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The UN Commander and the Law of Armed Conflict



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I CERTIFY THAT I HAVE READ AND REVIEWED
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NOTE

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SUMMARY

This paper will focus on the responsibilities of every officer and any commander, regarding the application of the Law of Armed Conflict (LOAC), better known as International Humanitarian Law (IHL) in the context of UN operations. This paper will demonstrate that there exists a doctrine of 'command responsibility' in conventional and customary international law.

The existing jurisprudence, which started with the trials after World War II, includes the four Geneva Conventions of 1949 and the Additional Protocols of 1977 and imposes a responsibility upon a commander for the illegal acts of his subordinates, known as 'command responsibility'. This jurisprudence has been further developed and reinforced by the rulings of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and finally, codified in the Rome Statute that led to the creation of the International Criminal Court (ICC) in July 2002.

The paper further examines the scope of this doctrine of 'command responsibility' as incorporated in the Rome Statute and the creation of the ICC, and analyses to what extent this doctrine applies to United Nations (UN) military operations.

Finally, having defined the responsibilities of a commander based on the doctrine of 'command responsibility' and humanitarian law, the paper will analyse the 'plea of ignorance' and will conclude that when a commander carries out his duty diligently there is very little room to plead ignorance for the misconduct of his subordinates. Although this does not mean that the commander is automatically criminally responsible for the actions of others, he remains accountable to his superiors for the performance of his troops.

Chapter 1 INTRODUCTION

National Armed Forces employed for maintaining law and order within their national borders must abide by the internal law of their respective country. However, when the Armed Forces of the Southern Hemisphere deploy abroad on UN operations, what are the legal obligations of commanders at all levels? To what extent do international law and, specifically, the Law of Armed Conflict apply to National Forces operating outside their respective country under a UN mandate, whether in a peacekeeping or a peace enforcing operation? Is it possible for higher authority to hold a commander responsible for the individual conduct of hundreds or thousands of troops operating in the most strenuous conditions? In the context of a UN military operation, to what degree is a Force Commander responsible for the actions or omissions of his subordinates? Can he plead ignorance as a defence?

These questions are important to clarify simply because the failure of a Commander to meet his legal obligations under the international law will bring discredit to himself, to his country, to the credibility of the UN, and, considering the ubiquitous presence of the media, will likely have a negative political impact at the strategic level. The murder of a Somali prisoner in the hands of Canadian troops in Somalia and the failure of Dutch troops to protect the people of Srebrenica in Bosnia are vivid examples. Think of Brazil, what would happen to Brazil's ambitions to obtain a permanent seat on the UN Security Council if the Brazilian Commander of the UN Force in Haiti would fail to meet his legal obligations?

This paper will focus on the responsibilities of every officer and, specifically, of any commander, regardless the size of his command, regarding the application of the Law of Armed Conflict (LOAC), better known as International Humanitarian Law (IHL)¹. This

¹ See Yoram Dinstein, "The Conduct of Hostilities under the Law of International Armed Conflict", (Cambridge: University Press, 2004) 20. The Law of Armed Conflict and Humanitarian Law are synonymous. The International Criminal Tribunal for the former Yugoslavia has suggested that 'international humanitarian law' is a more modern terminology than the more archaic 'laws of armed conflict'. The former has emerged in the last two decades because of human right doctrines but remains distinct. Accordingly, humanitarian law should not be confused with human rights laws.

paper will demonstrate that there exists a doctrine of 'command responsibility' in conventional and customary international law. The trials following World War II applied the Hague Convention of 1907, supplemented by the four Geneva Conventions of 1949 and the Additional Protocols of 1977 which impose a responsibility upon a commander for the illegal acts of his subordinates, known as 'command responsibility'. The existing jurisprudence has been further developed and reinforced by the rulings of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and finally, codified in the Rome Statute that led to the creation of the International Criminal Court (ICC) in July 2002. Acceptance of a command imposes upon the commander a duty to supervise and control the conduct of his subordinates in accordance with the LOAC.

The paper further examine the scope of this doctrine of 'command responsibility' as incorporated in the Rome Statute and the creation of the ICC, and to what extent this doctrine applies to United Nations (UN) military operations.

Finally, the paper will analyse the 'plea of ignorance'. Having defined the responsibilities of a commander based on the doctrine of 'command responsibility' and humanitarian law, we will conclude that when a commander carries out his duty diligently there is very little room to plead ignorance for the misconduct of his subordinates. Although this does not mean that the commander is automatically criminally responsible for the actions of others, he remains accountable to his superiors for the performance of his troops. The concept of 'command responsibility' is so encompassing that it cannot be the burden of the sole commander, although in the final analysis, the commander bears ultimate responsibility. Training for all troops must include the Law of Armed Conflict and all must clearly understand their responsibilities. Officers must be aware, at all times, of the activities of his/her command. Non-commissioned officers must, more than ever, maintain and enforce discipline. In the final analysis, a failure in 'command responsibility' is in fact a failure of due diligence of the whole chain of command and, ultimately, a failure of discipline.

Chapter 2 LAW OF ARMED CONFLICT (LOAC) OR THE INTERNATIONAL HUMANITARIAN LAW (IHL)

2.1 Law of Armed Conflict and the notion of ‘command responsibility’

The Law of Armed conflict refers to the part of international law that regulates the conduct of armed conflicts. It is the common view of the international community that the body of the law of armed conflict is comprised of two different but related parts: treaty-based law and customary law. In other words, all States and their citizens are bound in the conduct of war by both the treaties they have signed and international customary law. This is very important since customary law is now considered binding upon the actions of all states that are parties to an armed conflict, either of international or non-international nature, regardless of their being party to a specific treaty or agreement. Furthermore, a party cannot set aside compliance with international customary law based on the fortunes of war, whether this party is winning or losing the war.² Therefore, it becomes very important to define what constitutes customary law.

On 22 February 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). As part of the Statute of the Tribunal, the UN Secretary General outlined what constituted customary law of war in 1991:

“The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflicts as embodied in : the Geneva Conventions of 12 August 1949 for the protection of War Victims;...the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907;...the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948;...and the Charter of the International Military Tribunal of 08 August 1945.³

² L. C. Green, “The Contemporary law of armed conflict,” Manchester: University Press, 1993, 15-19.

³ Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993), February 22, 1993 (S/25704) (May 3, 1993) para.35.

As we shall see, the rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have expanded the common definitions of customary law.

In terms of ‘command responsibility’, a long-standing precedent recognizes that when a superior orders a subordinate to perform unlawful acts, the superior is criminally responsible. Since World War II, literature and court opinions have concentrated on the commander’s responsibility for the unlawful acts of his subordinates if he failed to prevent the unlawful activity when he “knew” or “should have known” of the activity.⁴

This aspect is essentially based on “the commander’s failure to act in order to: 1) prevent a specific unlawful conduct; 2) have established measures to prevent or deter unlawful conduct; 3) investigate allegations of unlawful conduct; and, 4) prosecute, and upon conviction, punish the author of the unlawful conduct. The choice of any legal standard and test is ultimately a matter of legal policy. Thus, to place a reasonably higher level duty on commanders on the assumption that this would maximise their vigilance and thus minimise the potential violations of subordinates, is a policy that leads to the adoption of a ‘should have known test’.”⁵ The essential element in terms of ‘command responsibility’ is that of causation, which will be examined in more detail in section 4.3.

2.2 The impact of the Rome Statute and the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)⁶

On 22 February 1993, the Security Council adopted Resolution 827, which created the International Criminal Tribunal for the Former Yugoslavia, mandating the to prosecution of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁷ In his report, the Secretary General stipulated that “the tribunal was to apply rules of humanitarian law that are beyond doubt part

⁴ M. Cherif Bassiouni, “Crimes Against Humanity in International Criminal Law,” (London: Martinus Nijhoff Publishers, 1992), 390.

⁵ Bassiouni, 368.

⁶ The reader can refer to the following site for more details: <http://www.un.org/law/icc/>.

of the customary law.”⁸ In November 1994, at the request of Rwanda, the Security Council created a second *ad hoc* tribunal to prosecute genocide and other serious violations of international humanitarian law committed in Rwanda and in the adjacent countries during 1994.⁹ Both tribunals had virtually identical statutes.

The first major judgment of the ICTY, in the case of *Tadic* on 2 October 1995, went beyond the Nuremberg precedents by deciding, as well, that “crimes against humanity could be committed in peacetime and by establishing the punishability of war crimes during internal armed conflicts.”¹⁰ Since then, both the ICTY¹¹ and ICTR decisions have constantly affirmed the principles of ‘command responsibility’.¹² Furthermore, the Statute of the International Criminal Court incorporates the jurisprudence regarding the scope of war crimes.

Accordingly, article 28 of the 1998 Rome Statute of the International Criminal Court (ICC), ratified on 1 July 2002, defines the responsibility of commanders and other superiors.¹³ Article 28 codifies the concept of ‘command responsibility’ in conventional and customary international law based on the 1899 and 1907 Hague Conventions, the four 1949 Geneva Conventions¹⁴ and Additional Protocol I and II.¹⁵ (See section 4.4 for more details.)

⁷ William A. Schabas, “An Introduction to the International Criminal court,” second edition, (Cambridge : University Press 2004), 11.

⁸ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Document S/25704.

⁹ Security Council Resolution 995 (1994).

¹⁰ Schabas, 12.

¹¹ For a more detailed analysis of the impact of the ICTY on international law see <http://www.un.org/icty/cases-factsheets/achieve-e.htm> .

¹² There have been numerous cases, for instance *Prosecution v. Tadic*, Case No. IT-94-AR72, *Prosecution v. Blaskic* (2000), Case No. IT-95-14, *Prosecution v. Erdemovic*, Case No. IT-96-22-A, *Prosecution v. Delalic et al.* (1998), Case No. IT-96-21, *Prosecution v. Krstic*, Case No. IT-98-33. Regarding the ICTR see *Prosecution v. Kayshema* (1999), Case No. ICTR-95-1-T, *Prosecution v. Akayesu* (1998), Case No. ICTR-96-4-T. For more see : <http://www.un.org/icty/index.html> and <http://65.18.216.88/default.htm> .

¹³ Schabas, 213.

¹⁴ The United States has ratified the Hague Conventions and the four 1949 Geneva Conventions, but has signed without ratifying the two additional protocols.

¹⁵ Additional Protocol I articles 86 and 87 read: Art 86. Failure to act and Art 87. Duty of commanders.

The ratification of the Rome Statute had a major impact on the development of international law since the creation of the United Nations. Signatory countries had to modify existing domestic laws to conform to the Rome Statute before ratifying the treaty. In this new world, individual criminal liability has been established for serious offenders and an institution has been created to prosecute them, whether they are simple soldiers, generals, or heads of state.¹⁶ Moreover, the view of the International Committee of the Red Cross, as expressed during the United Nations General Assembly, 56th Session on 12 November 2001, is that the greatest benefit resulting from the creation of the ICC “lies primarily in encouraging the exercise of national jurisdiction.”¹⁷

2.3 Jurisdiction and admissibility of the International Criminal Court (ICC)

The basic difference between the two ad hoc Tribunals, namely the ICTY and the ICTR, and the ICC is that the first two have jurisdiction strictly over crimes committed in the former Yugoslavia after 1991 and in Rwanda during the year 1994, while the ICC has jurisdiction on all the countries party to the treaty.¹⁸ In the Americas, twenty-two countries are party to the Rome Statute. Only Chile and the United States have signed but have not ratified the Rome Statute.

These countries have agreed that either the ICC or a national of a State party can prosecute crimes committed within the territory of a State party (including on board vessels or aircraft) regardless of the nationality of the offender. However, national courts have first priority. Paragraph 10 of the Statute preamble states: “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Articles 1 and 17 of the Statute reiterate this important qualification regarding admissibility. The ICC takes over only when a domestic legal system is unwilling or unable to investigate or prosecute a case. Therefore, although the ICC may have jurisdiction, a specific case may

¹⁶ Schabas, 25.

¹⁷ David Wippman & Matthew Evangelista, “New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts,” New-York: Transnational Publishers, 2005, 49 note 61.

¹⁸ For a list of the countries that have signed and ratified the Rome Statute of the International Court see: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

not be admissible because a domestic court is currently prosecuting the suspect.¹⁹ Furthermore, the ICC cannot prosecute a case that already tried by a national court, “except in the case of sham proceedings.”²⁰ It is also the case when an individual has been properly tried and condemned but later pardoned by his country Head of State.²¹ Finally, the contrary is also true. A country cannot prosecute an offender who has already been convicted or acquitted by the ICC.²²

If a State refuses to act, an increasing number of States provide for universal jurisdiction. It allows any State, even in the absence of a territorial or nationality link, to prosecute offenders in relation to crimes such as piracy, slave trade, traffic of children and women, as well as hijacking and other threats to air travel, attacks upon diplomats, nuclear safety, terrorism, apartheid, and torture. The application of universal jurisdiction also applies for genocide, crimes against humanity and war crimes. In practice, however, universal jurisdiction is rarely exercised.²³

The Rome Statute also distinguishes between jurisdiction in terms of subject matter, time and space. The Court has jurisdiction over crimes such as genocide, crimes against humanity, war crimes, aggression and offences against the administration of justice. Jurisdiction is limited by time and space. The Court cannot exercise jurisdiction over crimes committed prior to the entry into force of the Statute on 1 July 2002. In the case of a country that subsequently became party to the Statute, the “Court has jurisdiction over crimes committed after the entry into force of the Statute with respect to that State”.²⁴ Furthermore, the Court may examine the admissibility of a case on its own initiative and can refuse to hear a case that ‘is not of sufficient gravity’.²⁵ Finally, it also has jurisdiction over crimes

¹⁹ Schabas, 67-68.

²⁰ Schabas, 88.

²¹ An example would be the case of William Calley, who was found guilty of war crimes committed in My Lai village in Vietnam, who was pardoned by President Richard Nixon after only a short detention period.

²² Schabas, 88.

²³ Schabas, 73-74.

²⁴ Schabas, 69.

²⁵ *Idem*, 69.

committed on the territory of States that accept its jurisdiction on an ad hoc basis and on territory designated by the Security Council. However, the high seas, Antarctica and outer space remain out of reach of the Court. Nationality determines jurisdiction in such cases.²⁶

In terms of jurisdiction over individuals, following the trend established by the Nuremberg Charter and the 1948 Genocide Convention, Article 27 of the Statute stipulates that:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”²⁷

In its 2002 ruling in the Arrest Warrant Case, the International Court of Justice (which has jurisdiction over cases between States) confirmed that an incumbent or former minister of foreign affairs would be subject to the jurisdiction of an international tribunal like the ICC, *where it has jurisdiction*. However, the court also stipulated that diplomatic immunity still prevails. Therefore, although a State party to the Statute could not shelter its own Head of State or foreign minister from prosecution before the ICC, the latter could not demand that a State cooperate “in surrender or otherwise with respect to a third State”.²⁸ As well, the ICC cannot request a State party to act against certain international agreements reached with a third State such as Status of Forces Agreements (SOFAs), which protects

²⁶ Schabas, 78.

²⁷ Schabas, 213.

²⁸ The International Court of Justice overruled the decision of the House of Lords in the Pinochet case. See Schabas, 81, note 56.

peacekeepers based in a foreign country from prosecution by that country's domestic courts, unless authorized by the UN Secretary-General.

Finally, article 16 of the Statute stipulates that the United Nations Security Council can adopt a resolution under Chapter VII of the UN Charter requesting the ICC to suspend prosecution, and, that in such a case, the Court may not proceed for a period of 12 months. Such a resolution is renewable. This is precisely what happened on 12 July 2002 when the Security Council, under pressure from the United States, adopted the Resolution 1422 to prevent prosecution by the ICC of US personnel and personnel of any *other contributing country not a Party to the Rome Statute* over "acts or omissions relating to a United Nations established or authorized operation". At the time, the immunity applied for a period of 12 months starting on 1 July 2002 to operations of the Stabilisation Force (SFOR) in Bosnia and Herzegovina.²⁹

Chapter 3 CRIMES PROSECUTED BY THE ICC

Article 5 of the Statute specifies that the Court has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and aggression.³⁰ All these types of crimes have been prosecuted earlier by either the Nuremberg Tribunal or other post-war courts. At the time, these crimes were called 'crimes against peace', 'war crimes' and 'crimes against humanity'. The term 'crimes against peace' has now been replaced by 'aggression'. One major difference is that now 'crimes against humanity' can occur both in peacetime and during armed conflict. 'War crime's are punishable whether they are committed in non-international or in international conflict.³¹

²⁹ Schabas, 83-84.

³⁰ The crime of aggression remains to be defined since the participants to the Conference have been unable to agree on a definition. The issue is that according to Article 39 of the UN Charter, the Security Council has the prerogative of determining what constitutes an aggression. Therefore, the definition of aggression and the conditions of its prosecution demand a special amendment in accordance with Articles 121 and 123 of the Statute. Therefore, the crime of aggression will no further be discussed in this paper.

³¹ Schabas, 27.

The definitions of these crimes given in articles 6 to 8 of the Statute³² and in the Elements of Crimes correspond to the state of customary international law. However, these definitions are not immutable. Article 10 states: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” This is important as customary law will continue to evolve and the Court will be capable of keeping pace even if the Statute is not amended in a timely manner.

The Court is not only concerned with ‘the most serious crimes’ but also with the most serious criminals: leaders, organisers, and instigators. The Court is not likely to be concerned with low-level offenders. In such cases, the case can be inadmissible as not being ‘of sufficient gravity’. This is why all the definitions of crimes contain a built-in threshold. Genocide contains the notion of ‘special intent’ meaning that the perpetrator intended to destroy the targeted group in whole or in part. Crimes against humanity must be ‘widespread or systematic attack’. In other words, the Court is not concerned with isolated crimes – it will solely prosecute planned crimes or those committed on a large scale.³³

The UN General Assembly declared genocide an international crime in 1946. The distinction between genocide and crimes against humanity has narrowed now that crimes against humanity can be committed in peacetime as well as in wartime. Today, genocide is considered simply as the worst case of crime against humanity.³⁴ Article 6 of the Statute maintains a fifty-year old definition. It defines genocide as five specific acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. They include killing members of the group, causing serious bodily or mental harm, imposing conditions on the group intended to destroy it, preventing births within the group, and forcibly transferring children from the group to another group. The intent to destroy is fundamental, and the destruction could be physical, biological, or cultural. The cultural

³² See <http://www.un.org/law/icc/statute/romefra.htm> for details.

³³ Schabas, 29.

³⁴ Schabas, 37.

aspect is relatively new and is a result of the judgments of both the ICTY and the German Constitutional Court.³⁵

The term ‘crimes against humanity’ goes back to 1915 referring to the massacre of the Armenian population by Turkey. The term reappeared in 1945 in the context of the Nuremberg Tribunal. Since 1945, the term has been redefined many times. Article 7 of the Rome Statute codifies the evolution of the definition of crimes against humanity. The notion of crimes against humanity is linked to international armed conflict although Article 5 does not so stipulate. Like genocide, there is a threshold; the crimes must be part of a ‘widespread or systematic attack’. In addition, the attack must be against civilians to distinguish it from many war crimes that can target both combatants and civilians. Nevertheless, the attack does not have to be a military attack. The attack must also be part of a State or organizational policy. The ICTY went further and established that crimes against humanity could also be committed on ‘behalf of entities exercising de facto control over a particular territory but without recognition or formal status of a “de jure” state, or by a terrorist group or organization.’³⁶ Finally, the offender must have ‘knowledge of the attack’. The ad hoc tribunals have broadened the concept of crimes against humanity to include forcible transfer of population (ethnic cleansing) and sexual crimes against both men and women. For instance, the ICTY in the Kunarac appeal judgment of July 2002 determined that the policy component was not a required element of crimes against humanity. Reinforcing earlier judgments of the International Law Commission, the Appeals Chamber established the low-end threshold of crimes against humanity as being more than simply ‘isolated or random acts’.³⁷ This judgment gives the ICC plenty of latitude.

In summary, it appears clearly that the definitions of genocide and crimes against humanity require a level well beyond the scope of this paper. This paper will not discuss these two crimes since the topic deals with UN personnel and, specifically, the legal responsibility of a Force Commander under the International Humanitarian Law. It is indeed

³⁵ Schabas, 38, notes 45 and 46.

³⁶ Prosecutor v. Tadic (Case No. IT-94-I-T), Opinion and Judgment, 7 May 1997, para 654.

³⁷ Prosecutor v Kunarac et al. (Case IT-96-23 and IT-96-23/I-A), Judgement, 12 June 2002, paras 96 and 98.

most difficult to imagine a UN commander being the perpetrator of genocide or widespread and systematic attacks against civilians.

3.1 Definition of war crimes

The notion of war crimes goes back to the ancient Greeks. They have been punished as domestic offences since the beginning of criminal law.³⁸ The first international trial was conducted in 1474; Peter von Hagenbach was tried for atrocities committed during the occupation of Bresach. The Hague Conventions of 1899 and 1907 codified the laws of war in an international treat for the first time, for the first time, In 1913, a commission of inquiry sent by the Carnegie Foundation investigated atrocities committed during the Balkan Wars using the description of war crimes contained in the Hague Convention IV. At the end of World War I, the Commission on Responsibilities of the Authors of War examined potentially war crimes committed by the Central Powers. However, actual prosecution will have to wait until Nuremberg, which codified the definitions of war crimes.

Four years later, a second codification was proposed in the ‘grave breaches’ provisions of the four Geneva Conventions of 1949. At the time, these codifications concentrated on the most serious violations and applied only to armed conflicts of an international nature.³⁹ It is only in 1995 that the Security Council recognized that war crimes could be committed in internal armed conflict as well, when it adopted the Statute of the International Criminal Tribunal for Rwanda. In 1996, the International Criminal Tribunal for Yugoslavia confirmed that ‘international criminal responsibility included acts committed during internal armed conflict’.⁴⁰ Finally, at the Rome Conference in 1998, States confirmed the responsibility for war crimes in non-international armed conflict.

³⁸ Leslie C. Green, “International Regulation of Armed Conflict”, in M. Cherif Bassiouni, ed., International Criminal Law, 2nd ed, Ardsley, NY: Transnational Publishers, 2003, vol I, pp. 355-391.

³⁹ Schabas, 51-53.

⁴⁰ Prosecutor v. Tadic (Case No. IT-94-I-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

As of now, Article 8 of the Rome Statute⁴¹ lists four categories of war crimes. Two categories address international armed conflict and two apply to non-international armed conflict. As previously discussed, a jurisdictional threshold exists for both genocide and crimes against humanity. This is not the case for war crimes, isolated acts committed by individuals acting without direction or guidance from above or a single murder of a prisoner of war or a civilian may constitute a war crime. Actually, the Appeals Chamber of the ICTR has ruled in the *Akayesu* case that there exist no restrictions on persons who could be charged with war crimes. Civilians, including officials, can be charged as well.⁴²

Although war crimes do not require the same quantitative scale, the Rome Statute has tried to narrow the scope of war crimes. Article 8 specifies “The Court shall have jurisdiction in respect of war crimes *in particular* when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.” The phrase ‘*in particular*’ was included as a compromise to mean that the Court, although mainly concerned with war crimes of a certain magnitude, is not limited to those.⁴³

War crimes can be committed during both international and internal armed conflict as well as after the conclusion of overt hostilities, particularly during the repatriation of prisoners of war. The ICTY has written in the famous *Tadic* case that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’⁴⁴ Furthermore, *the Elements of Crimes* stipulate that the Prosecutor does not have to prove that the perpetrator had knowledge of whether or not there was an armed conflict or whether it was international or non-international. However, there must be a *nexus* between the crime and the conflict.⁴⁵

⁴¹ See Article 8 of the Rome Statute: <http://www.un.org/law/icc/statute/romefra.htm> .

⁴² Prosecutor v. Akayesu (Case No. ICTR-96-4-A), Judgment, 2 September 1998, paras. 640-3.

⁴³ Schabas, 30 and 56.

⁴⁴ Prosecutor v. Tadic (Case No. IT-94-I-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70. See also Prosecutor v. Tadic (Case No. IT-94-I-T), Opinion and Judgment, 7 May 1997, para 561; and Prosecutor v. Aleksovski (Case No. IT-95-12/I-T), Judgment, 25 June 1999, para 43.

⁴⁵ Prosecutor v Kunarac et al. (Case IT-96-23 and IT-96-23/I-A), Judgement, 22 February 2001, para 568.

The first category of war crimes listed in Article 8 refers to the ‘grave breaches’ of the Geneva Conventions. They therefore apply only to international armed conflict. The ICTY confirmed this issue in the *Tadic* decision.⁴⁶ Victims of ‘grave breaches’ must be ‘protected persons’, that is members of the armed forces of a country involved in the international armed conflict who are no longer engaged in combat due to injury or capture. The ICTY expanded this definition to extend protection to ‘nationals’ if they are not under the protection of the State for instance if they are part of a minority that is being targeted.⁴⁷ *Grave breaches* include:

- a) Wilful killing;
- b) Torture or inhuman treatment, including biological experiments;
- c) Willfully causing great suffering, or serious injury to body or health;
- d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- g) Unlawful deportation or transfer or unlawful confinement;
- h) Taking of hostages.

The second category of war crimes consists of the crimes defined as ‘Hague Law’ because they refer to the 1907 Hague Convention IV. As for the first category, the second group called ‘serious violations of the laws and customs of war’ applies to international armed conflict; however, there is no requirement that the victims be ‘protected persons’. Unlike the ‘grave breaches’ category of the Geneva Conventions, the ‘serious violations of the laws and customs of war’ category has evolved over the years as new crimes have been added to the 1907 list. Several offences have been drawn from Protocol Additional I of 1977. Examples are the protection of humanitarian or peacekeeping missions, the prohibition against environmental damage, crimes of sexual nature. It also includes provisions that deal with prohibited weapons, but excludes nuclear weapons. This last aspect is very important –

⁴⁶ Prosecutor v. Tadic (Case No. IT-94-I-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 80.

⁴⁷ Prosecutor v. Tadic (Case No. IT-94-I-A), Judgment, 15 July 1999, paras. 164-6.

in their respective declaration upon signature of the Statute, France and Great Britain specified that Article 8 refers solely to conventional weapons.⁴⁸

The inclusion of the Protocols Additional came about because of the rulings of the ICTY in the Prosecutor v. *Galic* and Prosecutor v. *Kordic* cases. In both cases, the accusations against the offenders referred to Article 85 of Protocol I, Articles 51 of Protocol I, and Articles 13 of Protocol II. As discussed previously, the Protocols Additional of 1977 were not included in the Statute of the Tribunal. Consequently, since none of the parties involved in the armed conflict had signed the two Additional Protocols, both defendants challenged the legality of charges based on the two Protocols on the ground that they did not have customary status. In the both cases, the Trial Chamber ruled that ‘violations of Protocol Additional I incurred individual criminal liability in the same manner that as did other violations of customary international law.’⁴⁹ Almost at the same time, another ICTY Trial Chamber affirmed the customary nature of the articles in Protocol I concerning the protection of civilians.⁵⁰ Later in early 2002, the customary nature of the relevant articles of the Protocols Additional was raised during the pre-trial of the Prosecutor v. *Strugar, Miodrag Jokic*, et al. In their rulings, both the Trial chamber and the Appeals Chamber re-affirmed the customary nature of Articles 51 and 52 of Protocol I and Article 13 of Protocol II⁵¹ as

⁴⁸ Schabas, 61-62.

⁴⁹ See Prosecution v. Stanislav Galic (Case No. IT-98-29-T) Judgment and Opinion, December, 5, 2003, paras. 54-56 and 202-205 and Prosecution v. Kordic & Cerkez, (Case No. IT-95-14/2-T), February, 26, 2001, paras. 168-169.

⁵⁰ Prosecutor v. Dragoljub Kunaracar, (Case No. IT-96-23), February, 22, 2001, para. 426.

⁵¹ See <http://www.tamilnation.org/humanrights/genevaconventions/gprotocol2.htm>

Art 13. Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

‘norms of customary international law designed to prohibit attacks on civilians and civilian objects.’⁵²

The two categories of war crimes that apply to non-international conflict are identical to Common Article 3⁵³ of the four Geneva Conventions (Article 8 paragraphs (c) and (d)), and include the Protocol Additional II of 1977 (paragraphs (e) and (f)). However, Article 8 paragraph 2 (f) makes it clear that the war crimes do not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’ but they apply to armed conflicts that ‘take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.’ Furthermore, Article 8, paragraph (3) specifies that ‘nothing in paragraph 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.’

The Common Article 3 crimes, like ‘grave breaches’, must be committed against ‘protected persons’, that is ‘persons not taking active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause’. Murder, mutilation, cruel treatment and torture, outrage upon personal dignity, taking of hostages and summary executions constitute war crimes. In 1986, the International Court of Justice in the Nicaragua case stated that ‘Article 3, which is common to all four Geneva Conventions of 12 August 1949, defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that [...] these rules also constitute a minimum yardstick [...]’

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

⁵² See Prosecutor v. Strugar, Jokic, et al. (Case No. IT-01-42-PT), June, 7, 2002, Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction, paras. 17-22, and Prosecutor v. Pavle Strugar, Miodrag Jokic, et al. (Case No. IT-01-42), November, 22, 2002, ICTY Appeals Chamber Decision on Interlocutory Appeal.

⁵³ See <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/6D73335C674B821DC1256B66005951D1> for more details.

and they are rules, which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."⁵⁴

The International Committee of the Red Cross refers to Common Article 3 as a 'mini-convention' of the laws applicable to non-international armed conflict, 'a common denominator of core human rights'.⁵⁵ The Appeals Chamber of the ICTY in the *Tadic* case referred to common Article 3 as 'certain minimum rules', which 'reflect elementary considerations of humanity applicable under customary international law to any armed conflict, whether it is of an international or international character.'⁵⁶ Finally, the ICTR in the *Akayesu* case declared that 'it is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.'⁵⁷

Article 8 paragraph 2 (e) reflects mostly but not all Protocol Additional II and is concerned with crimes intentionally committed against civilians and includes actions such as:

- a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- d) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- e) Pillaging a town or place, even when taken by assault;
- f) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any

⁵⁴ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ 4 para. 114 (Judgment of June 27).

⁵⁵ Schabas, 65.

⁵⁶ Prosecutor v. Tadic (Case No. IT-94-I-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 102.

⁵⁷ Prosecutor v. Akayesu (Case No. ICTR-96-4-A), Judgment, 2 September 1998, para. 608.

- other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- g) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - h) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - i) Killing or wounding treacherously a combatant adversary;
 - j) Declaring that no quarter will be given;
 - k) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - l) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

Interestingly, when one compares the war crimes list to the ‘crimes against humanity’ list, the two are very similar, except for the scope and breadth of the latter. In other words, war crimes are for the most part, crimes against humanity committed on a small or individual scale instead of being wide spread or directed against a whole group.

Having identified the nature of the crimes, which are liable under international customary law, following is an examination of the notion of individual and criminal responsibility.

3.2 The notion of individual criminal responsibility

Like the Tribunals of Nuremberg, Hague and Arusha, the ICC is concerned with trying individuals not States, more specifically the major criminals responsible for large-scale atrocities. Therefore, the Court is less likely to judge the actual perpetrators of the crimes, but rather those who organized, planned, ordered genocide, crimes against humanity and war crimes. These individuals can be tried either as principal offenders or as accomplices. Article 25, paragraph 3 states that an individual shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Mere presence at the scene of the crime does not constitute complicity, but when the accused has a legal duty to intervene, because of his superior position for example, presence may amount to a form of participation since failure to intervene constitutes encouragement or incitement.⁵⁸ Conspiracy occurs once two or more individuals agree to commit a crime, whether or not the crime is committed. The Rome Statute requires some overt evidence of the conspiracy, but does not require that the crime itself be committed.

⁵⁸ Schabas, 102.

Finally, the ICTY has proposed a theory of liability known as ‘joint criminal enterprise’. According to this scheme, an offender can be convicted of crimes committed by others if ‘this was reasonably foreseeable as a consequence of the criminal plan.’ Subsequently, Bosnian Serb leader General Radovan Krstic was convicted in August 2001 for complicity of ‘a joint criminal enterprise’ to commit genocide with respect to the Srebrenica massacre of July 1995.⁵⁹ This success and other prosecutions convinced the Prosecutor to amend the May 1999 indictment of Slobodan Milosevic for crimes against humanity and war crimes committed in Kosovo based on his participation to a joint criminal enterprise with Bosnian Serb military and civilian leaders.⁶⁰ However, to prevent abuse, the ICTY Appeals Chamber demanded that the Prosecutor must demonstrate ‘a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.’⁶¹

Chapter 4 APPLICABILITY OF THE INTERNATIONAL HUMANITARIAN LAW (IHL) TO UN OPERATIONS

4.1 Applicability of the International Humanitarian Law (IHL) to UN Peace support operations

Having established that there exists a doctrine of ‘command responsibility’ in conventional and customary international law, and that the ICTY and the ICTR as well as the ICC uphold and have further expanded the concept, its application to peace support operations conducted under UN mandate will now be discussed.

Simply stated, the problem is that most of the armed conflict rules of the Geneva Conventions bind a State party only when the State is a party to the armed conflict. As Hoffman has written:⁶²

⁵⁹ Prosecutor v. Krstic (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 622.

⁶⁰ Compare Prosecutor v. Milosevic et al. (Case No. IT-99-37-I), Indictment, 22 May 1999 with Amended Indictment, 29 June 2001 and Second Amended Indictment, 16 October 2001.

⁶¹ Prosecutor v. Tadic (Case No. IT-94-I-A), Judgment, 15 July 1999, paras 220 and 228.

“From the earliest days of the UN’s interest in peace enforcement, however, it has been argued that military operations conducted under the authority of Chapter VII of the UN Charter are not covered by the Hague or Geneva Conventions. Because the UN is not a state, it is ineligible to adopt those treaties. It follows that military forces are not traditional parties to a conflict when operating under UN Security Council resolutions based on Chapter VII. Forces committed to a Chapter VII operation do not take sides in any conflict; in principle they are intervening in a state or region to end a threat to international peace and security. Because they are not parties to a conflict, they are held not to have a vested interest in how it ends. Consequently, military forces committed to peace enforcement under Chapter VII are not covered by law of war.”

This is why both the UN and nations contributing troops contributing nations are unwilling to recognise that UN forces supporting either a Chapter VI, Chapter VII or VIII operation are participants in the conflict itself. Another aspect of the problem is that the IHL imposes an obligation to discipline the troops and the UN does not have its own internal disciplinary system.⁶³

From a logical point of view, it appears that the drafters of Chapter VII of the UN Charter clearly anticipated that UN forces would act rapidly and, if necessary, forcefully to restore peace and security in a manner similar to the role of a national police force. The basic purpose of the IHL is to reduce or mitigate the horrors of war. The role of the UN is to “maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of peace.”(UN Charter, Article 1.) It follows that “those who seek to act in the cause of lawfulness and humanity must surely

⁶²Michael H. Hoffman, “War, Peace, and International Armed Conflict: Solving the Peace Enforcer’s Paradox,” *Parameters* Vol. XXV, No.4 (Winter 1995-96): 44-45; see also L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: University Press, 1993), 52-53.

⁶³Note from D Law/T, LCol K. Watkin , 30 September 1998.

themselves, in principle, be willing to be bound, at the minimum, by the basic humanitarian norms of the *jus in bello*” (the just conduct of war).⁶⁴

Various international bodies have addressed the application of the laws of war to UN forces. The 1954 Hague Intergovernmental Conference approved a resolution recommending that the UN ensure the application of the 1954 Hague Cultural Property Convention by UN forces. In 1971, the Institute of International Law adopted the 1971 Zagreb Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be engaged. The Commission assumed both the existence of UN forces and the possibility that such forces might be involved in armed hostilities. Article 2 of the Resolution provides that: “The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.”⁶⁵

⁶⁴ Hilaire McCoubrey and Nigel D. White, “The Blue Helmets: Legal regulations of United Nations Military Operations,” Brookfield USA: Dartmouth Publishing Company Limited, 1996, 159.

⁶⁵ Adam Roberts and Richard Guelff, eds. “Documents on The Laws of War,” Oxford: Clarendon Press, 1989, 371, 373-374.

Article 2 of the Resolution provides that: The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Forces, which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

- (a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
- (b) the rules contained in the Geneva Conventions of August 12, 1949;
- (c) the rules which aim at protecting civilian persons and property.

Article 3 B. adds:

McCoubrey and White argue that the UN is an organisation with international legal personality. Therefore, its actions, including military actions, must be in accordance with the applicable provisions of international law. "It may be accepted, as it is suggested it must, that *jus in bello* (the just conduct of war) provisions are prima facie applicable to UN forces engaged in military hostilities."⁶⁶ Addressing the question of the UN and *jus in bello*, they argue that, "although a treaty usually binds only those states which are party to it, Article 38 of the Vienna Convention on Treaties provides that "nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognised as such. Clearly, if a treaty simply restates a principle or principles of customary law, it will bind all states in so far as the restatement is accurate."⁶⁷ According to this rationale, the 1889 and 1907 Hague Conventions and the four Geneva Conventions of 1949 are recognised as having the status of customary law. Their provisions would therefore apply to UN military operations. Whether or not the two Additional Protocols of 1977 also have customary law status is debatable. It seems that Protocol I would fall into that category, but it could be argued that Protocol II has not achieved such a status yet. Nevertheless, because the provisions of Protocol II are much fewer and far less restrictive than Protocol I, it may be a moot point.

If United Nations Forces are composed of national contingents with regard to which the United Nations has not issued any regulations such as those mentioned in the preceding paragraph, effective compliance with the humanitarian rules of armed conflict must be secured through agreements concluded between the Organisation and the several States which contribute contingents.

These agreements shall at least confer upon the United Nations the right to receive all information pertaining to, and the right to supervise at any time and at any place, the effective compliance with the humanitarian rules of armed conflict by each contingent.

⁶⁶ McMoubrey and White, 158.

⁶⁷ McMoubrey and White, 159.

A second aspect concerns the legal distinction between international and non-international conflicts. Simply stated, most rebellions, revolutions or civil wars do not fall within the purview of the Law of Armed Conflict. Article 2(7) of the Charter of the United Nations specifies that the organisation have no right to intervene in the internal jurisdiction of states unless international peace and security is threatened. In such a case, the Security Council may decide to take action under Chapter VII of the Charter.⁶⁸

The Rome Statute provides the world with an international jurisprudence in the cases of genocide, crimes against humanity, war crimes, including command responsibility. “By bringing together under its jurisdiction the grave breaches of the four Geneva Conventions as well as of Protocol I, the Court brings within its jurisdiction all significant breaches of both the customary and conventional law of armed conflicts.”⁶⁹

As already discussed, the Court has jurisdiction over “the most serious crimes of concern to the international community as a whole”; “lesser” war crimes such as rape or a breach of the law of armed conflict will fall under the jurisdiction of national military tribunals.⁷⁰ Finally, the jurisdiction of the Court applies to both international and non-

⁶⁸ L.C. Green, “War Crimes, Crimes against Humanity, and Command Responsibility,” *National War College Review*, Vol. L, no2, (Spring 1977): 55.

The adoption of the Additional Protocols to the 1949 Geneva Conventions in 1977 brought changes to the formal distinction between international and non-international conflicts. Article 1(4) of Protocol I stipulates that the provisions of the Protocol apply to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations.” When the Protocol is in effect regarding such conflict, all the rules, including Articles 86 and 87, concerning failure to act and the duties of commanders, do apply. (Roberts and Guelff 450.)

Protocol II is designed to deal with the protection of victims on non-international conflicts and seeks “to develop and supplement Article 3 common to the Geneva Conventions” of 1949, by introducing some measure of humanitarian control in what were previously conflicts unregulated by law. However, Article 1(2) specifies that it “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” (Green, “War Crimes” 55.)

Furthermore, Article 3 provides that “nothing in this Protocol shall be invoked as a justification for intervention, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs”. However, the Security Council may decide to take action and intervene in the conflict because it represents a threat to international peace. In practice, the law governing war crimes does not apply to such conflict. Nevertheless, to the extent that such offence amount to genocide or crimes against humanity, the normal rules will apply, including those related to command responsibility. (Green, “War Crime” 56.)

⁶⁹ Green, *War Crimes*, 53.

⁷⁰ Green, *War Crimes*, 53.

international conflicts. Therefore, it is reasonable to conclude that normal rules regarding criminal liability of both the soldier and his superiors do apply to UN mandated peace operations. As a minimum, the UN forces are subject to the rules of humanitarian law, including those of the Geneva Conventions and Protocol I.⁷¹

Having examined the legal aspect, we will now look at the position adopted by the United Nations through various documents. First, it is worth noting that in late 1950 during the Korean War, the UN command in Korea ordered all its forces to observe all the provisions of 1949 Geneva Convention III on prisoners of war. Likewise, Article 44 of the Regulations of the UN Emergency Force in Egypt stated, “The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel.” The UN Operation in Congo adopted the same article in its Regulations of 15 July 1963.

Comment [d1]: You need to footnote this paragraph, this is not 'commonly known information'.

In a letter to the International Committee of the Red Cross (ICRC) in January 1962, the UN Secretary-General, U Thant, confirmed that the “UN insists on its armed forces in the field applying the principles of these 1949 Geneva Conventions as scrupulously as possible.”⁷² Finally, “national contingents remain bound, to the same extent and the same degree, by the laws of war which would apply if the same forces were engaged in international armed conflict for their own states; states retain a responsibility for their contingents.”⁷³ This means that while , they may not be bound by other parts of the law that do not have the status of customary law.⁷⁴ However, the “Interoffice memorandum” of 24 May 1978 by Mr. Guyer and Mr. Urquhart to all commanders of UN forces, reflected in a second memorandum dated 30 October 1978 from the Commander-in-Chief of the UN forces to all commanders at General Staff and contingent level, specifies that “in case where the forces have to use their weapons in accordance with their mandate, the principle and spirit of the rules of International Humanitarian Law (IHL), should apply,

⁷¹ Green, War Crimes, 62.

⁷² Roberts and Guelff, 372.

⁷³ Roberts and Guelff, 372.

⁷⁴ Green, Contemporary LOAC, 320.

as laid down in the Geneva Conventions of 1949, the Additional Protocols of 1977 and elsewhere.”⁷⁵

A letter of 23 October 1978 to the President of the ICRC (in reply to a letter from the President dated 10 April 1978), in which the UN Secretary General stresses that “the principles of humanitarian law... must, should the need arise, be applied within the framework of the operations carried out by United Nations forces”.⁷⁶ The UN Secretary General in a letter, also dated 23 October 1978, addressed to the permanent representatives of governments sending contingents to the United Nations Interim Force in Lebanon (UNIFIL) points out that in situations “where members of such forces have to use their weapons in self-defence, in conformity with guideline D, the principles and spirit of IHL as contained, inter alia, in the Geneva (Red Cross) Conventions ... and the Protocols of 8 June 1977 ... shall apply”. To this end, the States providing contingents must ensure that their troops fully understand the principles of IHL and take the necessary measures to ensure their observance. The UN, for its part, “undertakes, through the chain of command, the task of supervising the effective compliance with the principle of humanitarian law by the contingents of its peace-keeping forces”.⁷⁷

On 9 October 1990, the UN produced a Draft model SOFA agreement between the UN and Host Countries. The original document states: “the United Nations peace-keeping operation and its members shall refrain from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements”.⁷⁸ Nonetheless, it does not specifically refer to the Law of Armed Conflict. However, the Model Agreement prepared by the Secretary General in May 1991 is more specific:⁷⁹

⁷⁵ Umesh, Palwankar, “Applicability of international humanitarian law to United Nations peace-keeping forces,” *The International Review of the Red Cross* No. 294, (May-June 1993): 232.

⁷⁶ Palwankar, 232.

⁷⁷ Palwankar, 233.

⁷⁸ United Nations Document A/45/594, “Draft model Status-of-forces agreement between the United Nations and Host Countries,” (Report of the Secretary-General, 9 October 1990): paragraph 6.

⁷⁹ Green, *Contemporary LOAC*, 325.

“The United Nations peacekeeping operations shall observe and respect the principles and the spirit of the general international conventions applicable to the conduct of military operations. The international conventions referred to above include the four Geneva Conventions of 1949 and their Additional Protocols of 1977 and the UNESCO Convention on the Protection of Cultural Property in the event of armed conflict. The Participating State shall therefore ensure that the members of its national contingent serving with the United Nations peacekeeping operation be fully acquainted with the principle and spirit of these Conventions.”

Not surprisingly, the Agreement in 1993 between the United Nations and the Government of Haiti on the Status of the United Nations Mission in Haiti, which duplicates the Draft model SOFA, included such a paragraph.⁸⁰ It is particularly interesting to note that the LOAC applied in that situation, which had nothing to do with an international conflict. The UN operation in Haiti was clearly a humanitarian intervention based on the will of the international community to stop human right abuses on a large scale. This confirmed as suggested by Professor Green that “should United Nations forces be deployed, as they often were in 1992, in areas where civil wars or non-international conflicts as defined in Protocol II are in progress, even though the parties may not have been observing the terms of that Protocol, the role, function, rights and obligations of the United Nations personnel are the same as they are in any peace-keeping operations.”⁸¹

In a letter dated 25 April 1995, addressed to the US Mission to the UN, the Director and Deputy to the Under-Secretary-General for Legal Affairs of the United Nations stated

⁸⁰ Agreement between the United Nations and the Government of Haiti on the Status of the United Mission in Haiti, 12 October 1993, paragraph 7.

The United Nations will ensure that UNMIH carries out its mission in Haiti in such a manner as to respect fully the principles and spirit of the general international conventions on the conduct of military personnel. These international conventions include the four Geneva Conventions (Red Cross) of 12 August 1949 and the Additional Protocols thereto of 8 June 1977 and the UNESCO International Convention for the Protection of Cultural Property in the Event of Armed Conflict.

⁸¹ Green, Contemporary LOAC, 325.

that the UN Model SOFA codifies “customary practices and principles applicable to UN peace-keeping or similar operations.”⁸² This confirmed the official position of the UN.

In addition, Article 20(a) of the UN Convention on the Safety of Peacekeepers of 2 December 1994 refers to the obligation of UN personnel to comply with international humanitarian law and human right laws.⁸³ Such a Convention would apply in situation other than war. Although very few states have signed and ratified the Convention, it illustrates the UN position, which is consistent with the policy taken in the Model SOFA.

The Secretary-General’s Bulletin of 6 August 1999, which entered into force on 12 August 1999, finally clarified the applicability of the humanitarian law to UN peace operations. In this bulletin, the Secretary-General states that “the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situation of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement or in peacekeeping operations when the use of force is permitted in self-defence.”⁸⁴

Section 2 of the same document adds that “the present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the appliance thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.”⁸⁵

Furthermore, Section 4 specifies: “in case of violations of international humanitarian law,

⁸² UN Model SOFA, note to the title.

⁸³ Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.

⁸⁴ United Nations Secretary-General’s Bulletin ST/SGB/1999/13. Observance by United Nations forces of International humanitarian law. New-York: United Nations, 6 August 1999, Section 1, para. 1.1.

⁸⁵ Idem, Section 2.

members of the military personnel of a United Nations force are subject to prosecution in their national courts.”⁸⁶

There is no doubt that the provisions of the Rome Statute bind the contributing countries that are also Parties to the Statute. As previously mentioned, such provisions apply to the majority of the countries of the hemisphere with the exception of the United States and Chile. However, the military personnel of all the countries, including the United States and Chile, is bound by the provisions of the 1889 and 1907 Hague Conventions, the four Geneva Conventions of 1949, particularly Common Article 3, and Protocol Additional I, which are recognised as having the status of customary law. Furthermore, the rulings of the ICTY have expanded the definition of what constitutes customary law. Although technically the United States has not ratified Protocol Additional I, it adheres to the principles and practices contained in Protocol I.⁸⁷

In summary, both the legal analysis and the official position adopted by the United Nations concur with Professor Green. The latter concluded that the guiding principle for all UN military personnel involved on any type of peace support operation is that “ they operate at all times in accordance with the principles of international humanitarian law and, when necessary, with the law of armed conflict, as embodied in conventions or customary law.”⁸⁸

4.2 Immunity of UN peacekeepers

In July 2002, as previously mentioned, the Security Council adopted the Resolution 1422 to prevent prosecution by the ICC of US personnel and personnel of any *other contributing country not a Party to the Rome Statute* over “acts or omissions relating to a

⁸⁶ *Idem*, Section 4.

⁸⁷ Helen Durham and Timothy L.H. McCormack, eds. “The Changing Face of Conflict and the Efficacy of International Humanitarian Law”, London: Martinus Nijhoff Publishers, 1999, p. 129 note 21.

⁸⁸ Green, Contemporary LOAC, 326.

United Nations established or authorized operation". In theory, it seems that troops involved in UN authorized missions are immune to the ICC jurisdiction. In practice, things are not as simple. First, the United Nations does not make international law, as any other actor on the international scene the United Nations is bound by international law. Secondly, the immunity applies solely to the United States and to the contributing countries, which are not a Party to the Rome Statute. However, as discussed in the previous section, international customary law binds all countries. Thirdly, the legality of that resolution is questionable because Article 16 of the Statute contemplates a specific situation or investigation and does not constitute a blanket exclusion of a category of persons.

Furthermore, Article 16 applies to UN missions authorized under Chapter VII of the UN Charter, and not all missions are created pursuant to Chapter VII. Ultimately, the ICC, is not an organ of the United Nations and therefore could decide to assess the legality of Resolution 1422.⁸⁹ Precedent exists whereby the ICTY reviewed the legality of Resolution 827, which created the *ad hoc* tribunal. Finally, the fundamental rule in international law is universality. All States are empowered to try and punish war criminals irrespective of the territory where the crime was committed or the nationality of the victim.⁹⁰

A larger issue concerns the diplomatic immunity enjoyed by UN senior officials and the complete immunity granted to military personnel in Status of Forces Agreements in the exercise of their official duties. The main purpose of granting immunity is to protect UN personnel from harassment and unilateral interference by the government of the state in which they operate. The International Court of Justice has reiterated the principles of immunity from process and personal inviolability, contained in the Vienna Convention, as recently as February 2002.⁹¹

The Convention on the Privileges and Immunities of the United Nations defines the scope of the functional immunity granted by the Charter. Article II, section 2 of the Convention

⁸⁹ Schabas, 84.

⁹⁰ Dinstein, 236.

⁹¹ Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgique), 14 February 2002 ICJ 121 para. 52.

states that the United Nations ‘shall enjoy immunity from *every* form of legal process except insofar as ... it has expressly waived its immunity.’⁹² Under the Convention, the Secretary-General has the sole authority to waive the immunity of UN personnel when, in his opinion, the immunity would impede the course of justice. This authority can be waived without prejudice to the interests of the United Nations.⁹³ The 1946 Convention does not cover military personnel but they receive immunity under SOFAs. Under the terms of SOFAs, military personnel in UN authorized missions remain under the jurisdiction of the contributing States, which retain the sole authority to waive immunity.⁹⁴

In practice, the Special Committee on Peacekeeping Operations and the Secretary-General’s office will launch an investigation when a UN official either civilian or military is accused of having committed ‘gross misconduct’ or an act of child abuse.⁹⁵ In the past, when military personnel were implicated, the UN practice has been to leave the investigation to the national contingent commander. However, the Special Representative of the Secretary-General (SRSG) for a given mission has the authority to form a Board of Inquiry and make a recommendation about immunity or repatriation to the Department of Peacekeeping Operations, which will follow-up with the member state.

Lately, the practice has been for the UN Secretary-General to waive immunity protections to UN personnel implicated in serious human right violations or other serious crimes. In both Kosovo and East Timor, UN staffs have been denied immunity protections after evidence of involvement in serious crimes involving unlawful property damage, sexual harassment, murder, and rape. Additionally, there has been one case of genocide related to Rwanda. Similarly, in East Timor in two cases involving rape and child sexual abuse, immunity protections were waived. Therefore, even if military

⁹² “Convention on the Privileges and Immunities of the United Nations”, February 13, 1946, 1 U.N.T.S. 15.

⁹³ Immunities Convention, *supra* note 18, at Section 20 and 23.

⁹⁴ See Model SOFA, *supra* note 20, para. 47(b).

⁹⁵ See Report of the Special Committee on Peacekeeping Operations on Comprehensive review of the whole question of peacekeeping operations in all their aspects, U.N. GAOR, 54th Sess., Agenda Item 90, para. 66, U.N. Doc A/54/839 (2000).

personnel involved on UN missions are protected from legal harassment by local authorities, recent practice shows that the Secretary-General is prepared to waive immunity protections to individuals involved in serious crimes or human right violations. In any case, military personnel remain subject to national legal jurisdiction, and therefore are liable to prosecution and punishment for their actions.

4.3 War crimes and ‘command responsibility’

In section 2.1, we introduced the ‘command responsibility’ concept. In the following section we will examine in further detail the relationship between command responsibility and war crimes.

Article 1 of all four Geneva Conventions of 1949 (Common Article 1) provides that “the High Contracting Parties respect and ensure respect for the Present Conventions in all circumstances”. These treaties, including the Additional Protocols of 1977, and international customary law impose the following duties on nations:⁹⁶

⁹⁶ James M. Simpson, “Law Applicable to Canadian Forces in Somalia 1992/1993.” A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia. Ottawa: Minister of Public Works and Government Services Canada, 1997,17.

- a. To disseminate to their citizens and in particular their armed forces the norms and rules of the Law of Armed Conflict;
- b. To train the members of their armed forces in the Law of Armed Conflict;
- c. To comply and promote compliance with the Geneva Conventions and Protocols; and to punish those who fail to comply with their obligations.

Therefore, the Parties (States) are required to bring to trial “persons alleged to have committed, or to have ordered to be committed, such grave breaches”. Similarly, as discussed above, Article 25 (3) (b) of the Rome Statute stipulates that a person who orders the commission of any crime within the jurisdiction of the Court is liable to prosecution and punishment.

As mentioned at the beginning, ‘command responsibility’ is essentially based on “the commander’s failure to act in order to: 1) prevent a specific unlawful conduct; 2) have established measures to prevent or deter unlawful conduct; 3) investigate allegations of unlawful conduct; and, 4) prosecute, and upon conviction, punish the author of the unlawful conduct. ...The choice of any legal standard and test is ultimately a matter of legal policy. Thus to place a reasonably higher level duty on commanders on the assumption that this would maximise their vigilance and thus minimise the potential violations of subordinates, is a policy that leads to the adoption of a ‘should have known test’.”⁹⁷

The essential element in terms of ‘command responsibility’ is that of causation. Obviously, to establish a chain of cause and effect is more difficult as one goes up the chain of command. The more removed a superior is from the scene of the crime, the more difficult it is to factually assess his responsibility. “The applicable standard, which applies to both military law and civilian criminal law, is the objective standard of ‘reasonableness’ in light of the existing circumstances, i.e., reasonableness in terms of actual knowledge or knowledge that should have been known. ...To hold a superior accountable on the basis of omission for the conduct of a subordinate, therefore, requires intent or knowledge that the omission can

⁹⁷ Bassiouni, 368.

actually or reasonably and foresee ably lead to a violation act and that the superior is in a position or has the ability to act in the prevention of the violent act”.⁹⁸

Actually, no theory of absolute liability has found acceptance in either international or domestic law. After World War II, contrary to the approach taken by the Yamashita Military Commission (comprised of American officers, none of whom had legal training), the Canadian Military Court in the Meyer case and the United States Court in “The High Command Case” did reject the strict liability theory that a commander could be held criminally responsible only on the basis of the commander/subordinate relationship **which is his duty** to understand.⁹⁹ In the last case, the tribunal stated, “that military subordination is a comprehensive but not a conclusive factor in fixing criminal responsibility. ...Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a **personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.**”¹⁰⁰

The Military Commission ruling in the General Yamashita case on December 7, 1945, and its subsequent confirmation by the United States Supreme Court on February 4, 1946 confirmed the existence of an affirmative duty on the part of a commander to take the appropriate measures within his power and circumstances to wage war within the limitations of the laws of war. In particular, it affirmed the requirement to exercise control over subordinates and established that the commander who disregards this duty has committed a violation of the law of war. Finally, it affirmed the legality “of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own”.¹⁰¹

The Canadian Military Court in Germany in the case of Brigadefuhrer Kurt Meyer ruled that:¹⁰²

⁹⁸ Bassiouni, 372.

⁹⁹ William H. Parks, “Command responsibility for War Crimes”, *Military Review*, Vol. XXVII (1989): 63.

¹⁰⁰ Bassiouni, 384.

¹⁰¹ Parks, 37.

¹⁰² L.C. Green, “Superior Orders and Command Responsibility,” *Canadian Yearbook of International Law* XXVII (1989):196; *War Crimes Regulations (Canada)*, P.C. 5831, Aug. 30, 1945.

(4) Where the evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.

(5) Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such a crime was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.

When knowledge is obvious, given the failure to act, the commander will be deemed responsible. In the case of General List,¹⁰³ the Tribunal imputed responsibility on the basis that “any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.”¹⁰⁴ As well, the Tribunal concluded that liability also arises when an illegal order from a superior HQ is passed through that commander’s staff to his subordinates; even when the commander himself is not aware.¹⁰⁵

¹⁰³ Known as the “Hostage Case”, this trial was the second joint trial at Nuremberg. General List, fifth ranking field marshal in the German Army, was charged with being principal and accessory to the murder and deportation of thousands of civilians committed by units under his command while serving as Armed Forces Commander Southeast and as Commander-in-Chief of Army Group A on the Russian front.

¹⁰⁴ Parks, 89.

¹⁰⁵ Parks, pp. 60 and 77. Similarly, in the High Command case, the Tribunal imputed responsibility to General von Kuechler on the basis that “it was his business to know”. The Tokio Tribunal in convicting General Muto and the Military Commission in convicting General Yamashita concluded, “a commander may normally be presumed to have knowledge of offenses occurring within his area of responsibility when he is present therein.” (Parks, 89.) Finally, the Canadian rule of 1945 in considering the responsibility of General von Roques for crimes committed within his area of responsibility, over which he had control, concluded that there is an imputation of “constructive knowledge” where it is established that under the circumstances he must have known. (Parks, 90.)

During the Vietnam War, the case of Captain Medina (US Army), the immediate superior to Lieutenant W. L. Calley, Jr. in the Mai Lay case (1971-1973), brought the command responsibility doctrine full circle from the Yamashita “must have known” through The High Command Case “should have known” to simple “actual knowledge”. Most experts consider the Medina case as being an anomaly in the US jurisprudence.¹⁰⁶ Already in 1956, the US Army Field Manual acknowledged “the commander is responsible if he has actual knowledge, or should have knowledge, through reports received by him or other means”.¹⁰⁷ This position corresponds to contemporary international norms as defined by Articles 86 and 87 of the 1977 Additional Protocol I to the Geneva Convention of 1949, which impose upon the commander a duty to supervise and control the conduct of his subordinates.¹⁰⁸ In

¹⁰⁶ Green, War Crimes, 41-42; see also Bassiouni, 386.

¹⁰⁷ U.S. Department of the Army, Field Manual 27-10: “Law of Land Warfare.” (Washington, D.C.: U.S. Government Printing Office, 1956), para. 501.

¹⁰⁸ Roberts, and Guelff, 439. Article 86 para. 2 of Protocol I states:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled him to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 establishes affirmative duties for the commander to prevent any breaches of the Conventions:

1. The High Contracting Parties and the Parties to the conflict shall require military

addition, Article 43 of Protocol I imposes the obligation to discipline the troops.¹⁰⁹ Finally, Article 12 of the 1991 Draft Code of Crimes re-affirms the responsibility of a commander for the crimes committed by his subordinates.¹¹⁰

commanders, with respect to members of the armed forces under which their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or their Protocol, and where appropriate, to initiate disciplinary or penal actions against violators thereof.

Also, Article II of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity stipulates:

“If any of the crimes mentioned in article I is committed (i.e., “war crimes” and “crimes against humanity”), the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.” (Bassiouni, 703.)

¹⁰⁹Roberts and Guelff, 411. Article 43 - Armed forces.

The Kahan Commission, set up by Israel to investigate the massacres at the refugee camps at Sabra and Shatilla after Israel's invasion of Lebanon in 1982, also supports the argument that there exists a doctrine of "command responsibility" in conventional and customary international law. The Commission concluded that the Minister of Defence, General Ariel Sharon, who commanded Israeli operations in Lebanon at the time, was "indirectly" responsible for the massacres of roughly 300 to 3000 people.¹¹¹ "Insofar as Israel has not signed Additional Protocol I of 1977 to the Geneva Conventions and gives no indication of adhering thereto, this practice indicates that it is now established in the customary law of armed conflict that compliance with an illegal order provides no defence to the military man carrying out the order, at least when the illegality is manifest, and that the superior who issues such an order carries personal liability for so doing."¹¹²

Not surprisingly, Article 28 of the Rome Statute addresses the responsibility of commanders and other superiors, and is totally congruent with the jurisprudence on the subject:¹¹³

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

¹¹⁰ Bassiouni, 746. The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

¹¹¹ Green, Superior Orders, 199-200; also Bassiouni, 389.

¹¹² Green, Superior Orders, 202.

¹¹³ <http://www.un.org/law/icc/statute/romeofra.htm>

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - a) That military commander or person either *knew* or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and
 - b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

Article 28 goes further by applying the rules of command responsibility not only to military commanders but to civilian superiors as well. However, it does differentiate between military and civilian leadership. The difference between paragraphs 1 and 2 specifies that, in a case of a civilian, a clear linkage must be traced between the crimes of the subordinates and the effective authority and control of the civilian superior. Secondly, when knowledge is attributed to a civilian superior, there is a strict requirement to demonstrate conscious disregard of the information available. The first point is based on the requirement to prove that the civilian superior was actually vested with effective authority and control as

a superior of the offenders, which is not as obvious as in the military case. The second point clearly limits the liability of civilians in comparison to military commanders.¹¹⁴

In other words, a military commander can be prosecuted for what amounts to negligence (should have known), while in the case of a civilian superior, the link must be established that he had actual or 'constructive' knowledge of the crimes being committed.¹¹⁵ Although the Rome Statute articulates more specifically the responsibility of civilian officials, the Law of Armed Conflict has always acknowledged that senior politicians taking an active role in the conduct of military affairs are 'assimilated to a military commander'.¹¹⁶ Consequently, there was little opposition to the inclusion of the concept of command responsibility within the Statute, with the exception of China. The United States proposed a compromise to adopt different rules for military commanders and civilian officials.

To hold a command position, therefore, imposes the legal duty to supervise, control, prevent, investigate and punish unlawful conduct by subordinates. Failure to do so becomes the basis for criminal responsibility. The military standards are higher than their civilian counterparts for two reasons: the requirement to enforce discipline in a military structure, and the effectiveness of deterrence in both international and national military laws. However, failure to act and failure to punish depend on knowledge and opportunity to act.¹¹⁷

The following paragraphs will examine the meaning of the term 'command responsibility' in the context of UN peace support operations.

4.4 'Command responsibility' in UN Peace Support Operations

The military defines command as "the authority vested in an individual (the commander) for the direction, co-ordination and control of military forces".¹¹⁸ Commanders

¹¹⁴ Dinstein, 242.

¹¹⁵ Schabas, 107.

¹¹⁶ L. C. Green, 'War Crimes, Extradition and Command Responsibility', 14 IYHR 17, (1984).

¹¹⁷ Bassiouni, 371.

¹¹⁸ Canada. B-GL-300-003/FP-000. Land Force Command. (Ottawa: Queen's Printer, 1998), 4.

exercise command over their own forces at all levels. Command authority is further refined to include either every aspect of military operations and administration (full command) or only part of it. In the context of UN peace support operations, troop-contributing countries retain full command of their respective contingents. Each contingent is under the command of a Contingent Commander appointed as the National Commander. This Contingent Commander has operational command,¹¹⁹ including administration and logistics, over the troops assigned to him by the national authorities. In turn, the UN Force Commander exercises operational control over part of the contingent.¹²⁰ Operational control represents a lesser degree of authority, which does not include administrative or logistic responsibility, and no direct authority to discipline the troops. Consequently, the authority and the responsibility of each are different.

In the case of the Contingent Commander, because he has operational command of his troops, the doctrine of “command responsibility” applies fully. He has the authority and obligation to control and discipline the troops under his command. The fact that the UN Force Commander has operational control of the various Contingents under his command does not relieve or attenuate in any way the overall responsibility of the Contingent Commander, even though the Force Commander is senior in rank to the Contingent Commander. This is because operational control is a lesser degree of authority than operational command.

The Force Commander has only tactical authority over the various contingents placed under his command. Per UN Model SOFA (paragraph 47 b), “military members ... shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in host country territory.” The authority to administer and discipline the troop remains at all times the prerogative of each Contingent

¹¹⁹ Canadian Force, B-GG-005-004/AF-000-Canadian Forces Operations, (Ottawa: Minister of Public Works and Government Services, 2005), GL-E-6. Operational command is defined as the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces and to retain or delegate operational and/or tactical control as may be deemed necessary.

¹²⁰ Operational control is defined as the authority granted to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control. Operational control does not include disciplinary authority over the troops assigned.

Commander. In a case where disciplinary action is required, the Force Commander can only discuss the issue with the concerned Contingent Commander. If the matter is of such gravity or if the situation warrants it, he must report to the Special Representative of the Secretary General (SRSG) or to the UN Headquarters in New York. In no circumstances, is he authorized to contact the National authorities directly.

A Force Commander is expected “to take such measures as are within his physical power under the circumstances to prevent or stop war crimes by that subordinate commander. It is the commander’s responsibility to take all measures possible to prevent the commission of war crimes by subordinates; lack of administrative control and hence formal administrative remedies does not foreclose or preclude use of other means.”¹²¹ In reality, a tactical commander always has the authority to issue a direct order to a subordinate to prohibit or to stop a specific action. The only difference is that someone else will take disciplinary action. In a UN peace support scenario, the Force Commander can always intervene, but disciplinary action is the responsibility of each contingent and ultimately of each contributing country. However, it is the responsibility of the Force Commander to initiate the disciplinary process.

The reverse is also true. A Contingent Commander has the obligation to remain vigilant and informed although he may not exercise direct tactical command during operations. Simply stated the Contingent Commander, as the overall National Commander who has delegated operational control to the Force Commander, retains overall responsibility under the principle that delegation of authority does not mean delegation of responsibility. A Contingent Commander cannot delegate his overall command and control responsibility. This includes the responsibility for orders issued by his staff. He also has the obligation to think about the legality and consequences of his orders before issuing them.¹²²

In any event, a commander, whether or not he is ultimately held responsible for the actions of his subordinates, remains accountable in terms of rendering an account to his superiors on how and how well he discharges his responsibilities and on actions taken to correct problems. It also involves accepting personal consequences, such as discipline, for

¹²¹ Parks, 84.

¹²² Green, War Crimes, 39-40. The Kafr Qassem case 1959.

problems he could have avoided had he taken the proper steps to prevent them. “This accountability is the complement of authority, and can never be delegated.”¹²³

When a commander issues an unlawful order, it is easy to prove his criminal liability for the ensuing war crime. However, when the commander denies having issued such an order and there are no witnesses or paper trail, the existence of the order may be inferred circumstantially as in the case of K. Meyer described at the beginning of this paper. On the other hand, can a commander plead ignorance as a defence?

Chapter 5 The Plea of Ignorance

A defence is a response to a criminal charge. Article 31 of the Rome Statute recognizes the following defences: mental disease, intoxication to a limited extent, self-defence, and duress.¹²⁴ Ignorance or lack of knowledge in the case of war crimes, superior orders in cases of genocide and crimes against humanity are formally excluded.¹²⁵ In the case of ‘command responsibility’, criminal liability is evaluated according to the criteria discussed above.

Logically, if subordinates accused of war crimes invariably alleged that they had to obey superior orders, the reverse should also be true. Superiors could plead ignorance. The question then is to what extent a superior is responsible for the actions of his or her subordinates.

Kelman defines responsibility as “a decision about liability for sanctions based on some judgement rule. Sanctions are usually negative but can include rewards as well as punishments.”¹²⁶ Usually, when we say someone is responsible for an event, we mean that the person caused the event to happen. If we say that person A holds person B responsible

¹²³ Land Force Command, 5.

¹²⁴ See Article 31: http://www.icccpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

¹²⁵ Schabas, 111.

¹²⁶ Herbert C. Kelman and V. Lee Hamilton, “Responsibility in Authority Situations,” *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* (Yale: University Press, 1989), 195.

for the occurrence of an event, we mean that A believes that B deserves praise or blame, reward or punishment, for doing or failing to do X, if and only if several things hold true. It must be true, that B caused X; that B had a duty with the respect of X; that X is an event or state of affairs that is beneficial (good) or harmful (bad); and that B has no adequate defence or excuse regarding X, such as non-culpable ignorance.¹²⁷

In practice however, when things go wrong in a large organisation, it is often difficult to discover who, if anyone, deserves the blame. A large number of people shares policy formulation. Committees make decisions, no specific individual. The same is true for policy implementation, when many contribute to the outcome. Therefore, it is difficult to assign moral responsibility. According to the Weberian model of hierarchical responsibility, moral responsibility falls almost exclusively on those at the top of the organisation – the higher one's position in the chain of command, the greater one's responsibility. Therefore, subordinates are absolved of moral responsibility for the consequences of their actions as long as they obey superior orders that are not manifestly unlawful.¹²⁸ Two issues come to mind. The first is the fact that officials below those at the very top of the hierarchy do have discretionary authority and discretionary power in bringing about outcomes. Is President Milosevic solely responsible for the alleged atrocities committed by Serbian security forces in Kosovo? The second difficulty is that it would be too easy to conclude that since we cannot discover who is to blame, no one is to blame; or to say that the tragedy was unavoidable, that it was an act of God.

It seems more reasonable that only those culpable actions which contributed to produce the tragedy are blameworthy. Each person is proportionately responsible to the degree of his particular contribution to the outcome. The greatest culpable action deserves the

¹²⁷ Arthur Schafer, *The Buck Stops Here: Reflections on Moral Responsibility, Democratic Accountability and Military Values*, A Study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Minister of Public Works and Government Services Canada, 1997), 3.

¹²⁸ Schafer, 7. As well, Article 33 of the Rome Statute reads: 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

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

greatest blame; but all who contributed by their wrongdoing bear some responsibility. Leaders at the top bear the heaviest moral responsibility when things go wrong, by virtue of their power and authority. However, in his testimony before the Commission of Inquiry into Somalia, General Boyle (then Canadian Chief of Defence Staff) testified, “If senior officers resigned every time their subordinates made an error, there would never be any leadership”. The point being that a superior has a right to expect that subordinates will carry out orders dutifully, diligently and in a legal manner. Therefore, superiors should not automatically be morally blameworthy simply because something has gone wrong.

As discussed in this paper, “no theory of absolute liability has found acceptance in either international or domestic law. No person, whether a commander or the lowest private, is held responsible for the acts of another absent the establishment of some sharing of the *mens rea*” (guilty intent).¹²⁹ “Individuals are not held to be morally responsible for their conduct unless they do the forbidden act (referred to by lawyers as the *actus reus*) in the appropriate mental state” (with what jurists call *mens rea*, i.e. deliberately, knowingly, intentionally, or, at the very least, negligently).¹³⁰ A bad outcome generates blame for the superior responsible only when a number of additional conditions have been met. In summary, a commander may be liable for the actions of his subordinates if:¹³¹

- a. He has actual knowledge that an offence has occurred and he fails to take disciplinary action against the individuals involved, or to take preventive measures to prevent further repetition of the offence; or
- b. He fails to use 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; or
- c. There is sufficient evidence to impute knowledge (should have known).

¹²⁹ Parks, 103.

¹³⁰ Schafer, 12-13.

¹³¹ Parks, 90.

Both (b) and (c) entail a number of criteria to consider in determining responsibility including: the rank of the accused; experience of the commander; the duties of a commander by virtue of the command he held; mobility of the commander; isolation of the commander; the “sliding probability ratio” of unit/incident/command, which means that the greater the importance of an offence and/or the unit involved; and the higher in the chain of command knowledge may be subjectively imputed. Other factors to be considered are: the size of the staff of the commander, the comprehensiveness of the duties of the staff by the commander, communications abilities, training, age and experience of the troops under his command, composition of the force within the command (a joint or combined force is more difficult to control), and the tactical situation.¹³²

Therefore, two elements must be taken into account; the first is knowledge that his subordinates are committing war crimes. The commander must have been aware, or should have been aware that war crimes were being committed. Knowledge is essential, in the total absence of knowledge the commander cannot be held responsible for the conduct of his subordinates. However, the information does not need to be complete, fragmentary information may be alarming enough to justify further investigation. The information is not limited to what is available through official reports; reliable media can also provide it. Inversely, if official reports provided information about war crimes and a commander failed to take action, he cannot argue that he had not read them or that he was absent from his headquarters.¹³³

The second element is effective control. Prosecutors must demonstrate that the commander had control over subordinates to the degree that he could have had some effect on whether the crimes were committed. As established in the *High Command* case of 1948, discussed at the beginning of this paper, there must be a personal dereliction. The failure to properly supervise subordinates is tantamount to criminal negligence:

“There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect

¹³² Parks, 90-94.

¹³³ Dinstein, 240.

amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”¹³⁴

The issue is, therefore, an act of omission, a failure to supervise and control subordinates. In such a case, command responsibility exists when a commander passively avoids taking action to prevent the commission of war crimes and refrains from punishing or at least initiate legal proceedings against the offenders. In this case, the command responsibility amounts to dereliction of duty. The commander is accountable for his own omission and can be found criminally responsible for war crimes committed by subordinates, irrespective and even in violation of orders issued.

Article 7(3) of the ICTY Statute reflects the same approach: ‘The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’¹³⁵

The official commentary by the UN Secretary-General on this clause summarizes the actual jurisprudence on command responsibility and reads:

“A person in a position of superior authority should, therefore, be held individually responsible for giving the *unlawful order* to commit a crime under the present statute. But he should also be held responsible for *failure to prevent* a crime or *to deter* the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority *knew or had reason to know* that his subordinates were about to commit or had committed crimes *and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.*”¹³⁶ (Italics added)

¹³⁴ The High Command case (USA v. von Leeb et al.) American Military Tribunal, Nuremberg, 1948, 11 NMT 462, 543. See also Bassiouni, 384.

¹³⁵ ICTY Statute, *supra* note 4, at 1194.

The ICTY Appeals Chamber in the *Celebici* case of 2001 ruled that in resolving issues of command responsibility, what counts is not the formal title of the commander but the actual possession of ‘*effective exercise of power or control*’ over the subordinates committing the war crimes.¹³⁷ Similarly, the ICTY Trial Chamber in the *Blaskic* case¹³⁸ of 2000 commented:

“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: the commander had reason to know within the meaning of the Statute.”

There exist three degrees of negligence: wanton negligence, gross or culpable negligence, and simple negligence, which amounts to the absence of due care. According to Parks, it is only when a commander is showing wanton negligence, namely the doing of a dangerous act or omission with a heedless disregard of the probable consequences, that said commander manifests the *mens rea* (guilty intent) or gross negligence to be held criminally responsible.¹³⁹

Therefore, it is not sufficient for a superior to assume that his subordinates are carrying out orders dutifully and legally. Leaders have the responsibility to establish control mechanisms and to develop in their organisation an ethical culture appropriate to a military organisation in a democracy. This critical concept implies effective training. The role of a commander requires the formulation of appropriate policies and, subsequently, careful

¹³⁶ ICTY Statute, 1175.

¹³⁷ Dinstein, 241.

¹³⁸ ICTY, Trial Chamber, Prosecutor v. Blaskic, (Case No. IT-95-14-T), 2000, para. 332.

¹³⁹ Parks, 97.

supervisory follow-up to ensure that his policies are being properly implemented and followed. In other words, a failure to put in place proper information procedures or failure to monitor compliance with existing procedures is not an excuse for self-induced ignorance. Commanders who plea ignorance must show that they did not know and that they could not reasonably have known. In other words, one must demonstrate that his ignorance is not culpable.¹⁴⁰ In fact, based on the customary international law, the protection of the innocent is one of the fundamental responsibilities of soldiers – even more so of officers and commanders.¹⁴¹

As expressed by Park “the commander’s responsibility lies or should lie in affirmatively manifesting an intolerance for illegal acts under any and all circumstances; and that the dividing line between moral and legal responsibility as it relates to incitement of others to act is a fine one. This dividing line could move depending on the tactical situation of the commander and his command; the casual remarks of the commander of a maintenance unit in a conventional war would seem to have less impact than those of an infantry company commander in a counterinsurgency environment”.¹⁴² Therefore, if discipline has been seriously deficient over a long period and the commander did nothing to correct the situation, this may constitute prima facie evidence of culpable ignorance. It is worth remembering that Protocol I, Article 87, paragraph 3 imposes a general duty on a commander to maintain discipline, and that includes a duty to take action in respect of war crimes committed or about to be committed, by his subordinates or by other persons under his control.

In the case of a UN Force Commander, he exercises tactical command only and final responsibility for discipline remains with the Contingent Commanders, who exercise operational command over the troops assigned to them by their respective country. However, the Force Commander remains responsible and accountable for maintaining overall discipline, and for taking preventive actions, even though follow-up disciplinary action remains the responsibility of the Contingent Commander and the contributing country.

¹⁴⁰ Schafer, 11 and 17.

¹⁴¹ Paul Christopher, *The Ethics of War & Peace: An Introduction to legal and moral issues* (New Jersey: Prentice Hall, 1994), 162.

¹⁴² Parks, 79; also Green, *War Crimes*, 35.

Chapter 6 CONCLUSION

The role of a commander is a difficult one. He may delegate his authority, but he cannot delegate his responsibility. He must accomplish the mission within the LOAC and exercise control over his subordinates to insure compliance. A commander is responsible for the actions of his subordinates if he had the means to control his troops and failed to do so. He is also liable if he knew of an offence and failed to do everything within his power to prevent or report said offence.

Control of his troops requires training conducted prior and during deployment, institution of proper procedures and instructions, readily available personnel and material, occurrence reported, inquiries conducted, and periodic inspection carried out. In other words, policies must be clearly enunciated, compliance enforced and discipline maintained. A commander must use all means available to him to know of and prevent war crimes within his command. He cannot ignore the obvious and plead ignorance to escape liability. He is also responsible if an illegal order issued through him or his staff. He may be held responsible even if he did not give the illegal order but is shown to have encouraged or incited his troops to perpetrate the illegal act. The same is true even if he just acquiesced.

The notion of ‘should have known’ is central to the doctrine of command responsibility. Knowledge can be either factual or presumed, if he fails to exercise the means of knowledge at his disposal, such as staff visits, reports. However, there is no absolute liability by which a commander is automatically held responsible for the actions of others unless wanton negligence can be proved. This requires immoral disregard for the actions of others and the consequences amounting to acquiescence in the offence. It must be demonstrated that the commander “shared the criminal intent of his subordinates and that he encouraged their misconduct through failure to discover and intervene where he had the duty to do so.”¹⁴³

A UN Commander cannot delegate overall responsibility. A Contingent Commander has the obligation to remain vigilant and informed even when he does not exercise direct tactical control during operations since he retains operational command over the troops

¹⁴³ Parks, 103.

assigned to the Force Commander, which includes responsibility for discipline. This is also true in the case of a UN Force Commander, who exercises tactical command. As such, he is responsible and accountable for the overall conduct of the troops under his command. Ultimately, whether or not a commander is responsible for the actions of his subordinates, he remains accountable in terms of rendering an account to superiors, on how and how well he discharges his responsibilities and on actions taken to correct problems. It also involves accepting personal consequences, such as discipline, for problems that could have been avoided had he taken preventive measures.

Clearly, 'command responsibility' cannot be the burden of the sole commander. Troops must receive training on the LOAC and apply it in the execution their duty. Non-commissioned officers must maintain and enforce discipline. Officers must be thoroughly aware of all that happens in their command at all times. This is what General Patton Jr., meant when he said that there is only one kind of discipline, perfect discipline, anything less is criminal.

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