# 10 Command Responsibility and *Respondeat Superior*

## 10.0. Introduction

Command responsibility, also referred to as "superior responsibility," is the other side of the obedience-to-orders coin. The soldier who obeys a manifestly unlawful order is culpable for any violation of the law of armed conflict (LOAC) resulting. The superior who gave the unlawful order is equally culpable for the subordinate's violation by reason of having given the unlawful order. In the past, it was viewed as a form of the crime of aiding and abetting.[1] No longer. Today, most authorities accept that "[command responsibility] does not mean . . . that the superior shares the same responsibility as the subordinate who commits the crime . . . but that the superior bears responsibility for his own omission in failing to act."[2] The superior is not responsible as an aider and abettor, but is responsible for his neglect of duty in regard to crimes that he knew were committed by his subordinates. "The superior's criminal responsibility flows from the neglect of a specific duty to take the measures that are necessary and reasonable in the given circumstances."[3]

*Respondeat superior*, "let the master answer," is a broader legal concept than command responsibility. In case law and in most LOAC/international humanitarian law (IHL) texts there is no distinction between command responsibility and *respondeat superior* and the distinction is thematic rather than doctrinal. Command responsibility, as the term suggests, indicates the criminal liability a commander bears for illegal orders that he or she issues. *Respondeat superior* is the same concept applied when the commander is criminally responsible, but did not actually order the wrongful act done. *Respondeat superior* liability is based on accomplice theory; although there was no order, the commander is responsible because in one way or another he/she initiated or acquiesced in the wrongdoing, or took no corrective action upon learning of it. Prosecutors rarely make a command responsibility/*respondeat superior* distinction. In practice, *respondeat superior* versus command responsibility is a differentiation more pedagogical in nature than substantive.

[1] "Aiding means giving assistance to someone, whereas abetting involves facilitating the commission of an act by being sympathetic thereto, including providing mere exhortation or encouragement." Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 241, citing *Prosecutor v. Akayesu*, ICTR-96-4-T (2 Sept. 1998), para. 484; and *Prosecutor v. Furundžija*, IT-95-17/1-T (10 Dec. 1998), para. 231.

[2] *Prosecutor v. Orić*, IT-03-68-T (30 June 2006), para. 293.

[3] Chantal Meloni, "Command Responsibility," 5–3 *J. of Int'l Crim. Justice*, (July 2007), 619, 628.

In militarily themed movies and television dramas, a subordinate often asks a superior, "Is that a direct order?" There are no *direct* orders or *indirect* orders. There are only orders; written or oral directives from a senior to a subordinate to do, or refrain from doing, some act related to a military duty. Although some directives can be communicated indirectly, or even in silence, such orders are not favored as bases for punitive action because of obvious problems of proof.

Both *respondeat superior* and superior orders have long histories as bases for, and defenses to, alleged violations of LOAC.

## 10.1. Command Responsibility and *Respondeat Superior*: A Brief History

"As early as 1439, Charles VII of Orleans . . . promulgated an Ordinance providing . . . the King orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company . . . 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 . . . "[4]

In the seventeenth century, Grotius wrote, "A community or its rulers may be held responsible for the crime of a subject if they knew of it and did not prevent it when they could and should prevent it."[5] Geoffrey Best points out, "If servicemen are to be brought to trial for carrying out unlawful and atrocious orders, do not logic and equity demand that their superiors must be brought to trial for issuing the same?"[6]

In 1799, during the American Revolution, the British Lieutenant Governor of Quebec, Henry Hamilton was captured and tried for depredations committed by American Indians allied with the British. "It is noteworthy that the language of the indictment held that the acts of the Indians were the acts of Hamilton. He was considered personally liable for the acts of subordinates."[7]

In American military practice, Professor Best's thought, that logic demands that those issuing unlawful orders should also be held responsible for their execution, is reflected in the 1886 writings of U.S. legal historian Colonel William Winthrop: "In the case of an act done [by an enlisted soldier] under an order admitting of question as to its legality or authority, the inferior who executed it will be more readily justified than the superior who originated the order."[8]

Following the American Civil War, Major Henry Wirz was charged with thirteen counts of murder and conspiracy to maltreat prisoners. Despite his plea of superior orders, he was convicted and hanged. Wirz was convicted of murder for acts he had ordered – *respondeat superior* – as well as for acts he personally committed – direct responsibility.

After World War I, Article 227 of the Treaty of Versailles, ending the war, called for the prosecution of the most senior German officer, the former German Emperor, William II, "for a supreme offense against international morality and the sanctity of treaties.

[4] Leslie C. Green, *Essays on the Modern Law of War*, 2d ed. (Ardsley, New York: Transnational, 1999), 283.
[5] Hugo Grotius, 2 *De Jure Belli ac Pacis Libri Tres* [*The Law of War and Peace*], Bk. II, Ch. XXI, sec. ii, Francis W. Kelsey trans. (1925), 138.
[6] Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994), 190.
[7] George L. Coil, "War Crimes in the American Revolution," 82 *Mil. L. Rev.* (1978), 171, 197.
[8] Col. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), 297, fn. 2. (Case citations omitted.)

A special tribunal will be constituted to try the accused . . . "[9] "International morality and the sanctity of treaties" are not war crimes and, although Kaiser Bill was granted sanctuary in Holland, beyond the jurisdictional reach of Allied tribunals, his case is one of the international community's earliest efforts to hold the superior responsible for, in this case, initiating war.

The post–World War I case against German General Karl Stenger had a similarly unsatisfactory outcome. Tried at Leipzig before the German Supreme Court of the Reich, contrary to the evidence of involved subordinates, he was acquitted of ordering his soldiers to give no quarter, and to shoot all prisoners of war.[10] "There can be no logical explanation for Stenger's acquittal . . . "[11] (Chapter 3, Cases and Materials.)

Shortly before World War II ended, Japanese General Tomoyuki Yamashita surrendered to U.S. forces. In October 1945, in Manila, he was tried by a U.S. military commission of five general officers. Upon the October 1944 American invasion, in Manila, Japanese defenders murdered an estimated 8,000 civilians and raped nearly 500. Yamashita was charged with having "unlawfully disregarded and failed to discharge his duty as a commander to control the operations of . . . his command, permitting them to commit brutal atrocities and other high crimes."[12] Yamashita's charges did not allege that he ordered, or even knew of, the crimes described in his charge sheet. It was a charge for which there was no precedent in U.S. military law.

On December 7th, 1945, the military commission convicted Yamashita and sentenced him to hang. In its opinion, the commission wrote:

> [T]he crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the Accused, or secretly ordered by the Accused. . . . [W]here murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held . . . criminally liable, for the lawless acts of his troops . . . The Commission concludes: . . . that during the period in question you failed to provide effective control of your troops as was required by the circumstances.[13]

Yamashita stood convicted not of having committed war crimes. That would be a simple case of command responsibility. He was convicted on the basis of *respondeat superior*, of being responsible for the acts of his troops – not by ordering them, but through his failure to control their actions or stop their crimes; he *must* have known of their acts.

Lawyers and scholars will long argue about the quality of justice received by Yamashita. While much of the evidence admitted in his trial by military commission would not have been admissible in an American courtroom, Yamashita's was not a trial like that enjoyed by an accused in a U.S. civilian criminal trial. "Although the procedures used in the trial . . . were deplorable and worthy of condemnation, there were sufficient facts given to

[9] 14 *AJIL* Supp. (1920).
[10] Claude Mullins, *The Leipzig Trials* (London: H.F. & G. Witherby, 1921), 151; George G. Battle, "The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes," 8 *Va. L. Rev.* (1921), 1, 11.
[11] Col. Howard S. Levie, "Command Responsibility," 8 *USAF Academy J. of Legal Studies* (1997–1998), 1, 3.
[12] Maj. Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now," 149 *Mil. L. Rev.* (1995), 293, 295.
[13] Maj. William H. Parks, "Command Responsibility for War Crimes," 62 *Military L. Rev.* (1973), 1, 30, quoting the Military Commission's written opinion. Also, Lt.Cmdr. Weston D. Burnett, "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra," 107 *Mil. L. Rev.* (1985), 71, 88.

enable the board which reviewed the record of trial to conclude [Yamashita was guilty] on the issue of command responsibility . . . "[14]

Was Yamashita convicted on the basis of strict liability – convicted merely because of his status as commander, without a showing of fault on his part? If that were true, the prosecutor would not have to prove his guilt to gain a conviction, nor could the accused avoid conviction by showing that there was no culpability on his part. No, in Yamashita's case the prosecution argued and convinced the Tribunal that he knew, or must have known, of the numerous and widespread atrocities committed by men under his command. Judging by the Tribunal's opinion, he was not convicted simply because he was in command when the crimes occurred. For all the procedural and evidentiary questions the Yamashita case raises, and there are several, "Yamashita was no virtuous innocent wrongly convicted."[15]

Yamashita was hanged four months after his military commission first convened. His case turned on the question of knowledge. Did he know, or must he have known, of the crimes of soldiers and sailors under his command? The commission answered that he did know, or must have known, of his subordinates' crimes and took no action to stop or later punish them. This is *respondeat superior*. Hays Parks writes:

> Acceptance of command clearly imposes upon the commander a duty to supervise and control the conduct of his subordinates . . . Equally clear, a commander who orders or directs the commission of war crimes shares the guilt of the actual perpetrators of the offense. This is true whether the order originates with that commander or is an order patently illegal passed from a higher command through the accused commander to his subordinates. . . . No less clear is the responsibility of the commander who incites others to act . . . [16]

World War II Japanese General Masaharu Homma was also tried by a U.S. military commission. Homma was the commander in the Philippines at the time of the Bataan Death March.[17] During that infamous sixty-five-mile forced march, approximately 2,000 American and 8,000 Filipino prisoners of war were either executed or died. Like Yamashita, Homma was found guilty of permitting members of his command to commit "brutal atrocities and other high crimes."[18] In his posttrial review of the Homma trial, General MacArthur wrote, "Isolated cases of rapine may well be exceptional but widespread and continuing abuse can only be a fixed responsibility of highest field authority . . . To hold otherwise would prevaricate the fundamental nature of the command function. This imposes no new hazard on a commander . . . He has always, and properly, been subject to due process of law . . . he still remains responsible before the bar of universal justice."[19] Although Homma's verdict was predicated on *respondeat superior*, MacArthur's review suggests that MacArthur applied a strict liability standard. The

[14] Capt. Jordan J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 *Military L. Rev.* (1972), 99, 181.

[15] Colonel Frederick Bernays Wiener, "Comment, *The Years of MacArthur*, volume III: MacArthur Unjustifiably Accused of Meting Out 'Victor's Justice' in War Crimes Cases," 113 *Military L. Rev.* (1986), 203, 206.

[16] Parks, "Command Responsibility," supra, note 13, at 77.

[17] Theater Staff Judge Advocate's Review of the Record of Trial by Military Commission of Gen. Masaharu Homma, 5 March 1946, at 1. On file with author.

[18] Id.

[19] Gen. of the Army Douglas MacArthur, *Reminiscences* (New York: McGraw-Hill, 1964), 298.

significant difference between the two is that evidence in support of a finding of *respondeat superior* may be rebutted; a finding of strict liability cannot be rebutted.

There were many other post–World War II trials relating to a commander's responsibility. Nazi General Kurt Meyer was convicted by a Canadian military commission of "inciting and counseling" soldiers under his command to murder prisoners of war, a case of *respondeat superior*.[20] Nazi Captain Erich Heyer instructed a prisoner escort of three prisoners of war to not interfere should the townspeople attempt to molest the prisoners. The townspeople subsequently beat to death the prisoners while the escort stood by. Heyer was sentenced to death for inciting the murders, a case of command responsibility.[21] Japanese Major General Shigeru Sawada was tried in Shanghai by a U.S. military commission for permitting the illegal trial and execution of three U.S. airmen. Although the trial occurred in Sawada's absence, he endorsed and forwarded the record. As the commander, he had ratified the illegal acts of subordinates and therefore was responsible for them – *respondeat superior*.[22]

These World War II–era cases emphasize the commander's responsibility: Knowledge, actual or constructive, is required for a conviction based either on command responsibility or *respondeat superior*. The fact that the commander had no hand in the actual crime is immaterial. If she ordered the crime, incited the crime, acquiesced in the crime, ignored her own knowledge of the crime, closed her eyes to an awareness of the crime, passed on a patently unlawful order, or failed to control her troops who were committing war crimes, she may herself be found guilty of those crimes. This is a broad range of situations allowing a finding that a commander is guilty of LOAC/IHL violations committed by subordinates.

**SIDEBAR.** On June 27, 1943, General George S. Patton spoke to the assembled officers and men of his 45th Infantry Division, just prior to their invasion of Sicily. In his remarks he said, "Attack rapidly, ruthlessly, viciously and without rest, and kill even civilians who have the stupidity to fight us."[23] According to court-martial defense lawyers and the court-martial testimony of numerous witnesses, including at least one colonel,[24] and confirmed by Major General (later General) Troy Middleton,[25] Patton also told his soldiers, "if the enemy resisted until we got to within 200 yards, he had forfeited his right to live."[26] In heavy fighting near Biscari, Italy, a few days later, Captain John C. Compton, of the 45th Infantry Division, formed "a firing party of about two dozen men,"[27] lined up forty-three captured

[20] *Trial of S.S. Brigadeführer Kurt Meyer* ("The Abbaye Ardenne Case"), 1945. IV L.R.T.W.C. (London: HMSO, 1947), 97.
[21] *Trial of Erich Heyer, et al.* ("The Essen Lynching Case"), 1945. I L.R.T.W.C., 88.
[22] *Trial of Lieutenant-General Shigeru Sawada and Three Others*, 1946. V L.R.T.W.C., 1.
[23] Aubrey M. Daniel III, "The Defense of Superior Orders, 7–3 *U. Rich. L. Rev.* (Spring 1973), 477, 498–9.
[24] Review of Board of Review, *United States v. Sgt. Horace T. West* (25 Oct. 1943), at 7. On file with author. Under World War II practice, a Board of Review was the final legal authority to pass on the legal sufficiency of a court-martial's findings and sentence.
[25] Frank J. Price, *Troy H. Middleton: A Biography* (Baton Rouge, LA: Louisiana State University, 1974), 168–71.
[26] Ladislas Farago, *Patton: Ordeal and Triumph* (New York: Obolensky, 1964), 415.
[27] James J. Weingartner, "Massacre at Biscari: Patton and an American War Crime," vol. LII, No. 1, *The Historian*, (Nov. 1989), 24, 29.

Germans and Italians and directed their execution. At roughly the same time, a sergeant of the 45th Infantry Division, Horace T. West, murdered by submachine gun fire thirty-seven German prisoners he was escorting to the rear. At their courts-martial, convened by General Patton, both Compton and West raised as their defense the "orders" issued by Patton in his June 27 speech.[28] The sergeant was convicted and sentenced to imprisonment for life; the captain was acquitted. A subsequent three-officer Washington-initiated inquiry into Patton's remarks exonerated the general.[29] (In a letter to his wife, General Patton wrote, "Some fair-haired boys are trying to say that I killed too many prisoners . . . Well, the more I killed, the fewer men I lost, but they don't think of that."[30]) As General Eisenhower said of General Patton, "His emotional range was very great and he lived at either one end or the other of it."[31] The trials of Patton's two subordinates illustrate that it was not only postwar Nazi accused who exercised the defense of superior orders.

There were other postwar cases, however, that reveal a subtle legal distinction in the Yamashita commander's standard of "must have known."

Article 47 of the 1872 German Military Penal Code, in effect throughout World War II, reads, "If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice: (1) if he went beyond the order given, or (2) if he knew that the order of the superior concerned an act which aimed at a general or military crime or offense."[32] The Nazis, then, were well-acquainted with the concept of command responsibility. Perhaps the most significant "subsequent proceeding" was that of "the High Command Case." In its 1948 judgment of Nazi Field Marshals Wilhelm von Leeb, Georg von Kuechler, Hugo Sperrle, and ten other senior officers, the tribunal held that for criminal culpability to attach to a commander for the war crimes of subordinates, "it is not considered . . . that criminal responsibility attaches to him merely on the theory of subordination and over-all command. He must be shown both to have knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence."[33] There would be no assertions by the victorious Allies of strict liability. "It is also urged [by the prosecution] that the defendant must have known of the neglect of prisoners of war from seeing them upon the roads. This is a broad assumption."[34] The American prosecutors were urging the Yamashita "must have known" standard to find criminal responsibility in the Nazi commanders. But although the tribunal balked at imputing knowledge on the part of a commander based merely on emaciated prisoners being visible on the roads, in another tribunal, "The Hostage Case,"[35] involving Field

[28] L.C. Green, *Superior Orders in National and International Law* (Leyden: Sijthoff, 1976), 131.
[29] Farago, supra, note 26, at 415–6.
[30] Martin Blumenson, *Patton Papers, 1940–1945* (Boston: Houghton Mifflin, 1972), 431.
[31] Dwight D. Eisenhower, *Crusade in Europe* (New York: Doubleday, 1948), 225.
[32] *U.S. v. von Leeb, et al.*, "The High Command Case" XI *T.W.C. Before the Nurnberg Military Tribunals Under Control Council Law No. 10* (Washington: GPO, 1950), 509.
[33] Id., 555.
[34] Id., 559.
[35] *U.S. v. List, et al.* ("The Hostage Case") XI *T.W.C. Before the Nurnberg Military Tribunals Under Control Council Law No. 10* (Washington: GPO, 1950).

Marshal Wilhelm List, the judges made clear that neither can a commander plead ignorance to that which he is tasked with knowing:

> We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. . . . The German *Wermacht* was a well equipped, well trained, and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war. . . . They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high ranking officers promptly. . . . An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he be ordinarily permitted to deny knowledge of happenings within the area of his command while he is present therein.[36]

Nevertheless, the von Leeb judges were willing to give commanders the benefit of the doubt on the issue of knowledge. "Noting that modern warfare is highly decentralized, this court held that a commander *cannot know* everything that happens within the command, so the prosecution must prove knowledge."[37]

In the cases of Field Marshals von Leeb and List, then, we see a distinction that separates the standard required for a commander's *respondeat superior* culpability for the acts of his subordinates. The concept was refined from a "must have known" standard (Yamashita) to a "should have known" standard (von Leeb and List). Nor was it a distinction without a difference. After von Leeb and List, a commander's knowledge of widespread atrocities constituting guilt under *respondeat superior* was rebuttably presumed (von Leeb and List) rather than irrebuttably presumed (Yamashita).

Did the von Leeb and List tribunals knowingly shade the standard articulated in *Yamashita*? History does not tell, but there is no reason to believe they did. Regardless, it is the shaded standard that the western world has long followed. The 1956 U.S. Army Field Manual, *The Law of Land Warfare*, notes, "The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops . . . subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[38] Great Britain's standard for commanders is the same.[39]

[36] Id., 1259–60.

[37] Landrum, "The Yamashita War Crimes Trial," supra, note 12, at 299. Emphasis in original. The *von Leeb* judgment reads, "Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed. . . . There must be a personal dereliction." "The High Command Case," supra, note 32, at 543.

[38] Dept. of the Army, FM 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 501, at 178.

[39] U.K. Ministry of Defense, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 16.36. "A commander will be criminally responsible if he participates in the commission of a war crime himself . . . particularly if he orders its commission. However, he also becomes criminally responsible if he knew or, owing to the circumstances at the time, should have known that war crimes were being or were about to be committed . . . "

### 10.1.1. *My Lai and* Respondeat Superior

How, then, to account for the acquittal of U.S. Army Captain Ernest L. Medina, Lieutenant William L. Calley Jr.'s company commander at My Lai? According to the testimony of twenty-five members of Calley's platoon, on March 15, 1968, the day before the massacre at My Lai, Captain Medina briefed the company on the next day's operation. "He is quoted as having told his company to leave nothing living behind them and to take no prisoners . . ."[40] (Not all who were present agreed that Medina made such an incriminating statement.) The next morning, 136-strong, Company C of the Americal Division's Task Force Barker was air-lifted to My Lai, anticipating a fight with a Viet Cong force. Instead, only civilians were there. The soldiers took no incoming fire all day. Poorly trained, weakly led, and ill-disciplined, they began killing the unresisting noncombatants, raping and maiming many as they murdered approximately 350 Vietnamese. A precise number has never been fixed.

There being evidence that Medina had either ordered or incited the crimes at My Lai, or known of them and taken no subsequent action, he was tried before a general court-martial. Calley had already been convicted of murdering twenty-two civilians, far fewer than he actually killed.[41] At Medina's trial there was ambiguous evidence that Medina gave the inciting briefing and clear evidence that he was in fields adjacent to My Lai while his subordinates' heavy firing was going on. The prosecution urged that Medina knew, or should have known, of the massacre, but, in addition to inciting it, he took no action either to stop it or to subsequently bring to justice those who committed crimes. "Even if he did not personally commit any crimes in My Lai, Medina clearly failed to maintain control over men under his command who were committing scores of them."[42] Despite apparently meeting the von Leeb–List standard – knew or should have known – and, for that matter, the Yamashita standard – must have known – Medina was acquitted.[43] One civilian nonlawyer who viewed the trial found the case poorly prosecuted.[44] Another calls it "a striking example of the extent to which a domestic . . . tribunal will devise a restricted formulation of the superior responsibility doctrine in order to avoid the prosecution of its own nationals."[45] But that ascribes a sinister motive to the court-martial that did not exist.

Captain Medina's acquittal notwithstanding, the LOAC/IHL standard for a commander's responsibility has not changed. The problem of proof for Medina's prosecutors lies in the Government's choice of Uniform Code of Military Justice (UCMJ) charges. Medina did not personally commit the war crime of murder in My Lai. However, in the

[40] Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 310.
[41] *U.S. v. Calley*, 48 CMR 19 (USCMA, 1973).
[42] Michael R. Belknap, *The Vietnam War on Trial* (Lawrence, KS: University of Kansas Press), 2002, 68.
[43] *U.S. v. Medina*, C.M. 427162 (ACMR, 1971). Unreported acquittal.
[44] Mary McCarthy, *Medina* (New York: Harcourt Brace Jovanovich, 1972), 6–7: "It was the third of the My Lai 4 cases [the two judge advocates] had prosecuted, and the third they were going to lose, quite evidently. . . . [T]hey appeared poorly prepared and were repeatedly taken by surprise by their own witnesses . . . ;" 58–59: "Why was [Medina] not tried for dereliction, misconduct, and misprision of a felony, as well as war crimes . . . especially after he checked in at the [Col. Orin] Henderson court-martial and freely testified to having lied to Henderson, the Peers Panel, and the Army Inspector General's office."
[45] Emily Langston, "The Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's Special Panels Bring Militia Leaders to Justice?" 4–2 *Int'l Crim. L. Rev.* (2004), 141, 157.

*Manual for Courts-Martial*, which implements the UCMJ, there is no charge for negligence in the exercise of command, a charging route for commanders in some European military codes. Medina was charged as a principal – an aider and abettor to the murders committed by his subordinates.

Under the *Manual for Courts-Martial* in effect in 1969, to be convicted as an aider and abettor the prosecution must prove the accused intended to aid or encourage the persons who committed the crime. "The aider and abettor must share the criminal intent or purpose of the perpetrator."[46] Newer editions of the *Manual for Courts-Martial* have not altered this requirement, which is a difficult standard for a prosecution to meet. Proving intent is often a vexing problem for prosecutors, civilian or military.

Compounding the prosecution's burden was the judge's instruction to the members (military jury). The prosecution asked that the members be instructed that proof of Medina's *actual* knowledge of Calley's acts was required for conviction. "Or should have known" was not included in the prosecution's requested instruction. Actual knowledge was not, and is not, an element of proof for aiding and abetting required by either the UCMJ or the *Manual for Courts-Martial*. Nor is it included in the military judge's guide to jury instructions, the *Benchbook*.[47] The prosecution's requested instruction was apparently based on the provision in *The Law of Land Warfare* that repeats the now-traditional von Leeb–List standard,[48] "The commander is also responsible if he has *actual* knowledge, or should have knowledge . . . "[49] Needless to say, Medina's defense counsel, prominent civilian lawyer F. Lee Bailey, did not object to the prosecution's proposed instruction. The members in Medina's case were instructed by Colonel Kenneth A. Howard, the military judge, in accordance with the prosecution's proposed instruction:

> [A]s a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him . . . Furthermore, a commander is also responsible if he has *actual knowledge* that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. . . . [T]hese legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge.[50]

"[C]ritics could argue that Howard's charge [to the jury] violated the army's own *Law of Land Warfare*, which authorized consideration of should have known logic."[51] Actual

[46] *Manual for Courts-Martial United States, 1969* (revised ed.), para. 156. Article 77 – Principals, at 28–4. In the discussion of Art. 77 applicable at the time of Medina's trial, the *Manual* notes that certain individuals, under some circumstances, have an affirmative duty to act if they witness a crime. Would not Medina have been such an individual?

[47] Dept. of the Army Pamphlet 27–9, *Military Judge's Benchbook* (30 Sept. 1996), 151.

[48] Col. William G. Eckhardt, "Command Criminal Responsibility: A Plea For A Workable Standard," 97 *Military L. Rev.* (1982), 10, 18.

[49] FM 27–10, *The Law of Land Warfare*, supra, note 38. Emphasis supplied.

[50] Judge's instructions, *U.S. v. Medina* (1971), Appellate Exhibit XCIII, quoted in: L.C. Green, *Essays on the Law of War*, 2d ed. (Ardsley, NY: Transnational, 1999), 301. Emphasis supplied. Excerpts from the instructions are also found at, Eckhardt, "Command Criminal Responsibility," supra, note 48, at 15.

[51] Richard L. Lael, *The Yamashita Precedent* (Wilmington, DE: Scholarly Resources, 1982), 132.

knowledge beyond a reasonable doubt was a high bar for the prosecutors to surmount; certainly more difficult than "knew or should have known." Although it is difficult to understand how an officer present at the location while the law of war breach is being committed to the accompaniment of large volumes of semiautomatic and automatic weapons fire over a matter of hours would not know of the breach, actual knowledge proved an insurmountable bar. Medina was acquitted, an outcome that has rightly drawn considerable criticism.[52]

Medina was not acquitted because the commander's standard had changed, however. Because of the constraining language of the UCMJ – "must share the criminal intent or purpose" – and the prosecution-requested "actual knowledge" instruction, the von Leeb–List standard was not applied. Even if it had been, Medina might have been acquitted. "A panel may well have concluded that there was insufficient evidence to establish that Captain Medina 'knew or should have known' of the atrocities of My Lai."[53] The precedential value of the Medina case should be minimal, yet the same result could be obtained again because the UCMJ provision requiring that aiders and abettors share the "criminal intent or purpose" remains in today's *Manual for Courts-Martial*. That requirement is sufficient in straightforward obedience to orders cases in which a senior orders a subordinate to commit an offense, but the requirement is deficient in *respondeat superior* cases, in which the superior instead fails to control his troops, or fails to take action regarding war crimes of which he knows or should know.

The Army's investigation of My Lai resulted in cover-up charges against eleven officers and war crime charges against four officers and nine enlisted soldiers.[54] Two officers, Captain Eugene Kotouc and 1st Lieutenant Thomas Willingham, were in both categories. None of the eleven cover-up cases involved obedience to unlawful orders or *respondeat superior*.

## 10.2. Recent Command Responsibility and *Respondeat Superior* Cases

The law of command responsibility and *respondeat superior* did not end with World War II, or with Vietnam's Medina acquittal.

In the 1990s, a reunited Germany struggled with the issue of command responsibility (and obedience to orders) through a series of more than 300 divisive cases involving former East German military border guards who, on the orders of their military and civilian superiors, shot and killed Germans attempting to escape to West Germany over the Berlin wall, in the 1970s and 1980s. In 1992, two junior border guards were convicted of killing two East Germans fleeing to the West. (An estimated 600 were killed attempting to flee.) Told by the German court that "they had a duty to disobey the Communist

[52] E.g., R.S. Clark, "Medina: An Essay on the Principles of Criminal Liability for Homicide," 5 *Rutgers-Camden L. J.* (1975), 59, 72.

[53] Maj. Michael L. Smidt, "Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations," 164 *Military L. Rev.* (June 2000), 155, 199.

[54] Lt.Gen. W.R. Peers, *The My Lai Inquiry* (New York: Norton, 1979), 214, 227. Of the twenty-two individuals charged, only six were court-martialed: Calley, Medina, Col. Oran Henderson, Capt. Eugene Kotouc, Sgt. David Mitchell, and Sgt. Charles Hutto. All were acquitted except Calley. Because of sentence reductions by senior officers and political appointees in President Nixon's administration, Calley spent slightly less than five months in confinement and two years and eleven months under house arrest in his on-base officers' quarters.

government's . . . shoot-to-kill policy along the wall,"[55] they were sentenced to three and a half years and two years, respectively. The trials of more than fifty other border guards followed.

Then, former East German colonels and generals were tried and convicted. "[T]he court held for the first time that . . . officers who issue an order to shoot must be held responsible for any resulting deaths. They will be judged the same as the perpetrator, not merely as the instigator . . ."[56] The officers' sentences to years of imprisonment "contrasted with the greater leniency that has been shown toward many low-ranking border guards."[57]

Finally, senior political leaders were tried. Erich Honecker, the unrepentant eighty-year-old former leader of Communist East Germany for three decades, was tried for manslaughter. His prosecution ended in mid-trial because he suffered from terminal cancer. He went into exile in Chile,[58] where he died sixteen months later. Other political leaders were tried, including Egon Krenz, East Germany's former security chief, who was sentenced to six and a half years' confinement for his role in issuing manifestly unlawful shoot-to-kill orders. In a 2001 judgment, the European Court of Human Rights unanimously held that the prosecutions of the leaders of the German Democratic Republic were not a violation of the principle of *nullum crimen sine lege*.[59] The border guard cases did not involve orders given and obeyed in armed conflict, but they illustrate the continuing international concern with obedience to orders and *respondeat superior*.

In 1997, in France, Maurice Papon, eighty-seven years old and the senior French authority in occupied France during World War II, was tried for orders he issued regarding the wartime deportation of French Jews. He was convicted and sentenced to ten years' confinement. In a 2001 case, in Rio de Janeiro a Brazilian police commander was sentenced to 638 years' confinement for ordering the shooting of prisoners, some of whom had surrendered, during a prison riot.[60] The trials of commanders continue today.

## 10.3. A Commander's Seven Routes to Trial

By the end of World War II and its war crimes trials, the outlines of command responsibility and *respondeat superior* and their variations were clear. Although some versions of command responsibility overlap somewhat with others, seven variations may be identified.

First, **a commander is liable for LOAC/IHL violations that he personally commits**. Command and subordinate status plays no role in such cases. In Bosnia in 1993, Vladimir Santic was the commander of a Croatian military police company and commander of "the Jokers," a particularly brutal "special unit" of the Croatian military police. Among his numerous crimes, Santic personally participated in the murder of a Muslim noncombatant and the burning of his house. The International Criminal Tribunal for the

[55] Marc Fisher, "German Court Finds Guards Guilty of Death at Berlin Wall," *Int'l Herald Tribune*, Jan. 21, 1992.
[56] A.P. "Ex-East German Retried, Held Guilty in Wall Death," *Int'l Herald Tribune*, March 6, 1996.
[57] Alan Cowell, "Germans Sentence Six Generals in Border Killings," *Int'l Herald Tribune*, Sept. 11, 1996.
[58] "The Honecker Bungle," *Washington Post*, Feb. 1, 1993, A18.
[59] *Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97, and 44801/98.49 ILM 811 (2001), reported at 95–4 *AJIL* (Oct. 2001), 904–910.
[60] Anthony Faiola, "Brazilian Official Guilty in Massacre," NY *Times*, July 1, 2001, A17.

Former Yugoslavia (ICTY) Trial Chamber found that Santic's "presence on the scene of the attack also served as an encouragement for your subordinates to abide by the [manifestly illegal] orders they had received."[61] Found guilty of murder and multiple crimes against humanity, Santic was sentenced to twenty-five years' imprisonment.

Lieutenant Calley was convicted by an Army court-martial of the premeditated murder of twenty-two unarmed, unresisting South Vietnamese women, children, and old men in the village of My Lai-4. These murders were aside from the hundreds of similar murders committed by soldiers under Calley's command. For his personal acts at My Lai, Lieutenant Calley was sentenced by the military jury to dismissal from the Army and confinement at hard labor for life.[62]

Second, on the basis of command responsibility, **a commander is responsible for LOAC/IHL violations that he orders a subordinate to commit**. In South Korea, in 1952, a Korean noncombatant caught inside a U.S. Air Force base without authorization was critically wounded during his apprehension by an enlisted Air Policeman. In deciding what action to take regarding the unconscious civilian prisoner, the lieutenant in charge directed the airman who had injured the Korean to "take him to the bomb dump and shoot him." "Is that an order?" the airman asked. "That's an order," the lieutenant replied. The airman murdered the injured Korean. In separate courts-martial, both the airman and the lieutenant were convicted of murder.[63] The lieutenant was sentenced to dismissal from the Air Force and confinement for life for the unlawful order he gave a subordinate.[64]

In 2007, the ICTY sentenced Dragomir Milošević, the Chief of Staff of the Sarajevo Romanija Corps of the Bosnian Serb Army, to thirty-three years' confinement for planning and ordering the shelling and sniping of civilians in Sarajevo with the intent to spread terror among the population, unlawful orders he gave to subordinates.[65]

Third, **a commander is responsible for disregarding LOAC/IHL violations of which he is aware, or should be aware, or for knowing of them and taking no action to punish those involved**. There must be information available to the commander that puts him or her on notice that there have been LOAC/IHL violations by a subordinate. "[The] reason to know standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the [ICTR Trial] Chamber be satisfied that the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.'"[66] That is the "should have known" standard.

In 1946, at a U.S. military commission held at Yokahama, Japan, it was charged that Yuicki Sakamoto "at prisoner-of-war camp Fukuoka 1, Fukuoka, Kyushu, Japan . . . failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."[67] Found guilty, Sakamoto was sentenced to life imprisonment for the violations of which he was aware but took no action.

[61] *Prosecutor v. Kupreškić*, IT-95-16-T (14 Jan. 2000), para. 827.
[62] *U.S. v. Calley*, supra, note 41.
[63] *U.S. v. Kinder*, 14 C.M.R. 742 (AFBR, 1954).
[64] *U.S. v. Schreiber*, 18 C.M.R. 226 (CMA, 1955).
[65] *Prosecutor v. Milošević*, IT-98-29/1-T (12 Dec. 2007), para. 966.
[66] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgment (3 July 2002), para. 28.
[67] Cited in: *Trial of General Tomoyuki Yamashita*, U.S. Military Commission, Manila, IV *LRTWC* 1 (London: U.N. War Crimes Commission, 1947), at 86.

In June 2008, in relation to the deaths of twenty-four Iraqi noncombatants at Haditha, Iraq, a U.S. Marine Corps lieutenant colonel and battalion commander was charged with having "willfully failed to direct a thorough investigation into [a] possible, suspected, or alleged violation of the law of war."[68] Because of perceived unlawful command influence, the charges, based on his failure to take action, were dismissed and the lieutenant colonel's case did not go to trial.

In late 2008, the ICTY convicted the commander of the Main Staff of the Army of Bosnia-Herzegovina, Colonel Rasim Delić of, *inter alia*, failure to take measures to punish subordinates known by him to have committed crimes against Serb prisoners. "[A] superior," the Trial Chamber held, "is bound to take active steps to ensure that the perpetrators of the crimes in question are brought to justice."[69]

In ICTY jurisprudence, at least, if a commander fails to impose appropriate punitive action, either in the form of disciplinary action or a criminal proceeding such as a court-martial, or if the action is clearly not proportionate to the offense committed, the commander may be held responsible.[70] (See *Prosecutor v. Hadžihasanović*, Cases and Materials, this chapter.)

Fourth, **a commander is responsible for LOAC violations that he incites**. In late 1944, in Essen-West, Germany, the police handed three captured British airmen to Nazi Captain Eric Heyer. In front of a crowd of angry Germans, Heyer instructed his men to walk the prisoners to a nearby Luftwaffe interrogation unit, thus informing the crowd of the time and route of the prisoners. Heyer told his soldiers to not interfere with the crowd, should they molest the prisoners. On the route through town the crowd grew increasingly unruly. Stones were thrown at the fliers, and they were beaten with sticks. Finally, they were seized and thrown off a bridge, killing one of them. The other two were then beaten and shot to death by the crowd. The prosecutor argued that

> Heyer "lit the match." . . . From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men. Hauptmann Heyer admittedly never struck any physical blow. . . . [but] an instigator may be regarded as a principal . . . Although the person who incited was not present when the crime was committed, he was triable and punishable as a principal. . . .[71]

Heyer was convicted and sentenced to hang.

Fifth, **a commander is responsible for violations committed by his troops whom he fails to control**. This was the charge of which General Yamashita was convicted in 1945. The Theater Judge Advocate reviewing Yamashita's record of trial, citing Article 1.1 of 1907 Hague Regulation IV (". . . To be commanded by a person responsible for his subordinates . . . "), wrote, "The doctrine that it is the duty of a commander to control his

[68] *U.S. v. Lt.Col. Jeffrey Chessani* (Camp Pendleton, CA, 2008). Unreported. See *Marine Corps Times*, June 30, 2008, 12; and http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm

[69] *Prosecutor v. Delić*, IT-04-85-T (15 Sept. 2008), para. 552. Delić, whose case is on appeal as of this writing, was sentenced to three years' confinement.

[70] *Prosecutor v. Hadžihasanović*, IT-01-47-T (15 March 2006), paras. 1770–80.

[71] *Trial of Erich Heyer and Six Others*, "The Essen Lynching Case," British Military Court (Dec. 1945), I *LRTWC* 88, 89–90.

troops is as old as military organization itself and the failure to discharge such duty has long been regarded as a violation of the Laws of War."[72]

Sixth, **a commander is responsible for the violations committed by his subordinates which he permits or acquiesces in**. In 1942, Major General Shigeru Sawada was the Commanding General of the Japanese Imperial 13th Expeditionary Army in China. Eight Doolittle raiders were captured by his troops after their thirty seconds over Tokyo (and, in some cases, Nagoya, Kobe, and Osaka). While Sawada was visiting the front, 300 miles from his Shanghai headquarters, the eight U.S. Army fliers were court-martialed. In a two-hour "trial," the Americans were not allowed to enter a plea, and there was no defense counsel, no witnesses, and no evidence offered. All eight were found guilty and sentenced to death. Tokyo confirmed three of the death sentences and, without explanation, ordered that five be commuted to life imprisonment. Three weeks after the court-martial, General Sawada returned to his headquarters, where he was given the record of the trial to review. Sawada put his chop on the record, then went to Nanking, where he protested to the Commanding General of China Forces that the death sentences were too severe. Imperial Headquarters trumped officers in the field, however, and the three Americans were executed. At a 1946 U.S. military commission, General Sawada was convicted of "knowingly, unlawfully and willfully and by his official acts cause eight named members of the United States forces to be denied the status of Prisoners of War and to be tried and sentenced . . . in violation of the laws and customs of war. . . . thereby causing the unlawful death of four of the fliers. . . . "[73] General Sawada was sentenced to be confined for five years.

In the 1948 *Hostages Trial*, a subsequent proceeding at Nuremberg, a U.S. tribunal tried twelve senior Nazi officers, including two Field Marshals. The tribunal's judgment held, "We agree that . . . commanders are responsible for ordering the commission of criminal acts. But the superior commander is also responsible if he orders, permits, or acquiesces in such criminal conduct."[74]

In 1991, in the breakup of the former Yugoslavia, the Prosecution was unable to prove that Yugoslav Lieutenant General Pavle Strugar ordered the bombing of the Croatian port of Dubrovnik, in which a number of noncombatants were killed and wounded and civilian cultural objects were destroyed. It did prove that he failed to stop it when he could have done so. He was convicted on the basis of command responsibility and sentenced to eight years' imprisonment.[75]

Seventh, **an officer may be responsible for violations committed by subordinates pursuant to manifestly illegal orders that he passes on to those subordinates**. The least clear and least exercised route to criminal liability, it is nevertheless a long-observed basis of command responsibility. "When subordinates are confronted with potentially illegitimate orders from their superiors . . . judgments of responsibility become complex, both for subordinates themselves and for outside observers."[76] In the 1945 *Jaluit Atoll* case, Rear

[72] "Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army," Dec. 26, 1945, n.p. On file with author.

[73] U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. V, *Trial of Lieutenant-General Shigeru Sawada and Three Others* (London: U.N. War Crimes Commission, 1948), 1.

[74] *U.S. v. List* ("The Hostage Case"), supra, note 35, at 1298.

[75] *Prosecutor v. Strugar*, IT-01-42-T (31 Jan. 2005).

[76] Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience* (New Haven: Yale University Press, 1989), 209.

Admiral Nisuke Masuda issued an order to summarily execute three captured American aviators who were in the custody of Japanese Navy Lieutenant Yoshimura. The prisoners were handed over to their executioners by Ensign Tasaki, who repeated the Admiral's order. Lieutenant Yoshimura and three warrant officers carried out the unlawful order by shooting and stabbing to death the aviators. Yoshimura and the warrant officers were convicted of murder by a U.S. military commission and sentenced to death by hanging. Ensign Tasaki, who did not participate in the executions but passed on the admiral's patently unlawful order, was sentenced to ten years' confinement, his punishment lighter than the others because of his "brief, passive and mechanical participation . . . "[77]

In *The Hostage* case, the tribunal was reluctant to hold *Generalmajor* Kurt von Geitner, a chief of staff of major Nazi units throughout the war, criminally liable for numerous illegal orders he passed on because he had no command authority. He was acquitted although, by standards that are clearer today than in 1948, there was a basis for his conviction.[78] At the Tokyo International Military Tribunal, Lieutenant General Akira Mutō, chief of staff to General Yamashita, and who, like von Geitner, had no direct command authority, was held liable on the basis of command responsibility.[79]

Liability for passing on unlawful orders expands the concept of *respondeat superior* to staff officers and other subordinate officers in the chain of command who, as in Ensign Tasaki's case, are between the commander who issues the unlawful order and the subordinate who carries it out. For example, staff officers: a battalion operations officer who is told to contact all company commanders in the battalion and advise them that rations are critically short and all prisoners must be "disposed of" so the battalion will have sufficient rations to carry on with the mission. In passing that unlawful order down the chain, the operations officer becomes a principle to the crime of the commander who issued it.

There are limits to liability on the basis of passing on unlawful orders. The tribunal noted in *The High Command Case*:

> Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.[80]

Does the totality of these "routes to trial" mean that a commander is responsible for all that happens or fails to happen on her watch? If a soldier attached to a UN peace-keeping mission kidnaps, rapes, and murders an eleven-year-old girl, is his lieutenant responsible? No. The lieutenant did not know and, absent a pre-act announcement by the soldier, had no way of knowing the criminal intent of his subordinate. The lieutenant could not have reasonably foreseen the criminal act intended and could not be expected to have

[77] *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy*, ("The Jaluit Atoll Case"), U.S. Military Commission, Kwajalein Island, Marshall Islands (Dec. 1945), I *LRTWC* 71–80, at 76.

[78] *U.S. v. List* ("The Hostage Case"), supra, note 35, at 1319.

[79] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (New York: Oxford University Press, 2008), 304.

[80] *U.S. v. von Leeb*, "The High Command Case," supra, note 32, at 510–1.

acted to prevent the subordinate's unforeseeable criminal acts. In such a case, the soldier, alone, is criminally liable for his misconduct. *Respondeat superior* is a broad concept, but its reach is not unreasonable. "It must be accentuated that command responsibility is all about dereliction of duty. The commander is held accountable for his own act (of omission), rather than incurring 'vicarious liability' for the acts . . . of the subordinates."[81]

During the U.S.–Vietnam war, My Lai and many other grave breaches were perpetrated during General William Westmoreland's watch. He was the four-star commander of the Military Assistance Command, Vietnam, with authority over all U.S. military personnel in South Vietnam. Could he have been charged with being a war criminal because of the grave breaches committed while he was in command, similarly to General Yamashita? By no means. General Westmoreland went to great lengths to see that orders were regularly published forbidding acts constituting war crimes. His written orders were republished on a regular basis, reminding members of all the Armed Forces under his command to not become involved in war crimes and that it was an offense to not report such crimes, known or suspected. When he learned of violations, they were prosecuted at court-martial. That is not to say that all Vietnam war crimes were discovered, or were in some cases adequately punished. But General Westmoreland did all that could be done within his authority to prevent, suppress, and punish war crimes. The law of armed conflict asks no more of a commander.

"This principle [of command responsibility] is also applicable to civilian non-military commanders . . . International instruments and case law do not restrict its application to military commanders only but extend it to cover political leaders and other civilian superiors in positions of authority."[82] The International Criminal Tribunal for Rwanda (ICTR) has held, "The crucial question . . . was not the civilian status of the accused, but the degree of authority he exercised over his subordinates. Accordingly, the Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility."[83]

Commanders, be they military or civilian, trained and experienced as they are, rarely need worry about the consequences of their orders because rarely are they of questionable lawfulness. When manifestly unlawful orders are issued, however, the leader risking his career and honor for a perceived *jus in bello* gain will discover the breadth of LOAC/IHL's road to trial.

## 10.4. When Officers Disobey

Officers are no less subject to the requirements of LOAC/IHL obedience – and penalties for disobedience – as are enlisted service members. In his classic work, *The Soldier and the State*, Samuel Huntington notes that obedience to lawful orders is the soldier's paramount duty. "For the profession to perform its function, each level within it must be able to command the instantaneous and loyal obedience of subordinate levels."[84]

[81] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 238.
[82] Kittichaisaree, *International Criminal Law*, supra, note 1, at 251.
[83] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T (21 May 1999), para. 216. To the same effect, several ICTY cases, including: *Prosecutor v. Aleksovski*, IT-95-14/1-A (24 March 2000), paras. 118–9, 133–7.
[84] Samuel P. Huntington, *The Soldier and the State* (Cambridge, MA: Belknap Press of Harvard University, 1957), 73.

What if a military officer receives an order which he or she believes to be unlawful but is expected to lead in executing? Just as an enlisted soldier, he or she must approach the issuing officer for clarification and, if remaining convinced of its unlawfulness, refuse to obey or to require subordinates to obey, and report the unlawful order to a senior officer. Particularly for officers, problems occasionally arise if the order is not manifestly unlawful on its face, but the officer believes it to clearly be an immoral but not necessarily unlawful order.

In 2005, a major in Germany's *Bundeswehr*, the Federal Armed Forces, refused to participate in a military software project that he believed would be used in support of U.S. combat operations in Iraq. He based his refusal on his belief that the conflict was itself illegal. Because he was the commander of the information technology project, his disobedience was significant. Months before his refusal he had contacted an army chaplain and his superior officer about his moral issues with the project, the conflict, and Germany's involvement. Without assurances that his project would not be used in the war, the major would not continue working on it. Assurances were not given, and he was relieved and charged with disobedience. At court-martial, the major was convicted of insubordination and demoted to the grade of captain. On appeal, however, the civilian Federal Administrative Court of Germany (FCA) reversed the military court and upheld the major's position that he did not act unlawfully in refusing to obey the order.

The FCA found it a fundamental right under Germany's Basic Law to disobey certain orders. Using the case as a platform to examine the larger issue of the legality of the US–Iraq conflict, the FCA made an assessment of the conflict in terms of German military law, domestic law, and the UN Charter. It "concluded that the soldier was right in his considerable doubts about the legality of the war against Iraq."[85] The German major's case notwithstanding, American officers, at least, are well-advised to "do not try this at home."

Given a similar case, the American court-martial system, even with its five-civilian-member appellate Court of Appeals of the Armed Forces (CAAF), is unlikely to reach a similar result. In September 1994, U.S. Army Captain Lawrence P. Rockwood, a Tibetan Buddhist, was deployed to Haiti as part of a UN multinational force. He became increasingly disturbed by intelligence reports that, he believed, reflected deplorable conditions in the Haitian National Penitentiary, in Port au Prince. After unsuccessful efforts to engage his unit in efforts to inspect the prison, and after repeated confrontations with his commanding officer about the matter, including orders by the commander directing him to take no action, Captain Rockwood acted on his own. He went to the prison and, with a loaded M-16 rifle, demanded to be allowed to inspect the building. Put off until U.S. authorities could arrive and take him into custody, Captain Rockwood was court-martialed. Contrary to his pleas of not guilty, he was convicted at court-martial of a variety of offenses, including disobedience and conduct unbecoming an officer. On appeal, CAAF, the highest appellate court in the military system, exhibited little sympathy. "Appellant cites us to no legal authority – international or domestic, military or civil – that suggests he had a 'duty' to abandon his post . . . and strike out on his own to 'inspect' the penitentiary. Neither does he suggest any provision of any treaty, charter,

[85] Ilja Baudisch, "International Decisions," 100–4 *AJIL* (Oct. 2006), 911, 913, discussing *Germany v. N*, Decision No. 2 WD 12.04., *Bundesverwaltungsgericht* (German Federal Administrative Court), 21 June 2005, available at: http://www.bverwg.de.

or resolution as authority for the proposition."[86] CAAF affirmed Captain Rockwood's sentence of dismissal from the army and forfeiture of $1,500 pay per month for two months.

Over the years, the Israeli Defense Force has seen many refusals of officers and enlisted personnel to obey orders on the basis of conscience. In 2007, twelve Israeli officers and enlisted men refused to evacuate by force Jewish settlers who had moved to the West Bank city of Hebron without permission. The soldiers were court-martialed.[87] In 2005, hundreds of Israeli soldiers signed declarations that on religious grounds they would refuse to serve if ordered to dismantle Israeli settlements in the Gaza Strip and the West Bank.[88] Many were court-martialed. In 2003, twenty-seven Israeli Air Force pilots, including a brigadier general who had participated in the 1981 Osirak raid (Cases and Materials, Chapter 5), signed a petition vowing that they would not take part in "illegal and immoral" air strikes in Palestinian areas of the West Bank and Gaza Strip. Their commanding officer said, "An officer who decides which mission he will perform and which he will not is in my view an officer morally unfit to command."[89] In 1982, a colonel commanding an armored brigade demanded to be relieved because of his moral objections to the Israeli campaign in West Beirut.[90] The Israeli Defense Force has consistently responded to refusals of orders by officers with courts-martial.

On the other hand, one wonders why so many World War II enemy officers did obey. A few senior German officers, including Field Marshals Erwin Rommel and Georg von Kuechler, refused to obey Hitler's Commando Order directing the summary execution of captured Allied soldiers.[91] Nazi *Generalleutnant* Karl-Wilhelm von Schlieben reportedly disobeyed Hitler's 1944 order to destroy the French port of Cherbourg.[92] "There is reason to suspect that officially recorded history has captured only a small subset of all such incidents [of disobedience],"[93] yet the great preponderance of Nazi officers did obey multiple manifestly unlawful orders.

Guenter Lewy writes, "the principle of unconditional obedience and of complete freedom from responsibility for superior orders has all but disappeared today."[94] All but disappeared, perhaps, but not disappeared completely, and certainly not for officers. In the case of manifestly unlawful orders an officer's duty is clear. Moral issues raised by superior orders are a murkier topic. An objecting officer "must not be obstinate, must give way in marginal controversies, and persist in his case only where his conscientious

[86] *U.S. v. Rockwood*, 52 MJ 98, 112 (CAAF, Sept. 1999).
[87] Ilene R. Prusher, "Soldiers' Refusal to Heed West Bank Evacuation Orders Roils Israel," *The Christian Science Monitor*, Aug. 8, 2007, 1.
[88] Haim Watzman, "At War With Themselves," *NY Times*, May 20, 2005, A25.
[89] Greg Myre, "27 Israeli Reserve Pilots Say They Refuse to Bomb Civilians, *NY Times*, Sept. 25, 2003, A12.
[90] Kelman and Hamilton, *Crimes of Obedience*, supra, note 76, at 75fn.
[91] Paul Christopher, *The Ethics of War & Peace*, 2d ed. (Upper Saddle River, NJ: Prentice Hall, 1999), 143. In his memoirs, Rommel wrote, "We had continually to circumvent orders from the Fuehrer or Duce in order to save the army from destruction." Erwin Rommel, B.H. Liddell Hart, ed., *The Rommel Papers* (London: Collins, 1953), 321. Rommel was forced to commit suicide for his involvement with anti-Hitler officers. After the war, Von Kuechler was sentenced to twenty years' imprisonment by a U.S. tribunal at Nuremberg.
[92] Martin van Creveld, *The Transformation of War* (New York: Free Press, 1991), 89.
[93] Mark J. Osiel, *Obeying Orders* (New Brunswick, NJ: Transaction Publishers, 1999), 313.
[94] Guenter Lewy, "Superior Orders, Nuclear Warfare, and Conscience," in Richard Wasserstrom, ed., *War and Morality* (Belmont, CA: Wadsworth Publishing, 1970), 124.

conviction is fundamentally involved."[95] Even "conscientious conviction" is highly risky. Officers, as well as enlisted personnel, must be wary of looking behind superior orders and hesitant to conclude that a commander's order is manifestly unlawful because it is contrary to a particular subordinate's moral holding. Personal morality and personal political viewpoints can be misread as something more, leading to serious results. Article 90 of the UCMJ prohibits disobeying a superior commissioned officer. The *Manual for Courts-Martial*, in its discussion of Article 90 and the lawfulness of orders, counsels, "An order . . . may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[96] This admonition applies to officers as well as enlisted personnel.

## 10.5. Command Responsibility and *Respondeat Superior* Today

Today, command responsibility and *respondeat superior* have a wider scope than sixty years ago when the concepts were articulated in the *Yamashita* tribunal decision. Like much of LOAC/IHL, the "knew or should have known" standard continues to evolve. Today, for those countries that have ratified it, it is reflected in Additional Protocol I, which addresses *respondeat superior*: Article 86.1 covers LOAC breaches resulting from a commander's inaction following breaches, and Article 86.2 addresses the responsibility of commanders who do not take measures to prevent foreseeable violations or take action regarding violations already committed by subordinates:

> The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances at that 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.[97]

Article 86.2 deals with a commander's *failure* to act. "[T]he responsibility of those who have refrained from taking the requisite measures to prevent or repress [war crimes], has been dealt with explicitly only since the end of the First World War."[98] Although the Article speaks only of "breaches," the term encompasses grave breaches, as well.[99] To establish a commander's legal responsibility it must be established that the individual failed to act when he had a duty to do so. There must be a direct link between the superior and the offending subordinate. A difficulty with "this provision perhaps consists in the difficulty of establishing intent (*mens rea*) in case of a failure to act, particularly in the case of negligence."[100] "Every case of negligence, however, is not necessarily criminal. It appears that the drafters of the Additional Protocol intended a *mens rea* that approached recklessness or willful blindness, rather than mere negligence. The drafters wanted to ensure that a superior who 'deliberately wishes to remain ignorant' would not

[95] Nico Keijzer, *Military Obedience* (The Netherlands: Sijthoff & Noordhoff, 1978), 279.
[96] *Manual for Courts-Martial, United States (2008 Edition)*, at IV-19.
[97] 1977 Additional Protocol I, Art. 86.2.
[98] Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds., *Commentary on the Additional Protocols* (Geneva: ICRC/Martinus Nijhoff, 1987), 1007.
[99] Id., at 1010–11.
[100] Id.

avoid criminal liability."[101] Deliberate ignorance is a continuing concern in *respondeat superior* cases.

> What is the position if the superior concerned persists in maintaining that he was not aware of the breaches committed or of information enabling him to conclude that they had been committed or were going to be committed, and if no proof can be furnished to the contrary? It is not possible to answer this question in the abstract . . . It is not impossible for a superior actually to be ignorant of breaches committed by his subordinates because he deliberately wishes to remain ignorant.[102]

In such cases it becomes a matter of proof for the prosecution, involving the particular circumstances, the location of the commander, his statements to others or their lack, the state of his communications, whether the subordinate was a member of the commander's unit or of an attached unit, the repetitive or singular nature of the breach, and so forth. These are essentially the issues of fact employed by the *Yamashita* tribunal prosecutors. Article 82, requiring legal advisors on the staffs of military commanders to advise them on the application of LOAC, makes it even more difficult for commanders to plead ignorance or oversight.

Article 87.1 of Protocol I is the reciprocal of Article 86.2, and the two provisions should be read together. Article 87.1 addresses the commander's duty to *take* action: "The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command . . . to prevent and, where necessary, to suppress and report . . . breaches of the Conventions and of this Protocol."

Who is a "commander"? For purposes of this Article, "commander" is intended "to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command'. This is quite clear . . . As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier . . . "[103] The Article enumerates several duties: to prevent breaches, to suppress or minimize them when they have been committed, and to report violations.

In identical terms, Article 7.3 of the Statute of the ICTY and Article 6.3 of the ICTR recite the von Leeb–List standard: "Individual Criminal Responsibility: The fact that any of the acts referred to in . . . the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[104]

The command responsibility provision of the Statute of the International Criminal Court (ICC), Article 28, although generally continuing the von Leeb–List standard, is more detailed than the ICTY and ICTR provisions, reducing the vagaries of judicial interpretation. For the first time, in ICC practice command responsibility is applicable

[101] Arthur T. O'Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles," 20–1 *Am. U. Int'l L. Rev.* (2004), 71, 80.

[102] Sandoz, Swinarski, and Zimmerman, *Commentary on the Additional Protocols*, supra, note 98, at 1014.

[103] Id., at 1019.

[104] *Prosecutor v. Nahimana, et al.*, ICTR-99–52-A (28 Nov. 2007), para. 625, taking a minority view, suggests otherwise. It holds that, while *de jure* authority implies the ability to prevent or punish, *de jure* authority "is neither necessary nor sufficient to prove effective control."

to civilian superiors (the "person effectively acting as a military commander"), as well as military commanders, and the rules for the two are slightly different.

> In order to incur liability, a military commander must know or 'should have known', whilst a civilian superior must either have known or 'consciously disregarded information which clearly indicated' that subordinates were committing or about to commit crimes. The military commander can be prosecuted for what amounts to negligence ('should have known'). Guilt of a civilian superior . . . however, must meet a higher standard. It is necessary to establish that the civilian superior had actual or 'constructive' knowledge of the crimes being committed.[105]

To establish the civilian superior's requisite *mens rea* it must be shown not only that he or she had information regarding the unlawful acts of subordinates, but that the civilian superior consciously disregarded that information. This is a somewhat higher standard than is required for military superiors.

The ICC military commander's standard is more confining than that of Protocol I. Protocol I, Article 86.2, enables the charging of commanders "if they knew, or had information which would have enabled them to conclude" that a violation was committed. The ICC's Article 28 (a)(i), in contrast, enables charging if the commander "knew or, owing to the circumstances at the time, should have known . . . " of violations. The ICC formulation, "owing to the circumstances" is broader than "or had information." A military commander might argue that she did not objectively "know" of violations – the Protocol term; but she might be unable to convincingly argue that "owing to circumstances" – the ICC term – she was unaware. Future cases will reveal whether conviction or acquittal will turn on such a fine point.

What is already clear are the three conditions that customary international law requires to be proven for a conviction based on command or superior responsibility. The necessary conditions are well-established in ICTY jurisprudence, and will likely be followed in ICC litigation. They are, first, the existence of a superior–subordinate relationship between the commander (military) or superior (civilian) and the accused individuals[106]; second, the commander or superior knew or had reason to know that the subordinate had committed a violation or was about to do so[107]; and, third, the superior failed to take necessary and reasonable steps to prevent the violation or to punish the offender.[108] Absence of proof of any one condition is sufficient for acquittal.[109]

Mixed tribunals ("internationalized domestic tribunals"), established by the UN in East Timor and Sierra Leone, also have jurisdiction over war crimes. Their regulations contain provisions allowing for prosecution on the basis of command responsibility/*respondeat superior* doctrine that mirrors the traditional von Leeb–List standard.[110]

[105] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 85.

[106] *Prosecutor v Delalić* (aka *Mucić*/ aka "Čelebici"), IT-96-21-A (20 Feb. 2001), paras. 189–98, 225–6, 238–9, 256, and 263; *Prosecutor v Aleksovski*, supra, note 83, at paras. 72, 76.

[107] *Delalić*, id., at paras. 196–7.

[108] Id., at para. 226; *Prosecutor v. Krnojelac*, IT-97-25-T (15 March 2002), para. 95.

[109] For an excellent review of ICTY case law on the three conditions, see Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 298–310.

[110] Suzannah Linton, "New Approaches to International Justice in Cambodia and East Timor," 845 *Int'l Rev. of the Red Cross* (2002), 93–119.

Various states have also enacted domestic versions of command responsibility/*respondeat superior* laws, most of them more or less approximating the traditional standard.[111] Civil cases in domestic U.S. courts have been decided on the basis of command responsibility, as well.[112]

### 10.5.1. *Recent Evolutionary Changes*

In command responsibility and *respondeat superior* cases, the most troublesome issue has always been the commander's state of mind – his *mens rea*, or guilty mind, or its absence. Did the commander know of his troops' violations, or was he unaware? Was he willfully unaware, or did he honestly not know of his subordinates' bad acts? After World War II, there was criticism that some tribunals, particularly the *Yamashita* tribunal, employed an overly broad interpretation of *mens rea* to find a former enemy commander criminally liable. No less a personage than Brigadier General Telford Taylor, Nuremburg International Military Tribunal Chief Prosecutor, compared war crime prosecutions in the European Theater, with their inconsistent results, to prosecutions in the Pacific. Taylor wrote:

> American Regular Army attitudes toward their defeated German compeers were remarkably inconsistent. Clarity was by no means served by the fact that . . . in the Philippines, five Regular Army U.S. generals, at the behest of General Douglas MacArthur, were trying General Tomoyuki Yamashita for failing to prevent his troops from massacring numerous Filipino civilians. There was no specific allegation that Yamashita had ordered these atrocities, or even that he knew at the time that they were in process, or that he could have stopped them had he known. On such a record, the indictment of a German general, much less the conviction and execution imposed on Yamashita, would have been highly unlikely. Apparently, in old-line military circles yellow generals did not rank as high in the scale of virtue as Nordic white ones.[113]

That may be granting Yamashita's conviction too great a moral significance, but it is representative of opinion in some military circles. In many World War II cases the required *mens rea* could be presumed from the circumstances of the accused officers' case. Times change, law evolves.

> The ICTY first [in 1998], and then also the ICTR [in 2003*], opted for a more careful approach to this element of command responsibility. In *Delalić*, the ICTY concluded that the 'knew or had reason to know' standard set in Article 7(3) of the [ICTY] Statute must be interpreted as requiring the commander: (i) to have 'actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing

[111] Germany's domestic law, for example, divides the commander's conduct into three categories of liability, two relating to violations of duty to supervise subordinates, the third to failures to report violations. Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 206–7.

[112] E.g., *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir., 1995); and, *Ford v. Garcia*, 289 F. 3d 1283 (11th Cir., 2002).

[113] Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred Knopf, 1992), 239.

* *Prosecutor v. Kajelijeli*, ICTR-98-44A-T (1 Dec. 2003), para. 776. "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."

> or about to commit crimes . . . ' or (ii) to have 'in his possession information of a nature, which at least, would put him on notice of the risk of such offenses . . . '[114]

*Delalić* represented a major shift.[115] The test employed in the much-criticized 1971 *Medina* case is now, in ICTY and ICTR jurisprudence, the law of armed conflict. The "duty to know," raised in post–World war II tribunals, was explicitly rejected. Moreover, the requirement of actual knowledge makes it impossible for prosecutors to assert the "should have known" test.

The ICTY and ICTR also have revisited the issue of the superior–subordinate relationship. In virtually all cases prior to the 1993 formation of the ICTY, the hierarchical military positions of the individuals – captain to lieutenant, major to sergeant, and so forth – allowed an inference that the superior had authority and command of the subordinate. The ICTY and ICTR reassessed that formal assessment, instead looking for effective control of a subordinate.

> [A] position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach . . . [116]

"[T]he accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. [Effective control will] almost invariably not be satisfied unless such a relationship of subordination exists."[117]

To be considered the superior of an offending subordinate, the prosecution must prove that the superior exercised effective control over the accused individual. In ICTY jurisprudence, effective control is indicated by an ability to prevent or punish. "According to the Appeals Chamber, the ability to initiate criminal investigations against the perpetrators may be an indicator of effective control."[118]

There are indeed unusual situations in which seniority in military rank or grade is not determinative of effective control. Imagine an intelligence specialist of the rank of staff sergeant who is attached to a patrol led by a sergeant. Although senior in rank, the intelligence specialist is not an infantryman and may not be trained to lead patrols, so he would not be the patrol's leader. While on patrol, if the patrol leader directs the intelligence specialist to commit a war crime, such as burning a dead enemy body, and the intelligence specialist does so, the patrol leader may be held criminally liable as

[114] Beatrice I. Bonafé, "Finding a Proper Role for Command Responsibility," 5–3 *J. of Int'l Crim. Justice* (July 2007), 599, 606.

[115] *Prosecutor v. Delalić* (aka *Mucić*/ aka "Čelebici"), IT-96-21-T (16 Nov. 1998), para. 386; " . . . [Regarding the standard of actual knowledge] in the absence of direct evidence of the superior's knowledge of the offenses committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence." The *Blašić* Trial Chamber disagreed with *Delalić* regarding the commander's required knowledge, a disagreement reversed by the Appeals Chamber. *Prosecutor v. Blašić*, IT-95-14-A (29 July 2004), para. 62.

[116] Id., *Delalić*, at para. 370.

[117] *Prosecutor v. Halilović*, IT-01-48-A (16 Oct. 2007), para. 59.

[118] Helen Brady and Barbara Goy, "Current Developments in the Ad Hoc International Criminal Tribunals," 6–3 *J. of Int'l. Crim. Justice* (1998) 569, 576, citing *Halilović*, id., at para. 182.

the superior, despite his junior rank vis-a-vis the intelligence specialist. (The specialist, too, will be disciplined for obeying the manifestly unlawful order.) This change in approach focuses on the conduct of the accused, rather than on his relationship with the perpetrator.

What is the effect of the *Delalić* opinion in U.S. military courtrooms? First, there rarely is a trial of a U.S. commander for command responsibility–based charges. Beyond that, ICTY opinions may be persuasive, but are certainly not binding, in U.S. courts. However, as seen in the *Medina* trial, the elements of proof required for a conviction of a commander as an aider or abettor effectively incorporate the requirement of *Delalić*. The United States may already be there.

## 10.6. Summary

Commanders are liable for the unlawful battlefield acts of which they know or should know of their subordinates. The commander's liability is not that of an aider and abettor. Instead, it is grounded in his own negligence in acting or not acting in regard to the subordinate's criminal acts; the commander either failed to anticipate the criminality when she possessed specific facts that should have led her to act, or she failed to prevent criminal acts of which she knew or, under the circumstances, should have known, or she failed to take corrective action as to crimes already committed. Today, the traditional formulation, reached through a series of trials of commanders starting after World War II, with the *Yamashita* tribunal, is customary law. It is a standard that is enforceable even if it was not codified.

Every military leader knows that with authority comes responsibility. The ambit of command responsibility and *respondeat superior* is particularly broad. It reaches commanders who personally violate LOAC, who order it violated, who fail to suppress – punish – past violations, who incite violations, who fail to control troops who commit violations, who acquiesce in the violations of subordinates, and who knowingly pass illegal orders on to subordinates. Of course, subordinates who execute manifestly illegal orders also remain liable for their unlawful actions in carrying out manifestly unlawful orders.

In most jurisdictions, a conviction of a military commander or a civilian superior requires proof of three elements: a superior–subordinate relationship, that the commander/superior knew or had reason to know that the subordinate had committed a crime or was about to, and that the commander/superior failed to take necessary and reasonable steps to prevent the crime or, if already committed, to punish the violator. No commander will be tried for subordinates' criminal acts of which he had no knowledge, actual or constructive, although the issue of knowledge may always be contested.

In U.S. military practice, based on the *Medina* precedent and suggested by ICTY jurisprudence, the standard for conviction of a superior, arguably, is now actual knowledge. Presumptive knowledge on a "should have known" basis will no longer suffice. This standard is in keeping with emerging international jurisprudence – although no case law has been located that supports those positions, a significant caveat.

As important as command responsibility/*respondeat superior* is in LOAC/IHL, it is "one of the forms of liability that is least likely to lead to successful convictions . . . Of the 99 accused who have faced trial before the ICTY and the ICTR [as of early 2007], only 54

were prosecuted on a theory of command responsibility and only 10 have properly been convicted."[119] Those convictions came in cases involving traditional military superior–subordinate contexts.

## CASES AND MATERIALS

### YAMASHITA V. STYER

327 U.S. 1; 66 S. Ct. 340 (4 Feb. 1946). Footnotes omitted.

***Introduction.*** *Upon his conviction by military tribunal in Manila, the Philippines, General Tomoyuki Yamashita petitioned the Supreme Court of the United States for writs of habeas corpus and prohibition. The Court did not review either the facts or the military tribunal's conclusions of law. The Court denied the petitions.*

*In discussions of the Yamashita case, the dissent of Justice William Francis (Frank) Murphy is often cited. Murphy was no stranger to high-profile contested cases or to the Philippines. Early in his legal career, Justice Murphy had been an Assistant U.S. Attorney. In the 1930s he was Governor-General of the Philippines, then U.S. High Commissioner of the Philippines. Just prior to his appointment to the Supreme Court bench, Murphy was the Attorney General of the United States. Although much of his dissent relates to other matters, given his background, Justice Murphy's comments, including those relating to command responsibility, bear strong consideration.*

The significance of the issue facing the Court today cannot be overemphasized. . . . The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . . No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence, and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed . . .

[119] Bonafé, "Finding a Proper Role for Command Responsibility," supra, note 114, at 602.

That there were brutal atrocities inflicted upon the helpless Filipino people, to whom tyranny is no stranger, by Japanese armed forces under the petitioner's command is undeniable. Starvation, execution or massacre without trial, torture, rape, murder, and wanton destruction of property were foremost among the outright violations of the laws of war and of the conscience of a civilized world. That just punishment should be meted out to all those responsible for criminal acts of this nature are also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals. . . .

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance . . . Otherwise stark retribution will be free to masquerade in a cloak of false legalism. . . .

. . . [R]ead against the background of military events in the Philippines . . . these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part . . .

. . . . But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the 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 whether he may be charged with personal responsibility for his failure to take such measures when violations result . . .

. . . [T]he 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.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." . . .

These provisions plainly imposed on petitioner . . . 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 . . .

. . . There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control . . . in the circumstances.

***Conclusion.*** *In reading Justice Murphy's dissent, one should remember that it was a dissent in a 6–2 decision. The majority included Hugo Black, Felix Frankfurter, and William O. Douglas, as experienced and learned jurists as Justice Murphy. (Justice Robert Jackson, on a year's leave from the Court while acting as Chief Prosecutor of the Nuremberg International Military Tribunal, took no part in the decision.)*

*Justice Murphy's first paragraph is in error when he asserts that there is no precedent for charging General Yamashita. This chapter has related several such precedents, although none are precisely on point in that they do not find guilt for a failure to control subordinate troops. In that regard, Yamashita was indeed the groundbreaking case that established a principle sometimes encountered even today.*

*Is it unreasonable to hold a commander responsible for the widespread misconduct of his or her subordinates? If not the commander, who should answer for an epidemic of war crimes in which specific actors are unidentified and unknowable? Should no one except the actual perpetrators be held accountable for gross indiscipline in such circumstances? Would that approach result in no charges, at all? Is a commander responsible for the conduct of his troops, or is he not? If a unit excels, who is awarded the medal – each stellar subordinate or the commander? If a unit fails in combat, are the troops responsible, or is the commander accountable? How far up – or down – the chain of command should one look?*

## THEATER JUDGE ADVOCATE'S REVIEW: THE UNITED STATES V. GENERAL TOMOYUKI YAMASHITA[120]

***Introduction.*** *A viewpoint different than that of Justice Murphy's is found in the U.S. Army's review of the Yamashita trial proceedings. Under World War II legal procedure, the senior military lawyer for the commander who initiated a court-martial or military tribunal, in this case the Theater Judge Advocate, was required to review the verbatim record of the proceedings to confirm the legality of the trial and the propriety of the findings. That review would be approved or disapproved by the officer who ordered the trial held, in this case General Douglas MacArthur.*

*In this extract from the review, the charge-by-charge review of the evidence is deleted, to focus on the reviewing officer's legal assessment of the accused's command responsibility.*

GENERAL HEADQUARTES
UNITED STATES ARMY FORCES, PACIIFC
OFFICE OF THE THEATER JUDGE ADVOCATE

JA 201-Yamashita, Tomoyuki — A.P.O. 500,
General, Imperial Japanese Army — 26 December 1945

SUBJECT: Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army.

TO: The Commander-in-Chief, United States Army Forces, Pacific, APO 500.

[120] On file with author. Citations and references to transcript pages omitted.

3.a. . . . . The prosecution introduced the following evidence on the issue of the direct responsibility of accused as distinguished from that incident to mere command. Accused testified that he had ordered the suppression or "mopping up" of guerrillas. About the middle of December 1944, Colonel Nishiharu, the Judge Advocate and police officer of the 14th Army Group, told Yamashita that there was a large number of guerrillas in custody and there was not sufficient time to try them and said that the Kempei Tai would "punish those who were to be punished." To this Yamashita merely nodded in apparent approval. Under this summary procedure over 600 persons were executed as "guerrillas" in Manila . . . In that same month, by a written order, Yamashita commended the . . . Kempei Tai garrison for their fine work in "suppressing guerrilla activities." The captured diary of a Japanese warrant officer assigned to a unit operating in the Manila area contained an entry dated 1 December 1944, "Received orders, on the mopping up of guerrillas last night . . . it seems that all the men are to be killed . . . Our object is to wound and kill the men, to get information and to kill the women who run away."

Throughout the record, evidence was presented in the form of captured documents and statements of Japanese made in connection with the commission of atrocities, referring to instructions to kill civilians . . .

The witness Galang testified that he was present and overheard a conversation between Yamashita and Ricarte, in December 1944. The conversation was interpreted by Ricarte's 12 year old grandson, Yamashita speaking Japanese which the witness did not understand and the interpreter translating into Tagalog which the witness did understand. When asked by Ricarte to revoke his order to kill all the Filipinos, Yamashita became angry and spoke in Japanese . . . "The order is my order. And because of that it should not be broken or disobeyed . . . " (Note: The defense introduced Bislummo Romero, the 13 year old grandson of Ricarte, who said he had never interpreted between his grandfather and Yamashita, and specifically denied interpreting the conversation testified to by Galang.)

. . . . Under this directive [Instruction on Rules of Evidence for Military Commissions, promulgated by General MacArthur's headquarters], the commission accepted hearsay testimony, ex parte affidavits, reports of investigation, official motion pictures and documents which ordinarily could not have been received by a court-martial but which, in the mind of the commission, had probative value. This method of procedure is assigned as error but this contention is without merit. It has long been recognized that military commissions are not bound by ordinary rules of evidence but . . . may prescribe their own rules so long as they adhere to the elementary principles of fairness inherent in Anglo-Saxon procedure . . . [T]he procedure in the instant case is in the main the same as that followed in the celebrated Saboteur Case (Ex parte Quirin 317 US 1), the legality of the trial in which was upheld by the Supreme Court. . . .

. . . . The evidence of the atrocities alleged in the ninety different specifications on which proof was adduced is clear, complete, convincing and, for the most part, uncontradicted by the defense . . .

The only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility. In the first place the atrocities were so numerous, involved so many people, and were so widespread that accused's professed ignorance is incredible. Then too, their manner of commission reveals a striking similarity of pattern throughout . . . Almost uniformly the atrocities were committed

under the supervision of officers or noncommissioned officers and in several instances there was direct proof of statements by the Japanese participants that they were acting pursuant to orders of higher authorities, in a few cases Yamashita himself being mentioned as the source of the order . . . All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval. Evidence in the form of captured diaries and documents also indicates that the executions of civilians were ordered by higher command. For example, captured notes and instructions by Colonel Fujishigo, one of accused's subordinates, contained the following: "Kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the Emperor, even women and children." . . . This group was commanded by a major general and the source of the order therefore comes high in the chain of command, close to the accused himself . . . [T]he conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators. . . .

RECOMMENDATIONS: It is accordingly recommended that the sentence be confirmed and ordered executed under the supervision of and at a time and place to be designated by the Commanding General, United States Army Forces Western Pacific.

***Conclusion.*** *Do you find the Review of the record of trial legally persuasive? It is admittedly unfair to form a responsible opinion from a brief and selective extract, but it provides the flavor of the Yamashita Review. How do you view the standard of admissibility of hearsay evidence, which is not unlike the standard initially employed in proceedings against Guantanamo Bay detainees in the "war on terrorism"? What of a twelve-year-old "interpreter" whose hearsay account is later denied by its maker? Should direct evidence of guilt be required for conviction? Should one consider the Theater Judge Advocate's conclusionary statements as reflecting evidence admitted at trial or as opinion?*

*From a reading of these selective review extracts one suspects that firm direct evidence of Yamashita's guilt was thin. Yet, should a commander of troops who committed so many atrocities over a lengthy period be permitted to simply say, "I didn't know"? Military commissions have historically been summary in their procedure and permissive in terms of admissible evidence. Were this not the first command responsibility case involving specific crimes by specific units commanded by a particular officer there would be little question of a guilty verdict. As the first such case in modern times, however, the prosecution was necessarily finding its way. Would that justify a conviction based on questionable evidence?*

*In 1945, the international community had little time for such questions. The accused were only Nazis and Japanese, and everyone knew their record of wartime conduct. Who cared about legal niceties, as long as they were hammered? It is a different world today. When ongoing combat is televised in real time, and non-governmental organizations watch courts-martial on CNN, or in person, military commissions, with their relaxed evidentiary standards and ultrastreamlined procedure may no longer be satisfactory prosecutorial vehicles.*

*U.S. Army Captain Frank Reel, a Boston labor lawyer until the war began, was assigned to Yamashita's defense team. Until his death in 2000, he remained convinced of Yamashita's wrongful conviction. Captain Reel wrote, "We have been unjust, hypocritical, and vindictive. We have defeated our enemies on the battlefield, but we have let their spirit triumph in our*

*hearts."*[121] *Perhaps. Passion certainly is no excuse for injustice. Still, Allied veterans of the Pacific war, and Filipino survivors of the Japanese occupation of Manila, might see General Yamashita's conviction differently than did Captain Reel. Not all war crime cases are as morally clear as we would wish.*

## PROSECUTOR V. HALILOVIĆ

IT-01-48-T (16 November 2005). Footnotes omitted.

***Introduction.*** *The Halilović judgment articulates the legal basis, under the ICTY Statute, of a commander's culpability – negligent performance of duty, rather than as an aider and abettor of the criminal actor. Although individuals not before the court are not bound by an ICTY judgment, there is little basis for disagreeing with it.*

54. The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighted against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offenses committed . . .

## "THE ĈELEBIĆI CASE" PROSECUTOR V. DELALIĆ, ET AL.

IT-96-21-T (16 November 1998). Footnotes omitted. All italics as in original.

***Introduction.*** *In this extract from the* Delalić *opinion, the Trial Chamber holds that Article 86 of the ICTY's Statute did not intend that a commander's negligence be an entirely objective standard. That approach, the Trial Chamber writes, rejected "knew or should have known" language. Accordingly, the prosecution must prove that the accused possessed specific information putting him/her on notice of the violations of subordinates.*

385. The Commentary to the Additional Protocols, on which the Prosecution relies, also cites the *High Command* case and the judgment of the Tokyo Tribunal, neither of which, however, make a clear ruling on the existence of any such general rule or presumption. While, in the *High Command* case, the tribunal held in relation to the accused von Kuechler that the numerous reports of illegal executions which were made to his headquarters "must be presumed" to have been brought to his attention, this case offers no support for the existence of a more general rule of presumption such as that proposed by the Prosecution. In contrast, the tribunal in that case explicitly rejected the argument that, in view of the extent

[121] A. Frank Reel, *The Case of General Yamashita* (New York: Octagon Books, 1971), 247.

of the atrocities and the communications available to them, it could be held that all the accused must have knowledge of the illegal activities carried out in their areas of command. The tribunal declared that no such general presumption could be made and held that the question of the knowledge of the commanders had to be determined on the basis of the evidence pertaining to each individual defendant.

386. It is, accordingly, the Trial Chamber's view that, in the absence of direct evidence of the superior's knowledge of the offenses committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence. In determining whether a superior, despite pleas to the contrary, in fact must have possessed the requisite knowledge, the Trial Chamber may consider, *inter alia*, the following indicia . . .

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

b. "Had reason to know"

387. Regarding the mental standard of "had reason to know", the Trial Chamber takes as its point of departure the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offenses are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.

388. In this respect, it is to be noted that the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates. Indeed, from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defense if, in the words of the Tokyo judgment, the superior was "at fault in having failed to acquire such knowledge".

389. For example, in the *Hostage* case the tribunal held that a commander of occupied territory is

> charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. *If he fails to require and obtain complete*

> *information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.*

Likewise, in the trial against Admiral Toyoda, the tribunal declared that the principle of command responsibility applies to the commander who "*knew, or should have known, by use of reasonable diligence*" of the commission of atrocities by his subordinates. Similarly, the tribunal in the *Pohl* case, describing Mummenthey's position as one of an "assumed or *criminal* naivete", held that the latter's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction did not exonerate him, adding that "*it was his duty to know*". Again, in the *Roechling* case, the court, under the heading of "The defence of lack of knowledge", declared that:

> [n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.

393. An interpretation of the terms of this provision in accordance with their ordinary meaning thus leads to the conclusion . . . that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates . . . The Trial Chamber thus makes no finding as to the present content of customary law on this point. It may be noted, however, that the provision on responsibility of military commanders in the Rome Statute of the International Criminal Court provides that a commander may be held criminally responsible for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control.

(d) *Necessary and Reasonable Measures*

394. The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offenses by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.

395. It must, however, be recognized that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense . . . [W]e conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. . . .

***Conclusion.*** *The exact contours of the information required to put a commander on notice are not specified in the opinion and probably could not be. As the Trial Chamber says in paragraph*

*394, regarding evaluating the actions taken by a commander, the information requirement is inextricably linked to the facts of each particular situation.*

*Given the factors listed in paragraph 386 that would put a commander on notice, would they indicate guilt or innocence, if applied in General Yamashita's case? In Captain Medina's case?*

## PROSECUTOR V. BLAŠKIĆ

IT-95-14-T (3 March 2000). Footnotes omitted.

***Introduction.*** *In 1992, in central Bosnia, the accused, General Tihomir Blaškić, commanded the HVO – the Croatian Defence Council – which consisted of eleven regular brigades. Among other grave breaches, he was charged with knowing that his subordinates were planning war crimes, including the murder of Muslim noncombatants and, without military necessity, the destruction of noncombatant property, including Muslim churches and homes, and not taking steps to prevent such acts. The Trial Chamber's opinion is instructive in addressing who a "superior" is, the commander's duty to know, what constitutes measures to prevent or punish war crimes, and what is meant by the term "prevent or punish."*

*Significantly, however, the Blaškić judgment disagrees with the Delalić judgment with regard to the scope of the commander's knowledge requirement.*[122] *Drawing on post–World War II case law, Blaškić imposes an affirmative duty on commanders to investigate the conduct of subordinates, regardless of whether they have information arousing suspicion. Compare paragraph 322 with Delalić paragraph 393, which requires "specific information" for a commander's liability to attach.*

322. From this analysis of jurisprudence, the Trial Chamber concludes that after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if "he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction.

331. Lastly, the Trial Chamber considers that the findings of the Israeli Commission of Inquiry responsible for investigating the atrocities perpetrated in the Shatila and Sabra refugee camps in Beirut in 1982 constitute further evidence of the state of customary international law. With respect to the responsibility of the Chief of Staff of the Israel Defence Forces, the Commission held that his knowledge of the feelings of hatred of the particular forces involved towards the Palestinians did not justify the conclusion that the entry of those forces into the camps posed no danger. Accordingly,

> The absence of a warning from experts cannot serve as an explanation for ignoring the danger of a massacre. The Chief of Staff should have known and foreseen – by virtue of common knowledge, as well as the special information at his disposal – that there was a possibility of harm to the population in the camps at the hands of the Phalangists. Even if the experts did not fulfil their obligation, this does not absolve the Chief of Staff of responsibility.

The Commission clearly held that the applicable standard for imputing responsibility is negligence.

[122] See Jenny S. Martinez, "Understanding Mens Rea in Command Responsibility, 5–3 *J. of Int'l Criminal Justice* (July 2007), 638–57, for a full discussion of this distinction.

> If the Chief of Staff did not imagine at all that the entry of the Phalangists into the camps posed a danger to the civilian population, his thinking on this matter constitutes a disregard of important considerations that he should have taken into account. [ . . . ] We determine that the Chief of Staff's inaction [ . . . ] constitute[s] a breach of duty and dereliction of the duty incumbent upon the Chief of Staff.

332. In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know . . .

d) *Necessary and Reasonable Measures to Prevent or Punish*
   i) *Arguments of the Parties*

333. The Prosecution put forth several measures which a commander can take in order to discharge his obligation to prevent offences from being committed. Accordingly, the exercise of effective command and control through the proper and diligent application of discipline is a common thread. The duty to punish entails the obligation to establish the facts, to put an end to the offences and to punish. "Necessary measures" are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time. "Reasonable" measures are those which the commander was in a position to take in the circumstances prevailing at the time. The lack of formal legal jurisdiction does not necessarily relieve the superior of his criminal responsibility. If subordinates act pursuant to criminal orders passed down from higher up in the chain of command the commander remains under an obligation to take all measures within his power. . . .

   ii) *Discussion and Conclusions*

335. The Trial Chamber has already characterized a "superior" as a person exercising "effective control" over his subordinates. In other words, the Trial Chamber holds that where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior. Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator . . . [T]his implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.

336. Lastly, the Trial Chamber stresses that the obligation to "prevent or punish" does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.

***Conclusion.*** *General Blaškić was convicted of nineteen various charges and sentenced to forty-five years' confinement, reduced on appeal to nine years' confinement.*[123]

[123] *Prosecutor v. Blaškić*, IT-95-14-A (29 July 2004).

*Must a commander comply with the "failure to investigate" liability standard of the* Blaškić *judgment or with the* Delalić *judgment's "only if you have specific information" standard of culpability? The question so far remains unresolved in the ICTY, suggesting that the prudent commander should comply with the higher "failure to investigate" standard.*

## PROSECUTOR V. HADŽIHASANOVIĆ

IT-01-47-T (15 March 2006). Footnotes omitted.

***Introduction.*** *During the armed conflicts in the former Yugoslavia (1991–2001), in 1993, Brigadier General Enver Hadžihasanović was appointed to the Joint Command of the Army of the Federation of Bosnia and Herzegovina (ABiH). In this extract from the ICTY Trial Chamber's judgment, the Chamber differentiates between war crimes "disciplinary" measures – administrative punishments like negative service record entries, poor efficiency reports, or other nonjudicial measures that might be taken by a local commander, and "criminal" measures – prosecution at a court-martial or civilian criminal trial. Here, the Trial Chamber is considering the accused's response to reports of beatings and the murder of a prisoner at an ABiH confinement facility known as "the Furniture Salon."*

1770. [I]n response to his report of 18 August 1993, Fehim Muratović spoke with the Accused Hadžihasanović about how two soldiers beat six prisoners of war at the Furniture Salon and, on that occasion, the Accused Hadžihasanović informed him that he was satisfied with the measures taken against those two 307th Brigade soldiers.

1772. . . . [A]fter the alleged incidents there was no investigation or criminal prosecution of the perpetrators of those crimes.

1773. Sead Zerić, Travnik District Military Prosecutor . . . stated that he never received a criminal complaint alleging that ABiH soldiers killed or mistreated prisoners of war or civilian detainees in his zone of responsibility . . .

1776. On the basis of the evidence, the Chamber is convinced beyond a reasonable doubt that following the mistreatment of six prisoners of war at the Furniture Salon, and the murder of one of them, Mladen Havranek, the 3rd Corps initiated no investigation or criminal proceedings against the perpetrators of those acts. The Chamber is, however, convinced beyond a reasonable doubt that the 307th Brigade took disciplinary measures against them and that the Accused Hadžihasanović was aware of those measures . . . [T]he measures taken after the alleged incidents were disciplinary in nature.

1777. The Chamber considers that the exercise of disciplinary power to punish the crimes of murder and mistreatment of prisoners of war is not sufficient punishment of the perpetrators of those crimes. The Chamber cannot overemphasize that in international law, a commander has a duty to take the necessary and reasonable measures to punish those who violate the laws or customs of war. Faced with the crimes of murder and mistreatment committed in a detention location controlled by his troops . . . the Accused Hadžihasanović could not consider as acceptable punishment the disciplinary sanction of a period of detention not exceeding 60 days. He had the duty to take specific measures to ensure that the perpetrators were prosecuted . . . [A]lthough he knew that his subordinates had committed the crimes of

murder and mistreatment against six prisoners of war at the Furniture Salon, the Accused Hadžihasanović failed in his duty to take the appropriate and necessary measures to punish the perpetrators.

1778. [T]he basis of a commander's duty to punish is to create and maintain an environment of discipline and respect for the law among those under his command. By failing to take the appropriate measures to punish the most serious crimes, a commander adopts a pattern of conduct which may in fact encourage his subordinates to commit further acts of mistreatment and, as a result, may entail his responsibility.

1779. In this case, by failing to punish appropriately the members of the 307th Brigade who committed the crimes of mistreatment and murder at the Furniture Salon, the Accused Hadžihasanović created a situation which encouraged repeated commission of similar criminal acts, not only at the Furniture Salon but also in all of the other detention locations controlled by the members of the 307th Brigade. . . .

1780. Consequently, the Chamber is of the opinion that the Accused Hadžihasanović must be held criminally responsible . . . for the cruel treatment of six prisoners of war committed at the Furniture Salon on 5 August 1993, for the murder of Mladen Havranek on 5 August 1993, and for the mistreatment committed after 18 August 1993 . . .

***Conclusion.*** *The Trial Chamber sentenced Hadžihasanović to imprisonment for five years. On appeal, the Appeals Chamber, although not disagreeing with the law or facts asserted by the Trial Chamber, found portions of the Trial Chamber's judgment unsupported by the evidence. With regard to the failure of General Hadžihasanović to adequately punish the soldiers who allegedly abused and murdered prisoners, the Appeals Chamber held*[124]:

33. . . . [T]he assessment of whether a superior fulfilled his duty to prevent or punish . . . has to be made on a case-by-case basis, so as to take into account the "circumstances surrounding each particular situation" . . . It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes . . . In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish . . .

320. The Appeals Chamber recalls that a position of authority does not in and of itself attract a harsher sentence . . . Rather, it is the superior's abuse of that level of authority which could be taken into consideration at sentencing . . .

***Conclusion.*** *The Appeals Chamber overturned several findings of guilt and reduced General Hadžihasanović's sentence to imprisonment for three years and six months.*

*The assessment of whether a commander fulfilled his duty to prevent or punish war crimes and grave breaches committed by subordinates must be made on a case-by-case basis. Like leaders in all wars, U.S. commanders in the conflicts in Iraq and Afghanistan have confronted that issue and, particularly early in the conflicts, sometimes made questionable decisions regarding their duty to charge. In August 2004, Army Sergeant James P. Boland was charged with assaulting an Afghan detainee killed while in U.S. custody in Bagram. The victim was one of two Iraqis found*

[124] *Prosecutor v. Hadžihasanović*, IT-01-47-A (22 April 2008).

*dead in the same cell, hanging "in a standing position with hands suspended above shoulder level for a prolonged period of time."*[125] *Both detainees had been beaten to death, according to their military death certificates. In June 2005, the sergeant received a letter of reprimand and was honorably discharged without trial.*

*Lieutenant P ——, An American Marine, was charged with the 2004 premeditated murder of two Iraqis apprehended at the scene of insurgent activity. At Lieutenant P ——'s pretrial investigation ("the legal bullshit," he called it) the lieutenant reportedly testified that he feared that the two victims were about to attack him, so he shot them, up to fifty times, having to reload to do so. The commanding officer agreed with the investigating officer's recommendation that charges not be preferred, and the case did not go to trial.*

*In 2006, the Army investigated a Special Operations unit that, continuously for seven days, reportedly kept detainees "in cells so small that they could neither stand nor lie down, while interrogators played loud music" so they could not sleep.*[126] *Some detainees were stripped, soaked, and then interrogated in air-conditioned rooms. One detainee died from such treatment, the investigation found. The report recommended no disciplinary action, saying what was done was wrong but not deliberate abuse. The commanding officer agreed, and no one was charged with any offense.*

*These are isolated cases among hundreds that have resulted in courts-martial. They nevertheless raise LOAC/IHL concerns.*

## PROSECUTOR V. KRISTIĆ

IT-98-33-T (2 Aug. 2001). Footnotes omitted.

***Introduction.*** *General Radislav Kristić was the Commanding General of the Drina Corps of the Bosnian Serb Army when, at Srebrenica, in July 1995, approximately 8,100 men and boys were murdered. In his capacity as commander of the troops involved in the massacre, Kristić was charged with genocide. This charge was not based on the actions of his subordinates, but on General Kristić's own actions.*

608. The evidence establishes that General Kristić, along with others, played a significant role in the organisation of the transportation of the civilians from Potocari. Specifically, the Trial Chamber has concluded that, on 12 July, General Kristić ordered the procurement of buses and their subsequent departure carrying the civilians from Potocari. At some later stage, he personally inquired about the number of buses already en route. The Trial Chamber has also found that General Kristić ordered the securing of the road from Luke to Kladanj up to the tunnel where the people on the buses were to disembark. It has further been established that General Kristić knew that this was a forcible, not a voluntary transfer.

609. The Trial Chamber has similarly concluded that General Kristić was fully aware of the ongoing humanitarian crisis at Potocari as a result of his presence at the hotel Fontana meeting . . . where General Mladić and Colonel Karremans of Dutchbat discussed the urgency of the situation, and, at the meeting on 12 July, when General Mladić decided that the VRS [Bosnian Serb Army] would organize the evacuation of the Bosnian Muslim women, children and elderly. Following this meeting, General Kristić was present himself at Potocari, for one

[125] Tim Golden, "Years After 2 Afghans Died, Abuse Case Falters," *NY Times*, Feb. 13, 2006, A1.
[126] Eric Schmitt, "Pentagon Study Describes Abuse by Special Units," *NY Times*, June 17, 2006, A1.

to two hours, thus he could not help but be aware of the piteous conditions of the civilians and their mistreatment by VRS soldiers on that day.

610. In light of these facts, the Trial Chamber is of the view that the issue of General Krstić's criminal responsibility for the crimes against the civilian population of Srebrenica occurring at Potocari is most appropriately determined . . . by considering whether he participated, along with General Mladić and key members of the VRS Main Staff and the Drina Corps, in a joint criminal enterprise to forcibly "cleanse" the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by Serbian forces.

617. In sum, the Trial Chamber finds General Krstić guilty as a member of a joint criminal enterprise whose objective was to forcibly transfer the Bosnian Muslim women, children and elderly from Potocari on 12 and 13 July and to create a humanitarian crisis in support of this endeavour by causing the Srebrenica residents to flee to Potocari where a total lack of food, shelter and necessary services would accelerate their fear and panic and ultimately their willingness to leave the territory. General Krstić thus incurs liability also for the incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise at Potocari.

618. Finally, General Krstić knew that these crimes were related to a widespread or systematic attack directed against the Bosnian Muslim civilian population of Srebrenica; his participation in them is undeniable evidence of his intent to discriminate against the Bosnian Muslims. General Krstić is therefore liable of inhumane acts and persecution as crimes against humanity.

631. The Trial Chamber concludes that . . . General Krstić exercised "effective control" over Drina Corps troops and assets throughout the territory on which the detentions, executions and burials were taking place. The Trial Chamber finds furthermore that from that time onwards, General Krstić participated in the full scope of the criminal plan to kill the Bosnian Muslim men originated earlier by General Mladić and other VRS officers . . .

633. . . . General Krstić may not have devised the killing plan, or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica's Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets.

644. . . . General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstić exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum . . . General Krstić must be considered a principal perpetrator of these crimes.

***Conclusion.*** *General Krstić, a commander who passed on manifestly unlawful orders, who issued manifestly unlawful orders, who acquiesced in his subordinates' violations, and who disregarded grave breaches of which he was aware, was the first accused individual convicted of*

*genocide by the ICTY. At one point in his trial, Kristić argued that it was impossible to refuse the orders of his superior, General Mladić, to kill the Muslims in his control. The Prosecutor asked Kristić, "What should a general do who received those orders?" General Kristić replied, "He should refuse the order."*[127]

*Kristić was sentenced to forty-five years' imprisonment. On appeal, his conviction of genocide was overturned, reduced to aiding and abetting genocide, and his sentence was reduced to thirty-five years.*[128]

[127] Marlise Simons, "Trial Reopens Pain of 1995 Bosnian Massacre," *NY Times*, Nov. 7, 2000, A3.
[128] *Prosecutor v. Kristić*, IT-98-33-A (19 April 2004).