base that can be handled in one case).¹⁸³ Its overuse has the potential for creating a standard of amorphous strict liability, but its effects in the context of a command relationship are more insidious. In fact, *any* position of superior authority in which subordinates are expected to obey the guidance of the higher authority and in which a collective unit functions as an extension of the will of the commander will, almost by definition constitute a form of JCE. This is an important but subtle point, that is often overlooked in the technical legal discussions over the scope and membership of a particular JCE.

The overlap of a JCE onto a military or paramilitary organizational structure tends to erode the perception of the participants in an armed conflict that the act of taking command in and of itself conveys an abiding obligation to ensure compliance with the laws and customs of war. Moreover, the expressive value of the proceedings and the substantive legal basis of convictions will be undermined by undue reliance on JCE as the form of convenience rather than one of appropriateness. Both theories remain viable and can be charged either separately or together. Nevertheless, the doctrine of command/superior responsibility should remain the preferred theory when it applies. Abandonment of the core concepts of command responsibility risk the creation of an inaccurate historical narrative that a campaign of criminality was the byproduct of a small group of like-minded criminals (the JCE) rather than the failure of commanders and those effectively acting as commanders at all levels to enforce the laws and customs of war. Prosecutors must remain faithful to their duty to marshal available evidence of what actually happened rather than shaping that evidence to selectively apply it to the theory of convenience (JCE). More to the point, an overreliance on JCE as a methodology for holding commanders and other superiors responsible runs the risk of eroding the effects that the law should have in reinforcing the affirmative duty of commanders and superiors to exercise leadership aimed at protecting the fundamental values of the *jus in bello*.

181. *Mpambara*, *supra* n. 178.

182. *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgement, 17 September 2003, para. 171.

183. A.M. Danner and J.S., 'Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California LR* (2005) p. 107, continuing that of the 42 indictments filed at the ICTY between 25 June 2001 and 1 January 2004 64% relied exclusively on a JCE mode of liability.

6. THE ORGANIZATIONAL THEORY OF ATROCITY

Commanders who field fighting organizations will always do so in a manner that permits them to control the violence. When they do not, their subordinates are liable to turn on them. But even where personal loyalty is high, the commander will need to justify a place of importance in the organization. This only happens in contexts where he retains the ability to control the organization. Therein lies the conceptual basis for imposing criminality on a leader who fails to use that position and authority to implement and enforce the laws and customs of war. A close look at how commanders field organizations, how they train their organizations and how they plan and conduct operations on the battlefield shows that it complex operations, and almost every atrocity, can rarely be executed without the commander. Commanders are the critical path to being able to form the fighting organization, and their organizations will be most effective – militarily – where they field their organization with the proper control mechanisms. Mao Tse-Tung put it simply, '[u]norganized guerrilla warfare cannot contribute to victory'.¹⁸⁴

An understanding of exactly how modern commanders are able to control their subordinates on the battlefield is integral for international criminal jurists to understand. Jurists who fail to appreciate the processes and protocols for controlling subordinates may misapply otherwise valid legal principles and create an anarchic hodgepodge of precedents that is increasingly ill suited to implementation in the smoke and dust and fatigue of actual conflict. As a noted political scientist has observed:

'[I]f insurgent organizations are to be held accountable for violations of international humanitarian law, instruments must be developed and refined to reflect the diverse structures of these groups. The ability of the international community to influence the behavior of a group is undoubtedly shaped by a host of factors, including the motivations of its combatants, internal incentives within the organization, the structure of command and control, the financing of the group, the degree of outside influence, and the likelihood of victory ... A focus on the internal structures of rebel groups raises important questions about the efficacy of trials and tribunals as a strategy for constraining anticivilian violence.'¹⁸⁵

184. Mao Tse-Tung, *On Guerrilla Warfare*, 45 translated by S.B. Griffith (Champaign IL, University of Illinois Press 2000) p. 45.

185. J.M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge, CUP 2007) p. 344, see also at p. 350, further emphasizing the need for a clear deterrent theory as follows: Mechanisms of deterrence depend on the fact that individuals care about the future. Opportunistic groups filled to the brim with consumers tend not to exhibit that characteristic. It is often difficult to make sense of the command and control structure in these groups, moreover, in order to assign individual responsibility. Although many opportunistic groups exhibit a high degree of centralization in military command, much of the violence for which they are responsible is committed in a decentralized fashion

Jurists must be able to realistically assess the modalities by which non-state actors control an organization in order to create a fighting force. This understanding must derive from a clear-eyed military reality which is in turn implemented in the processes of the law. Effective control derives from the commander's ability to control a fighting organization. Looking at conflict through this lens provides the pragmatic justification for the assumption of risk theory presented in Section 7.

The doctrine of effective control should serve as the unifying theme for a comprehensive theory of superior responsibility that also conforms to the modern modalities of conflict. Reform of the doctrine (and in some sense a revalidation of the precepts of command) begins with a return to its very foundations. As the ICTY Appeals Chamber noted in *Krnjelac*, it 'cannot be overstated that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty to exercise control'. The commander must be able to field an organization; he must be able to control the organization's activities beyond the initial push; and he must be able to maintain his personal viability and relevance to the situation. Each of these concerns will be examined in this section.

6.1 How to form a fighting organization

There are three essential paths, all of which must be satisfied, in order for an individual to form a fighting organization. These three hold true whether the fighting organization is a non-state, cellular terrorist organization or a modern armed force from an industrialized nation. Institutionalizing a fighting organization requires: fighters, materiale and an organization. Without all three of these the result would be a political organization, a social organization or a *levee en masse*. It is self-evident that fighters are required, and it follows that the very identity of the leader may be a significant element of the ability to exercise effective control after the onset of hostilities. Thus, while many cases will involve evidence related to the personal charisma or authority of the leader who recruits them, some exploration is necessary for the other two criteria.

Weapons are an essential component of a fighting organization. Often weapons – which are a component of material – are the critical path to enabling an organization's violence. The flow of weapons may be the critical link in establishing effective control in a conflict zone subject to an arms embargo by other nations. The Liberian conflict, *inter alia*, demonstrates that the flow of weapons can be the critical path to enabling an organization to function. The National Patriotic Front of Liberia's (NPFL, which was Charles Taylor's organization) offensive took place

as a result of a culture of indiscipline – one that goes unpunished by local, rather than national, commanders.

only after Charles Taylor's forces were able to put weapons in the hands of fighters in Liberia. One NPFL fighter told the story in this manner: '[a]s the NPFL came in we didn't even have to act. People came to us and said, "give me a gun. How can I kill the man who killed my mother?"'¹⁸⁶ The provision of arms also made the critical difference in Sierra Leone as the Revolutionary United Front (RUF) gained an ability to fight collectively. IRIN noted recently that the RUF essentially disintegrated when the arms were taken out of fighters' hands by the Disarmament, Demobilization and Rehabilitation (DDR) program and when the borders to Sierra Leone were effectively shut off from resupply of weapons.¹⁸⁷ It is no overstatement to recognize that the flow of weapons may very well be the essential evidence needed to establish the very existence of a command relationship such as that required by the first prong of the AFRC framework.

In modern professionalized military establishments, logisticians are integral components to the commander's planning process. This is because the military operations drive the logistics. In staff planning rooms the commander and the operations cell generally plan an operation first and then tell the logistics cell what is happening so that they can supply it. Only if the logistician is unable to supply it will the operations have to be modified. Planned military operations are often stalled because of a logistical incapacity,¹⁸⁸ but for the majority of modern militaries the numerous methods with which to supply the fighters with logistics reduces the reliance upon any one path. Where fighters can be resupplied via airdrop, helicopters or roads, the military commanders can plan their operations and to think about their battlespace virtually untethered from their logistical train.

However, for the commanders of non-state, decentralized forces, logistics is the critical path to battlefield success.¹⁸⁹ 'A good supply system is of basic importance

186. B. Berkeley, 'Liberia: Between Repression and Slaughter', *Atlantic Monthly* (Dec. 1992) p. 54.

187. IRIN News Organization, UN-OCHA, 6 September 2007, at <<http://www.globalsecurity.org/military/library/news/2007/09/mil-070906-irin02.htm>>. 'The other good news for Sierra Leone is that not only did the former rebel Revolutionary Armed Front (RUF) disarm but observers agree that without weapons the organization's command structure largely dissolved. After the death of its leader, Foday Sankoh, in 2003 the armed group even failed to turn itself into a political party.'

188. In the 2003 Iraqi conflict the advance of the U.S. First Marine Division towards Baghdad was put on hold temporarily until a corridor could be opened that would ensure the supply of the combat troops with the ammunition they required. J. Coughlin and C. Kuhlman, *Shooter: The Autobiography of the Top-Ranked Marine Sniper* (New York, St. Martin's Press 2005) pp. 147-149.

189. The amount and ease of attaining logistics and materiale also may impact the type of organization that is formed. See Weinstein, *supra* n. 185, p. 7. 'Factors that raise or lower the barriers to organization by insurgent leaders – in particular whether material resources to finance warfare can be easily mobilized without civilian consent – shape the types of individuals who elect to participate, the sorts of organizations that emerge to fight civil wars, and the strategies of violence that develop in practice.'

to the guerrilla band.¹⁹⁰ Commanders of decentralized fighting organizations must take logistics matters into account at the earliest stages of planning because delivery of those logistics often requires more of a military commitment, more time and is more critical than for other militaries. Although individual cells in the fighting organization can plan and train on their own, they will not be able to fight without weapons and ammunition. This creates a convenient set of circumstances for commanders of these organizations. They are able to retain control of the violence simply by throttling when and where weapons enter the hands of their fighters. In these organizations the commander becomes the logistics officer, at times keeping the arms and ammunition in his abode.¹⁹¹

Controlling the violence of the subordinates is simple, when you want to attack you point your cell towards where it is to attack and then put a weapon and enough bullets for the attack in their hands. The fighters attack like they have been trained to do and expend all their bullets. At the end of the attack the fighters are left with little to do since they have few bullets, and suddenly they become metaphorically chained again until the commander decides his next point of attack. Although this is a simplified example, it shows that in certain circumstances the provision of materiale may show, *ipso facto*, control over subordinates, especially if there is a lack of the other methods of control listed throughout this article. It is via this method that many external patrons are able to exert a varying amount of influence over their subjects. Ethiopia mandated that the Sudan People's Liberation Army adopt a unified command structure with John Garang in command in return for their support.¹⁹² The Rhodesians similarly mandated much of Renamo's strategy and organization and did not give the Mozambique rebel movement much flexibility in the implementation of its taskings.¹⁹³

The provision of arms and ammunition is not in itself enough to warrant a *prima facie* finding of effective control. There must also be some level of hierarchy, a disciplinary system and an orders process which define the organizational component of the group.¹⁹⁴ If the provision of arms and ammunition to a group is the

190. Che Guevarra, On Guerrilla Warfare, at <<http://social.chass.ncsu.edu/slatta/hi216/documents/che.htm>>.

191. See <<http://charlestaylortrial.org/2008/01/15/koker-testifies-about-operation-no-living-thing-and-arms-deliveries-from-liberia-to-sierra-leone-defense-counsel-begins-koker-cross-examination/>>.

192. D.H. Johnson, 'The Sudan People's Liberation Army and the Problem of Factionalism', in C. Clapham, ed., *African Guerrillas* (Bloomington IN, Indiana University Press 1998) p. 58.

193. See Weinstein, *supra* n. 185, p. 76.

194. *Ibid.*, p. 10. 'The membership profile of a rebellion then affects its internal organization and the strategies it pursues in war. Rebel leaders confront a series of difficult choices as they design their organizations and engage civilians. ... Activist movements can maintain internal discipline by drawing on established norms and networks enabling them to decentralize power within their armies; opportunistic rebellions must permit indiscipline in order to maintain their membership, while holding on to the reins of military strategy. ... Structures of internal control and external governance shape the

difference between a fighting organization and a political party, then a modicum of organizational capacity is the difference between a fighting organization and a mob. The Palestine cellular units of the late 1960s and early 1970s demonstrate this because they were unable to affect and coordinate their violence because of the lack of adaptability.¹⁹⁵ These three components all work together to enable the commander to impose his will on his subordinates. Without a hierarchy then there is no efficient way that he will be able to communicate his will to subordinates; without a disciplinary system he cannot ensure that violations of his orders are sanctioned; without an orders process he cannot effectively disseminate his orders to individual fighters.

The level of hierarchy required for a commander to impose his will on his organization will vary depending on the circumstances.¹⁹⁶ In cellular organizations the central cell may communicate infrequently with a large number of subordinates. For example, the Holy Spirit Movement in Northern Uganda had only three line companies of fighters, but each of these companies maintained between three and thirty platoons.¹⁹⁷ They may communicate only when there are changes to a plan or when the plan is to be executed. This limitation of communication and individual control enables the commander to maintain a greater number of subordinates. Where there is a greater level of tactical control over subordinates a commander will not have time to be able to communicate with each subordinate and will usually reduce the number of individuals he communicates with and the organization will become more pyramidal. 'In coordinating the activities of multiple agents, clear lines of hierarchical control help leaders to operate effectively in environments of uncertainty and limited information. Top-down leadership allows a group to control multiple arms working in unison toward common objectives.'¹⁹⁸

capacity of rebel groups to discipline the behavior of their members and influence the expectations of civilians about the types of behavior they will see when the rebels come to town.'

195. W. Laqueur, *Guerrilla Warfare: A Historical and Critical Study* (New Brunswick NJ, Transaction Publishers 1998) pp. 304-305.

196. See e.g., S. Shay, *The Red Sea Terror Triangle: Sudan, Somalia, Yemen and Islamic Terror* (New Brunswick NJ, Transaction Publishers 2005) p. 178; 'The war in Afghanistan saliently reflects the conflict between the state-oriented concept and "war machine" and the nomadic concept and "war machine"'. The Soviet union and the Communist regime in Kabul expressed the vertical, graded state-oriented concept, on philosophical, conceptual, and practical levels, while the Afghan mujahidin, assisted by the "internationale" of volunteers from all over the Muslim world, like Bin Laden, expressed the concept of the nomadic "war machine". This machine was built horizontally and was composed of scores of organizations and groups lacking a regulated or permanent structure and without define procedures of cooperation, whose only loose link was the joint goal – defeat of the communist regime and banishment of the Soviet Union's forces from Afghanistan.'

197. H. Behrend, 'War in Northern Uganda: The Holy Spirit Movements of Alice Lakwena, Severino Lukoya and Joseph Kony (1986-1997)', in Clapham, *supra* n. 192, pp. 107-118.

198. Weinstein, *supra* n. 185, p. 134.

No matter the design of the system, there must be some level of hierarchy. Those in the hierarchy will provide the authoritarian enabling mechanisms that the fighters will require to enable their violence.

A disciplinary system is also a vital requirement for a commander to ensure that his will is carried out by the organization. Mao contextualized the dilemma simply, 'Victory in guerrilla war is conditioned upon keeping the membership pure and clean.'¹⁹⁹ The commander must be able to sanction violations of his will.²⁰⁰ The commander must first be able to know when his orders are not followed. However, once violations of superior orders are made known to the superior he will necessarily take action to ensure that future violations of his orders are not undertaken. Controlling out of bounds behavior is the only way the commander will be able to ensure that his organization stays in the bounds he establishes for them. 'Discipline' in many non-state organizations may entail a withholding of benefits from a battle such as an enforced handover of loot or the provision of sex slaves to more compliant subordinates. In other circumstances this may be a withholding of the ability to wage battle until the commander is ready for it, like above. In still others, the disciplinary system may take the form of criminal sanctions.²⁰¹ It is of no import which tactic the commander takes to ensure that his organization is controlled; it is of no import what the behavior is that is out of bounds, because those bounds are established by the commander; the only thing of import is whether there is the ability to sanction out-of-bounds behavior. That is the essence of effective control. For if the commander cannot sanction violations of his will then his ability to impose his will on his subordinates only exists to the extent that his fighters are loyal to him in the face of many competing obligations.

Finally, the *sine qua non* of any organization is some orders process by which the commander's will gets carried out. Over time, the laws of warfare have become the lodestone of professionalism and the guiding point for professional military forces the world over. The will of the commander, operating under the overarching parameters of the law of armed conflict, provides the standards that separate trained professionals from a lawless rabble. Orders from the top are the indispensable element of establishing the corporate consciousness that will be examined in detail below. The commander must have the ability to direct his subordinates or the or-

199. Laqueur, *supra* n. 195, p. 87.

200. Che Guevarra, *supra* n. 190. 'One of the most important features of military organization is disciplinary punishment. Discipline must be one of the bases of action of the guerrilla forces (this must be repeated again and again). As we have already said, it should spring from a carefully reasoned internal conviction; this produces an individual with inner discipline. When this discipline is violated, it is necessary always to punish the offender, whatever his rank, and to punish him drastically in a way that hurts.'

201. Weinstein, *supra* n. 185, p. 127. 'Troops in the National Resistance Army risked serious punishment for any acts that contravened the formal code of conduct adopted by its High Command'

ganization is simply a group of people operating like a gaggle of fish where no decisions are made and reactions are based upon inputs from the lateral line. Without the ability to disseminate the orders of the commander, effective control is a meaningless concept. These situations, though, are not very prevalent. In leaderless, rudderless situations, the violence cannot be sustained because there is a dearth of the enabling factors which are the difference between violence and cowardice.²⁰²

From the military leader's perspective these are the three critical paths to a commander's ability to formulate a fighting organization. Without fighters, materiale and an organizational capacity the commander will be in charge of nothing besides his immediate surroundings. Only a limited amount of violence can be sustained in this environment. Yet, even a few individuals may be able to unleash violence that affects entire regions if there is a modicum of organization, material and fighters.

6.2 Training and corporate culture

Training is not a function of a commander's ability to field a fighting organization, but it is a function of how well that organization will function. Training can be broken down into three components: mechanical training, tactical training and cultural training. A commander's ability to utilize various units will mostly depend on the training levels in each of these areas of his subordinates. Those units who are untrained will be unable to perform certain missions and those units that are highly trained will be very flexible and will be able to perform many differing missions for the commander.

Mechanical training includes a rudimentary proficiency in the weapons that the individual fighter is responsible for deploying on the battlefield whether these be pistols, rifles or sophisticated aircraft. It may also include development of some technical skills such as driving, use of satellite location devices, intelligence gathering methods, or communications systems. Mechanical training impacts on the individual's ability to perform the task assigned, and the efficiency of the unit derives from the aggregate level of skill of its members. Once the individual fighter has achieved mechanical proficiency the fighter can be deployed to combat. However, the fighter is not likely to be truly effective without other, higher levels of training that only happen after mechanical training is completed. The second phase of training a military unit focuses on tactical training. For individual riflemen this will include movement training, firing commands and other battlefield survival techniques and procedures of the given organization. If the fighter's job is to com-

202. See Weinstein, *supra* n. 185, p. 134. 'While one could imagine that an organization without hierarchy might be difficult for a government to defeat, a fully decentralized structure would also make it more difficult for rebels to take on the tasks of governance fundamental to guerrilla warfare and the effective rule of the state should they succeed in battle.'

municate or to operate a crew-served weapon like a heavy machine gun then the training will vary a bit but will generally include those techniques and procedures that individual fighters receive. This training allows the unit to fight as a collective entity and enables the commander of the unit to be able to control the violence of his subordinates. It is this training which embeds the habits and operant conditioning of combat that will enable the fighters to kill when their forebrains shut off and their midbrains assume cognizance.²⁰³ Tactical training conditions fighters to an understanding of the battlefield so that when combat does come the landscape is a familiar rather than foreign place.²⁰⁴

The final and perhaps most essential component of effective control is the inculcation of a corporate culture on the subordinates. Cultural training helps units achieve the highest edge of effectiveness and cohesion, but can also be a nebulous thing to prove beyond a reasonable doubt in a courtroom. The commander/superior imprints an intent and vision onto the organization, as well as a corporate consciousness of compliance. In this manner, the organization is molded on the model provided and enforced by the leader, as well as the governing ideology that provides cohesion in its own right. Cultural training is what happens when fighters are not on the training field but are in their living spaces. Rarely is this formalized, but rather it is a meeting of the minds of individuals. NRA commanders used this aspect of training to 'shape the expectations and behaviors of the new recruits. One recalled that "the focus of political education was also on the building of interpersonal relationships". He remembered that the commanders were trying to build a "cohesive" group."²⁰⁵ The Eritrean People's Liberation Front was also renowned both for its long, indoctrination-focused training and its discipline.²⁰⁶ When individuals form part of a group collective they necessarily sacrifice a bit of their individuality in return for identification with the group. These bonds, after they form, are extremely difficult to break with the social or economic shocks that all fighting organizations must endure over their existence.²⁰⁷

203. See Grossman, *supra* n. 114, pp. xviii; 35; see also German General Hans von Seeckt reprinted in MAF p. 164; 'A true military discipline stems not from knowledge but from habit.'

204. See S.L.A. Marshall, *Men Against Fire: The Problem of Battle Command in Future War* (Gloucester MA, Peter Smith Publishing 1978) pp. 36, 59, 'noting that training "enables the willing soldier, the man who will fight when he gets the chance, to recognize the breadth of each opportunity and to know when and where to use his fire to full advantage and with regard for his own need of protection. It may also stimulate and inform the man who is already fixed with a high sense of duty so that in him the initiative becomes simply a form of obedience.'

205. Weinstein, *supra* n. 185, p. 141.

206. See D. Pool, 'The Eritrean People's Liberation Front', in Clapham, *supra* n. 192, pp. 19-25.

207. See P. Woodward, *The Horn of Africa: State Politics and International Relations* (London, Tauris 1996) p. 107; 'The end of conflict in Eritrea had left a political legacy very different from that in Ethiopia. Instead of a coalition of forces led by one small remote region, Eritrea had a unified command which had asserted ever more control over the territory during the course of the war. At the

Although this culture is derived from the tribal, religious, and societal baseline of the fighters, it is generally an extension of the commander's personality. The commander determines what behavior will and will not be tolerated by subordinates, and sets the standards for operationalizing the orders of superiors. The commander also determines when and for what actions to reward subordinates, thereby imposing both a personal will and a personality onto the unit. When a commander in a speech dehumanizes the enemy, it is an implicit leadership effort interpreted by subordinates as guidance to adapt a greater moral distance and use it to subconsciously enable their killing.²⁰⁸ When a commander is a bigot or racist and tolerates borderline behavior when it is executed against a group he personally dislikes, then that behavior is implicitly tolerated and more violence will be focused against the group.²⁰⁹

The group identity mechanisms do more than simply serve as the points of coalescence for the unit, they also serve as to bolster all of the killing enabling mechanisms. A group which has a singular culture will generally be easier to control in combat. Peru's Shining Path was able to wage a successful insurgency for many years, although it eventually was defeated by the Peruvian state, because it was an ideologically homogenous organization.²¹⁰ Similarly, the EPLF were able to defeat the Ethiopian state and overcome its inherent tribal tensions because of its cultural training.²¹¹ Compliance to battlefield orders, especially dangerous orders, will be higher among those units who have trust running throughout the organization.²¹²

centre of that achievement had been the army itself which had evolved from a guerrilla force into a highly organized regular army numbering some 100,000 by the end of the war. It had been an outstanding military achievement not only in African but also in international terms. As well as excelling as an army in the field, it had developed a high degree of self-sufficiency, especially in the repair of captured weaponry, and proved able at such disparate activities as road-building and medical services. In addition to being brave and skilled, EPLF [the Eritrean People's Liberation Front] cadres were committed and disciplined. Even after victory in 1991, the forces were required to remain intact and without pay until 1995. Although there were incidents resulting from this situation, most notably in 1993, they were defused without serious consequences. In the long term it is planned to reduce the army to 30,000, though this also raised the problem of demobilization and subsequent employment opportunities.'

208. See e.g., *Nahimana, Barayagwiza and Ngeze*, Case No. 99-52-A, Appeals Chamber Judgment, 28 November 2007, paras. 794-794, 803, 822, 'discussing the use of the RTLM radio station as a means of establishing effective control and transmitting expectations.'

209. For an example of this see the Regimental Commander's comments following the US Marines killing civilians in Haditha, Iraq. 'Simple Failures' and 'Disastrous Results' Excerpts from Army Maj. Gen. Eldon A. Bargewell's report: Washington Post, Apr 21, 2007, A13, at <<http://www.washingtonpost.com/wp-dyn/content/article/2007/04/20/AR2007042002309.html>>.

210. Weinstein, *supra* n. 185, p. 88.

211. Pool, *supra* n. 206, p. 32.

212. Keegan, *supra* n. 115, p. 50; 'For if one once admits that the behavior of a group of soldiers on any part of the battlefield ought to be understood in terms of their corporate mood, or of the conditions there prevailing at the time, indeed in terms of anything but their willingness to do as duty, discipline and orders demand, then the whole idea of the outcome of a battle being determined by one commander's defter manipulation of his masses against his opponent crumbles.'

This trust is achieved most easily where there is a strong group identity centered on the culture of the group as a collective.

The development of a command climate, or corporate culture, is the essence of effective control. The command climate is an important concept in any organizational context, but is absolutely vital in the context of fighting organizations vested with massive violent capability which is often combined with a near-complete absence of oversight. The commander creates a culture in which subordinates know what will and will not be tolerated, both in and out of combat. The commander's expectations and guidance provide the default behavioral constraints when an authority figure is not in the immediate vicinity of a subordinate. The command climate habituates subordinates to loot or not, to commit personal violence against civilians or not, to report crimes they either see or hear about or not, and a myriad of other tasks. On a chaotic battlefield, silence is as telling as sound. This is not only a function of subordinate initiative, but is also a function of how militaries around the world are trained: by repetition of conduct where only the wrong is disciplined the members learn to do what is asked of them by a lack of disciplining rather than kind words of encouragement.

The commander ingrains the thought that subordinates can do what they like up to the point where they are disciplined. After a unit has achieved a certain amount of mechanical proficiency, tactical proficiency and has attained a group identity through cultural training it is able to fight collectively on the battlefield. Yet this training does not end once an organization enters the battlefield. The cultural and tactical training, especially, continue throughout a fighter's affiliation with the organization. As the organization becomes more familiar with the tactics and culture of its enemy it may modify its own tactics and culture in some way. Even after combat, the organization may continue to modify its tactics and culture to prepare for the next engagement.

6.3 Mission orders and the end state

Commanders, even those who have only a few men subordinate to them, make choices on the battlefield. It is simply impossible to control every aspect of what every subordinate does at all times during combat. The art of commanding fighters in battle requires knowing what to focus the commander's mind on, what criteria are required in order to make a tactical change, and how to make a tactical change. If certain units are performing to the expected standards, the leader puts them out of his mind for the time being to understand what the enemy is doing. Only if a unit is not doing what the commander needs them to do is there a need to modify its behavior, or its incentive structures. This is one reason why professionalized militaries constantly train by negative reinforcement of bad behavior, while non-state armed groups also sanction undesirable behavior using less formal, legalistic means. On

the other hand, the general absence of reward for good behavior embeds in the fighters an internal initiative to keep doing what they have been doing until they are told otherwise. This only works either where the commander does not need to (or want to) retain a high level of individual control over subordinates or where there is a high level of trust between a commander and subordinates.

Over time, military history has shown that the best fighting organizations are those whose subordinates are able to improvise on the battlefield, but yet do so with an eye toward achieving the overarching goals of the campaign. This type of order is known as an end state. A commander that wants to embrace the adage that no plan survives first contact will simply designate to subordinates the job that is to be done at the end of the day. A mission order is generally short, laying out what the commander wants the end state to be and often providing the reason for that end state. Too much specificity by a commander reduces a subordinate's efficiency on the battlefield because when things change on the battlefield it will take time to report those changes to the superior and will require time to wait for the superior to make a decision and report back to all the subordinates what he wants to happen. Renamo was such an organization, where 'ultimate authority for all decisions rested with Renamo's military commander, Aphonso Dhlakama, and his senior officers in Gorongosa and Maringue. Commanders and combatants in Renamo did not trust one another; the organizational structure of the movement reflected this lack of cohesion.'²¹³

When a commander has a high level of trust in his subordinates that confidence may be manifested by brief orders with little or no explanatory rationale followed by a permissive operational environment which allows the subordinates to utilize their superior information to make achieve the commander's end state in the optimal time and manner. During the American Civil War General Ullyses S. Grant told General Sherman 'I do not propose to lay down for you a plan of campaign: but simply to lay down the work it is desirable to have done and leave you free to execute it in your own way.'²¹⁴ When the AFRC was marching towards Freetown, Sierra Leone the central cell only designated villages that were to be targeted and then let subordinate commanders keep their forces 'on the right path'.²¹⁵ The Sendero Luminoso Central Committee 'provided the overall direction of each military campaign (telling militants, for example, to target government officials, to build new

213. Weinstein, *supra* n. 185, p. 145.

214. Reprinted in Marshall, *supra* n. 204, p. 189.

215. See AFRC Trial Judgement, *supra* n. 133, para. 596, and para. 1791: 'Witness TF1-334 described at length the movement of the troops towards State House on 6 January 1999. His evidence reveals a steady, organised advance pursuant to the orders of the Accused Brima who had specified the locations to be captured. The witness was part of the advance troop and he refers to a number of occasions where they captured new ground and then waited for the brigade senior command, including the Accused Brima, to arrive and tell them what to do next.'

guerrilla bases, or to increase urban actions), it was the responsibility of regional committees to decide what actions would be taken'.²¹⁶

In a culture where mission orders are the norm, tactical orders given during combat may be rare. This is especially the case in organizations that do not have the communications assets to be able to make tactical changes on the battlefield. This does not mean that commanders have ceded control of their organization. Control comes in the initial orders where the commander establishes the endstate and articulates the reasons for that endstate. Authentic effective control, more importantly, may arise from the cultural training of the organization. To a certain extent full control of subordinates is never available to a commander. A commander must always rely that the training and guidance prior to combat will fill the gaps when he is not in a position to make positive directions to his subordinates. The current jurisprudential understanding of effective control does not fully account for the role of the commander in forming an organization, shaping its command climate, and controlling it even in the absence of personal presence, clear communications, or even frequent contact with disparate bands of fighters operating across geographically remote areas. The next section of this article will outline precisely how this enforcement gap can be closed while taking into account the normative and pragmatic reasons that superior responsibility exists at all.

7. A COMPOSITE THEORY OF COMMAND RESPONSIBILITY

The concept of effective control should be reconceptualized by jurists to extend its present applications by including an imputed responsibility to any commander who organizes a collective entity with the intent of conducting hostilities and thereafter fails to create a climate of compliance with the laws and customs of war. This approach will permit the extension of liability to commanders who organize cellular units that operate on the basis of primary loyalty to a local leader and with little/no tactical control by the hierarchy, such as the tactics in seen in Iraq, Afghanistan, and a number of modern non-international armed conflicts.²¹⁷

216. Weinstein, *supra* n. 185, p. 85 and p. 154; 'The Central Committee reserved the power to provide the movement with a "guiding line" in terms of ideological direction and strategic actions, while regional and local committees received significant latitude to choose their targets, organize activities, recruit new members, and reward and sanction their own militants. The Central Committee oversaw these activities by requiring regular reports and providing detailed advice and criticism about the directions taken in each region. By decentralizing operations, it demonstrated its faith in the abilities and commitments of Sendero members. ... Its decentralized structure enabled the Shining Path to better respond to local conditions and to execute its military operations successfully. It was difficult for the Peruvian intelligence services to penetrate and disrupt the movement because of its multiple centers of power.'

217. See *supra* nn. 147-150 and accompanying text.

According to the ICRC, 'The first duty of a military commander, whatever his rank, is to exercise command.'²¹⁸ The commander/superior is the decisive actor because inattention to the basic legal duties inherent in a hierarchy of authority undermines the 'very essence of the problem of enforcement of treaty rules in the field'.²¹⁹ It therefore follows that the commander be held responsible in all circumstances for failure to take the 'necessary measures' to comply with the laws and customs of war 'at the level of the troops'.²²⁰ Accountability of commanders, whether they be in organized armed forces, non-state entities, or transnational organizations is essential 'so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided.'²²¹ Some courts have noted that although these doctrines are interrelated, they are distinct from one another in that:

'there is a difference between the concepts of responsible command and command responsibility. The difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties.'²²²

The Composite Theory of Command Responsibility advocated in this article postulates that it is entirely appropriate, and indeed essential, to conflate these previously distinct concepts. Though there will continue to be some instances where the traditional principles of effective control will warrant liability when applied as a template, the legal, practical and normative underpinnings of superior responsibility discussed above illustrate the growing gap between legal aspirations and the actuality in juridical practice. In practice, the precepts of command/superior responsibility will atrophy as a discrete doctrine which in turn may defeat any possibility of achieving hope for deterrent effects derived from the commander's will and authority. Jurist should be careful as a normative priority to preserve, and indeed revitalize, the essence of command/superior liability.

A Composite Theory of Command Responsibility would have the collateral benefit of reinforcing a commonality of expectations by refocusing attention on the fundamental norms of command around the world. An expanded imputation of responsibility on those who initiate and control violence would lead to a unified theory of command responsibility applicable to any military or paramilitary organization around the world and to any person assuming command or effectively

218. Commentary to Protocol I, *supra* n. 68, Art. 87, para. 3549, at <<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/36fc92eb9e83fbbec12563cd00437bfb!OpenDocument>>.

219. *Ibid.*, para. 3550.

220. *Ibid.*

221. *Ibid.*

222. *Hadžihasanović*, *supra* n. 15, para. 51.

operating as an authoritative commander. Such a Composite Theory would also require reexamination of the majority holdings in *Hadžihasanović* and *Orić* appeals.²²³ On the other hand, military operations are highly sensitive to cultural relativity, and a simplistic assessment of responsibility based on a template of temporal or geographic factors falls short of capturing the essence of the real criminality.

By reconceptualizing the doctrine of effective control, jurists can close the enforcement gap to ensure greater compliance with the laws and customs of war by placing criminal responsibility where it properly lies. International humanitarian law has previously sought to maximize compliance by placing the responsibility for the enforcement of those laws with the only actors who will be able to practically prevent their violation and enforce those laws when needed: the commanders. The state actors who were negotiating and furthering international humanitarian law realized that compliance was only attainable by vesting commanders with this responsibility and then letting them determine what disciplinary requirements would ensure compliance. Yet, as non-state actors become increasingly common and grow in political and military power, there seems to be a reluctance to extend the primary enforcement responsibility to non-state actors, especially those actors who have organized in a way unfamiliar to western jurists. In practice, superior responsibility will atrophy as a discrete doctrine taking with it the best aspirations any deterrent effect unless jurists revitalize its essence.

The methods an individual commander uses to enable his subordinates to kill and uses to control the violence of his subordinates will vary depending on many factors such as the personality of the commander, the objectives of the commander, the culture of the society that the fighters are pulled from, the available materials for the commander and many other factors. These requirements are absolute since they go to the commander's ability to field and control units conducting operations. However, the techniques for exercising control in fact vary widely across cultures and continents, and are subject to some cultural relativity. In some conflicts the disciplinary system comes by taking away the spoils of a conflict, whereas in other conflicts the disciplinary system is analogous to criminal courts throughout the world. In some conflicts, the hierarchy is very flat and the orders process is focused on the desired endstate, while in other conflicts the hierarchy is pyramidal and the orders process is focused on a higher level of tactical control. Some circumstances augment the authority of a commander with tribal, religious, or familial disciplinary structures that can be molded to suit the needs of ongoing operations. In none of these situations is there a dearth of control, it is only implemented in different ways. Aligning effective control to these important truths should be a simple matter if jurists and prosecutors are willing to relinquish the preconceived niceties of past, westernized, professionalized assumptions.

223. *Supra* nn. 63-82 and accompanying text.

The Composite Theory of Command Responsibility proposed herein has the key benefit of freeing jurists from the geographic and temporal shackles that currently encumber legal analysis. An understanding of the mechanisms for how orders are disseminated and what level of control is sustained by commanders is essential, irrespective of whether they maintain tight tactical control, because the trend is certainly towards less tactical level control by commanders and more towards establishing a culture in his own image and then giving orders that will leverage rather than stifle subordinate initiative. Indeed, the shift towards a broader conception of effective control is a logical extension of existing doctrine because the ‘test for effective control is not the possession of *de jure* authority, but rather the material ability to prevent or punish the proven offences. Possession of *de jure* authority may obviously imply such material ability, but it is neither necessary nor sufficient to prove effective control.’²²⁴ In practice, cases such as *Orić, Halilović, Mpambara* demonstrate that the current narrow focus on tactical control without a broader analysis of the role of the responsible perpetrator in fielding the organization is unduly restrictive. The relevant judicial inquiry should be whether the perpetrator was the principal organizing factor in the onset of the pattern of criminality, not simply whether he or she was in a position to exercise effective control at the precise time and place of the charged offenses. Though the law is clear that mob violence and individualized violence are beyond the reach of international humanitarian law,²²⁵ the current approach operates to help shield perpetrators who conduct hostilities using tactics that mimic chaos and random violence.

Courts should continue to enter into a subjective determination of whether there was effective control at the time that atrocities were committed, or when notice was received, without hewing to narrowly focused geographical and temporal limitations. The Composite Theory of Command Responsibility would lead courts to make that subjective determination in light of the the long arc of the conflict. Tribunals should take into account how the fighting organization was established and controlled by its commanders. This may not have the precision which many lawyers would prefer because the determination must be subjective. Yet subjective determinations are not foreign to war crimes jurisprudence, nor are they rare. The subjective determination of how the particular atrocity committing organization was controlled is the only way to determine whether there was effective control at the time the atrocities were committed – or when notice was acquired by the commander. Only after the court determines the particularities of how the organization was controlled should it enter into a determination of whether there was effective control at the time the atrocities were committed. The *AFRC* case was the first

224. *Nahimana, Barayagwiza and Ngeze*, *supra* n. 20, para. 625.

225. Rome Statute, *supra* n. 108, Art. 8(2)(d).

judgment to take into account this two step process. Other courts would be wise to follow suit.

However, judges should not pinpoint the determination of whether effective control was maintained at the time the atrocities were committed too closely. If the organization was controlled loosely, if the training was temporally or geographically removed from the commission of the crimes, if the orders process was not tightly controlled, in short, if the organization was shaped by a philosophy of indoctrination and subordinate initiative, then the wide view of control must preempt the narrow view of control at the time of commission. Similarly, if the organization was tightly controlled with a distinct hierarchy and leaders who maintained communication up and down the chain of command throughout most of the conflict than the narrow view of control must take precedence over the wide view of control at the time of commission. This duality is the essence of the Composite Theory proposed in this article.

There is a distinct difference between a breakdown of control during a conflict, and the active fielding of a unit with a systemic lack of constraining mechanisms. This should not be confused by the courts or misconstrued in the case law. Where a commander makes the positive decision to field an organization without the ability to suppress violations and, in turn, atrocities occur, then courts should not be constrained from imposing criminal liability on that commander for the failure to properly suppress violations of the laws of war. The wellspring of such criminal culpability is the failure to responsibly carry out the quintessential duty of command – primary enforcer of the laws and customs of war. However, where the commander has emplaced mechanisms to suppress atrocities and where there is a complete breakdown of control then that commander has not violated that core duty. If the court is too myopic in making the determination of effective control, it will fail to take into account some of the most prevalent control mechanisms: the moral enabling mechanisms and the cultural training mechanism. Both of these mechanisms take place over the long arc, rather than happen in a moment. There is rarely one instant where a word said by a commander to a subordinate is going to reduce the likelihood of the subordinate committing atrocities. This type of training takes time. If a court becomes too myopic in its determination then it would be too easy for commanders who want to commit atrocities to simply separate temporally the training (which may even encourage atrocities) from the commission of atrocities. This temporal separation may hedge against effective control at the point of commission and a failure to take the entire circumstances of the training of the fighters into consideration will fail to recognize the operational realities.

This is not to say that pinpointing the operational realities at the time of the commission is unimportant. Taking a narrow view is necessary to see whether the commander had any ability to suppress at the time they were committed or to punish after he acquired notice. A Composite Theory embraces both the wide view of

the conflict and the narrow view at the time of the atrocities. In the broad sense, some authorities simply fail to act on their responsibly to serve as primary enforcer of the laws and customs of war. However, where the commander has emplaced mechanisms to suppress atrocities and where there is a complete breakdown of control then that commander has not violated his duty. At first blush, this might sound to untrained ears like a plea for strict liability against any person simply by virtue of exercising a position of command or superior authority. Though recent case law suggests that commanders are under a positive duty to prevent or suppress all crimes,²²⁶ command and superior responsibility cannot be based on a strict liability²²⁷ which would obviate inquiry into the relevant conduct and pertinent *mens rea* by the perpetrator.²²⁸ In fact, the current approach of the ICC as articulated in the *Lubanga* decision on the confirmation of charges that conceives of the commander as a 'co-perpetrator based on joint control over the crime'²²⁹ treads perilously close to strict liability while it simultaneously abandons the roots of command/superior responsibility.

If jurists recognize the problems presented herein, there are three options: (1) scrap the test for effective control; (2) reconceptualize the notion of superior responsibility based upon a close analysis of the mode of organization and the reality

226. See *Orić* Trial Judgement, *supra* n. 82, para. 328; '[S]ince a superior is duty bound to take preventive measures when he or she becomes aware that his or her subordinates 'are about to commit such acts', and, as stated before, such acts comprise the commission of a crime from its planning and preparation until its completed execution, the superior, being aware of what might occur if not prevented, must intervene against imminent planning or preparation of such acts. This means, first, that it is not only the execution and full completion of a subordinate's crimes which a superior must prevent, but the earlier planning or preparation. ... [T]he superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing.'

227. See *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Trial Chamber Judgement, 22 January 2004, para. 607, at <<http://69.94.11.53/ENGLISH/cases/Kamuhanda/judgement/220104.htm>>. 'A superior in a chain of hierarchical command with authority over a given geographical area will not be held strictly [responsible] for subordinates' crimes. While an individual's hierarchical position may be a significant indicium that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone.' See also *Prosecutor v. Kajelijeli*, Trial Chamber Judgement, Case No. ICTR-98-44A-T, 1 December 2003, para. 776 (same), at <http://69.94.11.53/ENGLISH/cases/Kajelijeli/judgement/031201-TC2-J-ICTR-98-44A-T-JUDGEMENT%20AND%20SENTENCE-EN_.pdf>.

228. See *Prosecutor v. Bagilishema*, Trial Chamber Judgement, Case No. ICTR 95-1A-T, 7 June 2001, para. 44, at <<http://69.94.11.53/ENGLISH/cases/Bagilishema/judgement/index.htm>>. 'As to the *mens rea*, the standard that the doctrine of command responsibility establishes for superiors who fail to prevent or punish crimes committed by their subordinates is not one of strict liability.'

229. *Prosecutor v. Thomas Lubanga Dyilo*, *supra* n. 35, para. 342; 'Hence, although none of the participants has overall control over the offense because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.'

of operations; (3) shift the basis of responsibility squarely onto a JCE model. This article recommends the second option. Moving completely to JCE would obfuscate the criminality that is most directly presented by a perpetrator who organizes and controls individuals who subsequently commit atrocities. Abandoning the test for effective control would negate the positive jurisprudential gains of the past decade. In any event, the caselaw has crystallized such that enervating effective control would represent a wholly unnecessary expenditure of judicial effort. What is needed is a Composite Theory that embraces the narrow tests but also embraces the context of criminality within which they occur. Such a Composite Theory is situated to close the enforcement gap between state and non-state actors, and yet requires only a short conceptual leap in the way in which jurists think about effective control.

The broadened conception of a Composite Theory is in one sense a very slight adjustment to current practice because the terminology of effective control and the established prongs for affixing responsibility to a particular commander remain unchanged. There may well be cases in which the current approach is perfectly suited to producing the correct analysis. To be clear, the current jurisprudence may well support liability in many cases, but the Composite Theory proposed herein would make localized findings of effective control one aspect of the larger judicial inquiry.

On the other hand, commanders are the critical path to being able to form the fighting organization, and their organizations will be most effective – militarily – where they field their organization with the proper control mechanisms. A Composite Theory of Responsibility represents an important shift in the current judicial conception of effective control. The current framework should not be abandoned, but its application should be updated based on an understanding of modern conflicts. In other words a finding that the commander/superior did not exercise effective control over disparate forces at the precise time and place of the offenses might not be the dispositive evidence requiring dismissal of the charges. Joseph Kony, for example, should be accountable for the organization and fielding of the Lord's Resistance Army and its use on a broad campaign to terrorize civilians irrespective of whether he had actual or constructive knowledge of particular crimes against particular villages or whether he issued specific orders to that effect.²³⁰ Such a fundamental shift in the thinking related to effective control would modernize the doctrine of superior responsibility and perhaps generate some added focus on the obligations of those most able to prevent atrocities by controlling their subordinates: non-state actors pitted against each other or against state actors.

230. See Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, at <<http://www2.icc-cpi.int/iccdocs/doc/doc97185.PDF>>.

Commanders have assumed a risk of criminal liability when they unleashed their violence on a society, and where a superior has notice of criminal violations and does not do everything in his power to suppress further violations or to punish violators there must be criminal liability. This article does not propose any burden shifting. The burden of showing that there was a fielding of an organization without proper suppression mechanisms must remain fully vested with the prosecutor. Admittedly there is a tension here. On the one hand, the prosecutor would be required to show the presence of a suppression mechanism in the overall determination, but on the other hand the prosecutor would be required to show that the suppression mechanism was not used properly. The accused would be faced with the quandary of which angle to challenge, since the tactics are likely mutually exclusive. The accused could challenge the presence of the suppression mechanism, but if this was ineffective than the court could easily determine that a suppression mechanism was present but merely used improperly. Alternatively, the accused could challenge that he used the suppression mechanism properly but that there was a breakdown of control which enabled the atrocities to be committed.

8. CONCLUSION

Since commanders are the critical path to enabling the organization to fight collectively they – logically – must be the critical path to controlling and focusing the violence which they alone are responsible for releasing onto the battlefield. At present, there is a legal disconnect that threatens to render the doctrine of command responsibility obsolete in the modern era of non-state, decentralized participants in conflict. As Elie Wiesel observed, ‘[A] destruction that only man can provoke, only man can prevent.’²³¹ Above all, this central truth warrants the legal conclusion that because international law entrusts commanders as the primary enforcement mechanism for the laws and customs of war, any commander in any conflict under any form of organization who fields a fighting force assumes the risk of criminality if he does not properly emplace mechanisms to ensure compliance with the laws and customs of warfare. As one World War I era commander observed: ‘If you start a man killing, you can’t turn him off again like an engine. After all, he is a good man. He was probably half off his head.’²³² It is commanders who are responsible for turning this engine on, and it is commanders who are re-

231. M.K. Albright and W.S. Cohen et al., eds., *Preventing Genocide: A Blueprint for U.S. Policymakers* (United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the U.S. Institute of Peace 2008) p. 17.

232. Commentary by Professor Guy Chapman a young officer in the Kitchener battalion who had just fought in the Battle of the Somme in 1916 reprinted in Keegan, *supra* n. 115, p. 48.

sponsible for focusing the violence of their subordinates. Commanders are humanity's best hope of constraining the momentum of conflict to a focused violence pinpointed on accomplishing the mission which the individual commander was given rather than on a generalized violence which perpetrates crimes and does little to accomplish a specific mission with a specific military objective.

This article closes with a plea to jurists. Those commanders who hold themselves out as military commanders must be held to the standards that international law places on all military commanders to suppress atrocities. Those commanders who field fighting organizations without the proper methods for enforcing compliance with the laws and wars assume the risk of criminal sanction where criminal violations occur by their subordinates. A close look at how commanders field organizations, how they train their organizations and how they plan and conduct operations on the battlefield shows that in complex operations, and almost every atrocity, the commander assumes the risk of personal responsibility as a concurrent aspect of commencing violent activities.

Any armed conflict represents a complex commingling of human factors: politics, personalities, men and women struggling to survive amidst incredible hardships, the face of an uncertain future, the competition between personal honor and fear, the conflict between courage and common sense, anxiety interspersed with exhilaration, fatigue, elation, catharsis, compassion. The leaders responsible for unleashing the waves of violence that destroy lives and threaten to destroy social and family structures represent the thread binding these diverse factors. The pervasive, sustained, violent nature of war crimes, crimes against humanity and genocide is different than the crimes of normal civil society. These crimes are much different psychologically, practically and sociologically than other crimes and an effective vetting of the facts is only attainable by those litigators and judges who understand the operational realities of those who commit them. The alternative is to extrapolate current trends and anticipate additional acquittals in the future of those perpetrators clever or lucky enough to exploit the lacunae in current case law.

ABSTRACT

Commanders are the critical path enabling the formation and employment of any fighting organization. By extension, their units are most militarily effective where they are governed by adequate control mechanisms. The classic doctrine of command responsibility that imputes the criminality of subordinates onto their leaders is founded on the legal premise that commanders are responsible for establishing affirmative controls over their subordinates to regulate their conduct. The commander is thereby criminally culpable for failing to create a climate of compliance

with the laws and customs of war. The obligation of commanders to control the conduct of their subordinates, or to take action to ameliorate violations when they do occur, applies to both formalized regular military organizations and the loosely structured non-state entities that are common in modern conflicts. Current legal tests for evaluating such 'effective control' inaccurately reflect modern operational reality by narrowly focusing on the particular circumstances of the criminal act and the precise relationship between the perpetrators and the superior at the moment of the offense. However, courts have developed and applied a series of tests for evaluating 'effective control' that in practice become formulaic and limiting. This trend is exacerbated when applied to warlords or non-state actors in non-hierarchical organizations.

Command responsibility has deep historical roots that transcend culture and geography, indicating a timeless consensus that commanders bear personal and professional responsibility for the acts of their subordinates regardless of the context in which they occur. International law subsequently developed to place a heightened responsibility on commanders who field a fighting organization and control the application of violence by their subordinates. Without the proper internal enforcement of the laws and customs of warfare, the commander becomes liable to external criminal enforcement, directed towards both the subordinates and the commander. Prosecutorial trends toward charging joint criminal enterprises and other new theories of individual responsibility fail to understand the essence of the criminality at issue for all fighting organizations – that it is the fielding of the fighting organization without the proper safeguards that in many cases is the causal factor for mass atrocities. Is the law presently configured such that a rebel warlord, a terrorist leader or an outsourced intelligence operator may evade superior responsibility simply because of the unorthodox structure of the fighting organization or the disaggregated orchestration of violence?

If the theory of effective control is not reconceived, the answer will be yes, and increasingly so. It is perhaps inevitable that the changing face of warfare requires a modernized conception of effective control. The concept of effective control should be reconceptualized by jurists to extend its present applications by including an imputed responsibility to any commander or non-state actor assuming that role who organizes a collective entity with the intent of conducting hostilities and thereafter fails to create a climate of compliance with the laws and customs of war. This approach will permit the extension of liability to commanders who organize cellular units that operate on the basis of primary loyalty to a local leader and with little/no tactical control by the hierarchy, such as the tactics seen in Iraq, Afghanistan, and a number of modern non-international armed conflicts.

Jurists should analyze superior responsibility cases with full cognizance of modern command and control theory in order to sustain its viability as a practical prosecutorial tool to regulate the crimes committed by loosely knit groups and

non-state actors conducting atrocities in chaotic circumstances. A reconceived theory of effective control would retain the current indicia developed by jurists, which are most often applicable to state actors and formalized military hierarchies. To be clear, the current jurisprudence may well support liability in many cases, but the Composite Theory proposed herein would make localized findings of effective control one aspect of the larger judicial inquiry. A Composite Theory of Responsibility would revitalize and modernize the doctrine of superior responsibility and avoid impunity for those perpetrators clever or lucky enough to exploit the lacunae in current case law.

