SOME INTERNATIONAL LAW PROBLEMS RELATED TO PROSECUTIONS BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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I. INTRODUCTION

The presentation of prosecution cases before the International Criminal Tribunal for the former Yugoslavia (the Tribunal) will require argument on a wide range of international law issues. It will not be possible, and it would not be desirable, simply to dust off the Nuremberg and Tokyo Judgments, the United Nations War Crimes Commission series of Law Reports of Trials of War Criminals, and the U.S. government's Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10 and presume that one has a readily available source of answers for all legal problems. An invaluable foundation for legal argument before the Tribunal is provided by Pictet's Commentaries on the 1949 Geneva Conventions, the International Committee of the Red Cross’ (ICRC) Commentaries on the Additional Protocols of 1977 to the Geneva Conventions of 1949, the few cases decided since 1950, old case law, and various learned articles and treatises. They must be reviewed and analyzed. At the same time, however, just as the prosecutors in the post-1945 war crimes trials argued successfully that customary law had evolved after 1907 and 1929, so it is reasonable to presume that customary law has evolved since the Geneva Convention of 1949 and the Additional Protocols of 1977.

It is essential to pay due heed to the principles of nullum crimen sine lege and nulla poena sine lege.1 One must, however, distinguish

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1. These terms loosely translate to “no crime without a statute” and “no punishment without a statute,” respectively.
between the existence of a substantive crime and the existence of jurisdiction to punish the crime. The ICRC made the following remarks while the statute for the International Criminal Tribunal for the Former Yugoslavia ("Tribunal Statute") was being drafted:

International Humanitarian Law as embodied in the four Geneva Conventions and Additional Protocol I does contain an obligation incumbent upon the parties to a conflict as well as other contracting parties to repress grave breaches of this law, which are thus submitted to universal jurisdiction. However, it does not provide for any international jurisdiction, although, at the same time, in no way does it prohibit such jurisdiction. Consequently, the competence to create an international tribunal cannot be based upon existing International Humanitarian Law itself but, in the present case, upon Resolution 808.²

Article 1 of the Tribunal Statute sets out the competence of the Tribunal as follows:

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.³

As a starting point for analysis of the Tribunal Statute, one must bear in mind that the legal basis for the Tribunal is a Security Council resolution, that the Tribunal exercises jurisdiction on the basis of internationality and not universality, and that the Tribunal has the power to prosecute persons responsible for serious violations of humanitarian law.

II. ARTICLE 3 OF THE TRIBUNAL STATUTE

A. Common Article 3 of the Geneva Conventions

Early indictments issued by the Tribunal prosecution, now publicly available, generally allege three types of charges against an

² Some preliminary remarks by the ICRC on the setting up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia (UNSCR 808 (1993) adopted on 22 February 1993) ICRC Doc. 25-03-93 DDMIJUR/422B.
accused. The indictment of Dušan Tadic, for example, alleges in part that:

Dušan TADIC participated in the willful killing of Emir KARABASIC, a GRAVE BREACH recognised by Articles 2(a) and 7(1) of the Statute of the Tribunal, or;

Alternatively, Dušan TADIC participated in the murder of Emir KARABŠIC, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR recognised by Articles 3 and 7(1) of the Statute of the Tribunal and Article 3(1) (a) of the Geneva Conventions.

Dušan TADIC participated in the murder of Emir KARABASIC, a CRIME AGAINST HUMANITY recognised by Articles 5(a) and 7(1) of the Statute of the Tribunal.

As this indictment evidences, the prosecution has adopted the approach that Article 3 of the Tribunal Statute confers power to prosecute persons violating common Article 3 of the Geneva Conventions.4 This approach reflects the fact that, in certain circumstances, the law applicable to international armed conflicts may not apply to a particular case. In such a case, assuming the existence of a non-international armed conflict is established, common Article 3 of the Geneva Conventions is to be applied.

The application of common Article 3 to the Balkan situations has not been universally endorsed. It has been suggested that the Tribunal has no power to punish violations of common Article 3 of the Geneva Conventions under Article 3 of the Tribunal Statute for several reasons. First, common Article 3 does not entail individual criminal liability.5 Second, Article 3 of the Tribunal Statute refers exclusively to international armed conflicts.6 Third, Article 4 of the Rwanda Statute refers specifically to violations of common Article 3 and, therefore, by negative implication, the Tribunal does not have

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4. Both common Article 3 of the four Geneva Conventions and Article 3 of the Tribunal Statute refer to violations of the laws or customs of war. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288; Tribunal Statute, supra note 3, art. 3.


such power.\textsuperscript{7} These arguments however, are without merit. The fundamental mandate of the Tribunal is to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. Violations of common Article 3 constitute such serious violations. Indeed, when the Tribunal Statute was approved, the United States indicated its view that breaches of common Article 3 could be prosecuted under Article 3 of the Tribunal Statute.\textsuperscript{8} Although at one time the concept of violations of the laws or customs of war was applicable exclusively to international armed conflicts, that time has passed. Most conflicts today are internal armed conflicts, and a customary law, tailored for internal armed conflicts, has emerged. This body of customary law is not identical to the customary law for international armed conflicts. It includes, however, a concept of violations of the laws and customs of war and, at a minimum, breaches of the obligations contained in common Article 3 constitute violations of the laws and customs of war for internal conflicts. The words of the International Court of Justice (ICJ) judgment in the \textit{Nicaragua} decision are particularly relevant:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which, in the Court's opinion, reflect what the Court in 1949 called elementary considerations of humanity.\textsuperscript{9}

The fact that common Article 3 does not contain grave breach provisions is irrelevant, as the Tribunal is not the agent of a state exercising jurisdiction on the basis of the universality principle, but is rather an international tribunal exercising statutory jurisdiction on behalf of the world community. Further, common Article 3 has been adopted by the successor states to the former Yugoslavia. It applied throughout the territory of the former Yugoslavia before the conflicts began by virtue of Socialist Federal Republic of Yugoslavia (SFRY)

\textsuperscript{9} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 114 (June 27) (citing Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9)).
B. Additional Protocol I

Although it has not yet done so, it is reasonable to expect that the prosecution will eventually seek indictments charging individuals with violations of Additional Protocol I under Article 3 of the Tribunal Statute. It is unfortunate that the grave breach provisions of Additional Protocol I were not specifically referred to in Article 3 of the Tribunal Statute because most of Protocol I does reflect existing customary international law and both the SFRY and the various successor states have accepted the obligations of both Additional Protocols. One of the drafters of the Tribunal Statute offered this justification for the omission: “[Protocol I], notwithstanding the customary law nature of most of its provisions, was, as a whole, not yet qualified as indubitably part of customary law.” This argument however, is unpersuasive. The specific violations listed in Article 3 of the Tribunal Statute are derived from the rules annexed to Hague Convention IV respecting the Laws and Customs of War on Land and from the 1945 London Agreement on War Criminals which provided the basis for the Nuremberg Tribunal. Much of the language used in these two documents and repeated in the Tribunal Statute is archaic and of debatable utility. For example, Article 3(c) of the Tribunal Statute which restates Article 25 of the Hague Rules, prohibits “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings...” The current U.S. Army Manual on The Law of Land Warfare, interprets the Article 25 provision as follows:

14. Tribunal Statute, supra note 3, art. 3(c).
b. Interpretation. An undefended place, within the meaning of Article 25, HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:

1. Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
2. no hostile use shall be made of fixed military installations or establishments;
3. no acts of warfare shall be committed by the authorities or by the population; and,
4. no activities in support of military operations shall be undertaken.

The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.

As is obvious, very few places will be undefended within the meaning of this provision. Use of outdated language in the Tribunal Statute narrows the scope of prohibited activities. Indeed, in modern humanitarian law, the concept of the military objective as the focus of military operations provides greater protection to the civilian population than the concept of the undefended place which applies in only a few marginal situations.

Fortunately, Article 3 of the Tribunal Statute explicitly indicates that it does not contain a closed list of violations of the laws or customs of war. It is, therefore, possible to argue that the grave breach provisions of Protocol I also constitute violations of the laws or customs of war, either because the concept “laws or customs of war” includes all of the humanitarian law treaties applicable in the territory of the former Yugoslavia, including the Protocols, or because specific provisions in the Protocols simply state existing customary law. When the statute was adopted, France, the United States and the United Kingdom all made statements in the Security Council indicating that Article 3 of the Tribunal Statute included the Additional Protocols. It may be expected that the prosecution would be particularly interested in charges concerning grave breaches of

Protocol I listed in Article 85(3)(a) making the civilian population or individual civilians the object of attack, and Article 85(3)(b) launching an indiscriminate attack affecting the civilian population or civilian objects.\textsuperscript{17} The prosecution may also be interested in charges related to Article 54, which prohibits starvation of civilians as a method of warfare.\textsuperscript{18}

In some instances, it will be necessary to establish that customary law has indeed evolved beyond its position after World War II. For example, in 1948, a U.S. military tribunal in the German High Command Trial made the following rather chilling finding:

Leningrad was encircled and besieged. Its defenders and the civilian population were in great straits and it was feared the population would undertake to flee through the German lines. Orders were issued to use artillery to "prevent any such attempt at the greatest possible distance from our own lines by opening fire as early as possible, so that the infantry, if possible, is spared shooting on civilians." We find this was known to and approved by von Leeb. Was it an unlawful order?

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender.

We might wish the law were otherwise, but we must administer it as we find it. Consequently, we hold no criminality attaches on this charge.\textsuperscript{19}

\textsuperscript{17} Protocol I, supra note 11, art. 85(3), 1125 U.N.T.S. at 42, 16 I.L.M. at 1428.


\textsuperscript{19} United Nations War Crimes Commission, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 84 (1949) (citations omitted).
It is not unreasonable to hope that, with the evolution of both humanitarian law and human rights law since the end of World War II, customary law on this particular point is now somewhat more humane.

III. COMMAND RESPONSIBILITY

The Tribunal is not functioning in an environment similar to that of the international military tribunals at Nuremberg and Tokyo. Unlike in Nuremberg and Tokyo, the conflict in the former Yugoslavia continues. There is no conquering army to ensure that the accused, witnesses, and all relevant documents are brought before the Tribunal. Although there is a continuing conflict, it is, however, reasonable to assume that the prosecution will take all practicable measures to develop cases against the leaders ultimately responsible for the terrible crimes committed in the territory of the former Yugoslavia, even if those leaders are still in power. The doctrine of command responsibility will constitute an important part of legal argument concerning the responsibility of the leadership. For the purposes of this discussion, command responsibility is defined as the responsibility of military, political, or bureaucratic superiors for the acts of subordinates, and the concept includes both acts of commission and omission. The doctrine of command responsibility is normally viewed in the literature as essentially applicable to military commanders and as primarily concerned with responsibility for failure to act. Colloquially, and among non-specialist lawyers, however, command responsibility is regarded as a wider concept encompassing, for example, the criminal liability assigned to major German leaders by the tribunal at Nuremberg.

A. Article 7

Consideration of the doctrine of command responsibility as it will be argued before the International Tribunal must begin with Article


21. It is possible that a new term of art such as superior responsibility should be developed. In the absence of such a development, the term command responsibility will be used here on the understanding that it is being given the wider, colloquial meaning. The term military command responsibility will be used to describe the more restricted approach applicable to military commanders.
7 of the Tribunal Statute. Article 7 states that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. 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.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.\(^\text{22}\)

The Report of the Secretary-General which accompanied the draft Statute addressed the issue of command responsibility as follows:

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.\(^\text{23}\)

Although Article 7(3) is infelicitously worded, it provides a basis for liability independent of Article 7(1). The superior who is found liable under Article 7(3) is not liable for the international legal equivalent of domestic military offenses such as dereliction of duty or negligent performance of a military duty. If subordinates commit offenses such as the grave breach of willful killing as referred to in Article 2 of the

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22. Tribunal Statute, supra note 3, art. 7.
Statute, then a superior found liable as a result of Article 7(3) is also guilty of the grave breach of willful killing. Further, a superior who is held liable under Article 7(3) is a party to the main offense and is liable for the commission of the applicable offense under Articles 2 through 5 of the Statute.

Article 7(3) uses a number of undefined expressions: “superior”, “subordinate”, “knew or had reason to know”, and “necessary and reasonable measures”. In order to understand these expressions, it is necessary to understand both the customary law doctrine of command responsibility and recent developments in treaty based law.

B. Command Responsibility Doctrine in the Aftermath of World War II

The liability of political and other leaders was set forth as follows in the Nuremberg Charter:

Art. 6: Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [Art. 6(b) deals specifically with war crimes and Art. 6(c) deals with crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.

Art. 7: The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.24

Neither the Nuremberg Charter nor the Judgment of the International Military Tribunal for the Trial of German Major War Criminals addressed the responsibility of military commanders or other leaders for a failure to act, probably because the degree of participation by leaders in the offenses for which they were convicted made consideration of this issue unnecessary.

The roots of the customary law doctrine of military command responsibility can be found in Hague Convention IV of 1907 and in decisions of certain war crimes tribunals following World War II. In the Hague Convention IV, one begins to see the early development of the military command doctrine. The Convention 1) imposes an

obligation to issue law of land warfare instructions to the armed forces;\textsuperscript{25} 2) makes belligerent states responsible for all acts committed by their armed forces;\textsuperscript{26} 3) defines lawful combatants to include members of the armies and also members of militia and volunteer corps which meet certain conditions including being commanded by a person responsible for his subordinates and conducting their operations in accordance with the laws and customs of war;\textsuperscript{27} and 4) assigns a high degree of responsibility to the commander of forces occupying an area, in particular, an obligation to insure, as far as possible, public order and safety.\textsuperscript{28}

In general, the leading Japanese cases dealing with the doctrine of military command responsibility such as \textit{Yamashita}\textsuperscript{29} and \textit{Toyoda},\textsuperscript{30} addressed incidents in which it was clear that offenses had been committed but there was no direct evidence that the accused ordered their commission. In the leading German cases, however, such as the \textit{High Command} case\textsuperscript{31} and the \textit{Hostages} case,\textsuperscript{32} it was usually clear that offenses had been committed and that orders had been given at the highest level. Consequently, the decisions in the German cases revolve around the degree of responsibility to be assigned to commanders for implementing these orders.

The approach taken by tribunals in the post-World War II cases differed depending on whether the accused commander was responsible for units deployed in combat as an operational or tactical commander, or was responsible for an occupied area. A higher degree of responsibility was assigned to occupation commanders. Although the post-World War II tribunals were quite willing to hold military commanders responsible in appropriate circumstances, generally they

\begin{itemize}
\item \textsuperscript{25} Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 2290, 1 Bevans 631, 639.
\item \textsuperscript{26} Id. art. 3, 36 Stat. at 2290, 1 Bevans at 640.
\item \textsuperscript{27} Hague Regulations, \textit{supra} note 13, art. 1, 36 Stat. at 2295-96, 1 Bevans at 643-44.
\item \textsuperscript{28} Id. art 42-56, 36 Stat. at 2306-08, 1 Bevans at 651-53.
\item \textsuperscript{29} United Nations War Crimes Commission, \textit{Yamashita Trial}, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1949). General Yamashita was tried for atrocities committed by troops under his command in the Philippines in the closing days of the war.
\item \textsuperscript{30} Parks, \textit{supra} note 20, at 69-73. Admiral Toyoda was Commander in Chief of the Japanese Combined Fleet, Combined Naval Forces and Naval Escort Command and Chief of the Naval General staff. He was acquitted in one of the last major war crime trials.
\item \textsuperscript{31} United Nations War Crimes Commission, \textit{The German High Command Trial}, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949). Fourteen high ranking officers of the German army were tried for war crimes and crimes against humanity.
\item \textsuperscript{32} United Nations War Crimes Commission, \textit{The Hostages Trial}, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949).
\end{itemize}
appear to have been reluctant to hold the commander's staff officers liable because such officers rarely had executive authority. Perhaps in part because of this reluctance, many of the witnesses testifying in trials involving military commanders were members of the commanders' staffs. Further, much of the documentary evidence appears to have been captured records originally in the custody of such staffs. For obvious reasons, prosecution cases before the Tribunal will rarely, if ever, be in a position to make extensive use of captured documents or captured staff officers.

The Yamashita case is probably the best known military command responsibility case. It is thought to stand for the proposition that a military commander is liable for the acts of his troops on the basis of strict liability. Major William H. Parks, however, has criticized this viewpoint:

The value of the study of the Yamashita trial lies not in its often misstated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not), but in the legal conclusions it actually reached. Yamashita recognized the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the summum jus of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own. In the latter it became the foundation for all subsequent trials arising from World War II. In the former its value lies primarily in the general rather than the specific sense - while recognizing the duty of the commander and the violation of the law of war for failure to exercise that duty, the duty was all the more absolute in Yamashita because of General Yamashita's additional responsibilities as military governor of the Philippines. As military governor, all trust, care, and confidence of the population were reposed in him. This was in addition to his duties and responsibilities as a military commander...

In the trial of Admiral Toyoda, which resulted in an acquittal, the tribunal summarized its view of the essential elements of a military commander's responsibility as follows:

1. That offenses, commonly recognized as atrocities, were commit-
ted by troops of his command;

2. The ordering of such atrocities. In the absence of proof beyond a reasonable doubt of the issuance of orders then the essential elements of command responsibility are:
   1. As before, that atrocities were actually committed;
   2. Notice of the commission thereof. This notice may be either:
      a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
      b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.

4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.

5. Failure to punish offenders.\textsuperscript{34}

This summary of the essential elements of the doctrine of military command responsibility constitutes, with one addition, a usable statement of customary law as it existed around 1950. The addition relates to notice of the offense. The Toyoda statement indicates that actual or constructive notice of the commission of the offense must be established. As a result of an analysis of other relevant cases, Parks has concluded that if it is not possible to establish that the accused ordered the commission of the offense, a military commander may nevertheless be held liable if either actual or constructive notice is established. Liability can also be established if the accused should have known of the commission of the offense but has displayed such serious personal dereliction as to constitute willful and wanton disregard of the possible consequences. The existence of the "should have known" test is clearly established in the case law. The content

\textsuperscript{34} Parks, \textit{supra} note 20, at 72 (providing the relevant text from the official transcript of the record of trial in U.S. v. Soemu Toyoda).
of the test is justified on the basis that is inappropriate to hold individuals criminally liable for offenses such as grave breaches on the basis of lesser standards such as simple or gross negligence.\

Although it is practicable to state the customary law doctrine of military command responsibility as it existed about 1950 in terms which are generally acceptable, it is more difficult to establish the elements of a more generalized doctrine of command responsibility applicable to political and bureaucratic superiors as well as to military superiors. One partial explanation for this difficulty is that while existing international law, historical tradition, and military reality impose substantial direct responsibility on military commanders to control their troops, political leaders tend to be viewed as distanced from military activity and insulated from personal liability. Another partial explanation is that although the Nuremberg Charter explicitly indicated that officials and political leaders would not be freed from responsibility or punishment, attention was focused on incidents in which non-military persons were active participants. As a result, while it has become accepted that political and bureaucratic superiors can be held responsible for acts of subordinates directly ordered, the extent of criminal liability for acts of subordinates not ordered remains unexplored. The only post-World War II trial which appears to have considered the responsibility of political and bureaucratic leaders for failure to act is the Tokyo Trial. In that case, the Tokyo Tribunal imposed direct international legal responsibilities on political and bureaucratic leaders as well as military leaders:

The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of governments to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility for prisoners held by Japan may be stated to have rested upon:

(1) Members of the government;

(2) Military or naval officers in command of formations having prisoners in their possession;
(3) Officials in those departments which were concerned with the well-being of prisoners;
(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill treatment of prisoners if:

(1) They fail to establish such a system.
(2) If having established such a system, they fail to secure its continued and efficient working. . . . Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:
(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
(2) They are at fault in having failed to acquire such knowledge.36

Because the Tokyo decision stands alone, its precedential value is ambiguous. It is unclear, on the basis of the decision, whether one should conclude that political and bureaucratic leaders have exactly the same responsibilities as do military leaders for the acts of their subordinates. One reason why the command responsibility doctrine may differ for military commanders and others is that military commanders do exercise command. They have control over subordinates in a rigid hierarchical system with disciplinary powers and the authority to order subordinates. The scope of this military authority includes the power to order subordinates to risk their own lives. Most bureaucratic leaders do not wield the same type of life and death authority.

Despite the problem of extrapolating an analogous doctrine of command responsibility for civilian leaders, the Tokyo decision can be used as a guide for establishing that civilian leaders can be held

culpable for certain acts of subordinates. The *Tokyo* decision provides support for the following propositions: (1) once the veil of statehood is pierced, international law may impose obligations on political and bureaucratic leaders in the same way that it imposes obligations on military leaders; (2) political and bureaucratic leaders may be held responsible for the acts of subordinates when they have ordered the commission of these acts; (3) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a relationship with subordinates similar to those of a military commander and they fail to act to prevent or punish; and (4) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a duty established either directly by international law or indirectly by domestic law or practice to ensure that their subordinates comply with the law and the leaders fail to fulfill that duty.

C. Post World War II Developments in the Doctrine of Command Responsibility

There have been no war crimes trials involving the doctrine of command responsibility since the post World War II trials. In the aftermath of the My Lai massacre during the Vietnam conflict, there was considerable discussion of the concept of command responsibility and its application to senior U.S. military commanders. Disciplinary action was taken against a few senior officers and Captain Medina was tried for a violation of U.S. municipal law under the Uniform Code of Military Justice for the acts of his subordinate, Lieutenant Calley. Neither the *Medina* case, which resulted in an acquittal, nor the disciplinary action resulted in a significant development of the doctrine.

The first treaty to explicitly address the doctrine of command responsibility is the Additional Protocol I of 1977:

*Article 86 - Failure to act*
1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible
measures within their power to prevent or repress the breach.

Article 87 - Duty of commanders
1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Convention and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol and, where appropriate, to initiate disciplinary or penal action against violators thereof.\[37\]

These articles should be considered as essentially reflecting current customary law. Although the English language version of 86(2) uses the words "information which should have enabled them to conclude," the French version "des informations leur permettant de conclure" means "information enabling them to conclude." As both languages are official, the French version governs as it has the meaning which reconciles the divergent texts, having regard to the object and purpose of the treaty.

Article 86 imposes obligations on High Contracting Parties and on "superiors," while Article 87 imposes duties on "military commanders". Despite this difference, the two separate commentaries on Protocol I, by the ICRC\[38\] and Bothe, Partsch and Solf\[39\] discuss Article 86 in essentially military terms. The approach taken is that non-military persons may be superiors within the meaning of Article 86, but, if so, they should be exercising powers over subordinates which are substantially similar to those of military commanders. The ICRC

\[38\] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 1005-16 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY].
\[39\] MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMed CONFLICTS 523-29 (1982).
Commentary indicates three conditions which must be fulfilled if a superior is to be held responsible for an omission relating to an offense committed or about to be committed by a subordinate:

a) the superior concerned must be the superior of the subordinate . . . ;

b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;

c) he did not take the measures within his power to prevent it.⁴⁰

The ICRC Commentary discusses "superior" in what is, at a minimum, quasi-military terms:

a) The qualification of superior

This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However, it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of commanders). The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.⁴¹

Although there have not been post World War II trials developing the command responsibility doctrine, there have been events sparking further debate on the application of the doctrine. In September 1982, Lebanese Phalangist militia forces trained, paid, equipped, and, to a degree, under the control of Israel, were permitted by Israel to enter the Sabra and Shatila refugee camps near Beirut. While there they massacred several hundred Palestinian refugees. Following the massacre, the Israelis established the Kahan Commission to assess the responsibility of various Israeli commanders and

⁴⁰ ICRC COMMENTARY, supra note 38, at 1012.
⁴¹ Id. at 1013 (footnotes omitted).
political figures for the massacre. Although the Commission’s treatment of command responsibility was based more on a moral analysis rather than legal doctrine, the Commission did indicate that certain persons were responsible on the basis of what is referred to as “indirect command responsibility.” The term “indirect command responsibility” was used because the Phalange militia was not normally under direct Israeli command. A different analysis might have concluded that Israel did have sufficient control of the Phalangist forces to be regarded as responsible on the basis of command responsibility *per se*. No trials were held although disciplinary measures were taken against some Israeli officers.

At the very least, the Kahan Commission adopted a legalistic framework for assigning responsibility, although the expression “indirect responsibility” is perhaps inaccurate:

If it indeed becomes clear that those who decided on the entry of the Phalangists into the camps should have foreseen - from the information at their disposal and from things which were common knowledge - that there was danger of a massacre, and no steps were taken which might have prevented this danger or at least greatly reduced the possibility that deeds of this type might be done, then those who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded the anticipated danger. A similar indirect responsibility also falls on those who knew of the decision; it was their duty, by virtue of their position and their office, to warn of the danger, and they did not fulfill this duty. It is also not possible to absolve of such indirect responsibility those persons who, when they received the first reports of what was happening in the camps, did not rush to prevent the continuation of the Phalangists’ actions and did not do everything in their power to stop them.

The Commission assigned differing degrees of responsibility to those who made or implemented the decision, those who occupied certain positions and knew of the decision, and those who occupied certain other positions and received reports about what was happening in the camps. The report analyzed the decision making process related to the decision to allow Phalange troops into the camps in some detail, and most of its conclusions about responsibility are based on the

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43. Id. at 496.
specific facts of the incident and on the facts of Israeli political life. It asserted that political leaders have specific duties in times of armed conflicts that cannot be evaded even if they are not involved in the military decision making process. Further, some senior politicians may be integrally involved in making and implementing military decisions or may set broad military policy decisions and delegate responsibility for decisions of lesser magnitude to military commanders.

The Commission rejected the argument that the political leadership possessed no knowledge that the camps were being entered and concluded that certain political leaders, once informed of the entry into the camps, failed to fulfill duties to inquire about the circumstances imposed by the known history of Phalangist activity. The Commission also concluded that Phalangist excesses must have or should have been foreseen on the basis of direct and circumstantial evidence presented to the political leaders. The Commission's comments on the responsibility of the Minister of Defense are particularly telling:

As a politician responsible for Israel's security affairs, and as a Minister who took an active part in directing the political and military moves in the war in Lebanon, it was the duty of the Defense Minister to take into account all the reasonable considerations for and against having the Phalangists enter the camps, and not to disregard entirely the serious consideration mitigating [sic] against such an action, namely that the Phalangists were liable to commit atrocities and it was necessary to forestall this possibility as a humanitarian obligation and also to prevent the political damage it would entail. . . . [T]he Minister of Defense made a grave mistake when he ignored the danger of the acts of revenge and bloodshed by the Phalangists against the population in the refugee camps.

. . . Regarding [his] responsibility, it is sufficient to assert that he issued no order to the I.D.F. to adopt suitable measures. Similarly, in his meetings with the Phalangist commanders, [he] made no attempt to point out to them the gravity of the danger that their men would commit acts of slaughter. . . .

Had it become clear to the Defense Minister that no real supervision could be exercised over the Phalangist force that entered the camps with the I.D.F.'s assent, his duty would have been to prevent their entry. The usefulness of the Phalangists' entry into the camps was wholly disproportionate to the damage their entry could cause if it were uncontrolled. . . .

It might perhaps be inferred from [the Phalangists'] military
organization that the soldiers would heed the orders of their commanders and not break discipline; but at the very least, care should have been taken that the commanders were imbued with an awareness that no excesses were to be committed and that they give their men unequivocal orders to this effect. The routine warnings that I.D.F. commanders issued to the Phalangists, which were the same kind as were routinely issued to the I.D.F. troops, could not have had any concrete effect.

... [R]esponsibility is to be imputed to the Minister of Defense for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. These blunders constitute the non-fulfillment of a duty with which the Defense Minister was charged.  

One other document which should be taken into account is the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind. The latest iteration of this document buttresses the customary law position by addressing the issue of superior responsibility as follows:

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.  

IV. CONCLUSION

The customary international law doctrine of command responsibility as it is reflected in the Tribunal Statute is applicable to military commanders, paramilitary commanders, political leaders, and other leaders who exercise a high degree of control over subordinates. The concept of command responsibility imposes personal criminal responsibility on a superior for international crimes committed by persons

44. Id. at 502-03.
under his or her command or control. The superior may be held responsible for the acts of subordinates: (1) if the superior planned, instigated, ordered, committed or otherwise aided and abetted in the commission of a crime, or (2) if the superior failed to prevent or punish the perpetration of crimes by persons under his or her command or control.

A superior may be held liable for the commission of an offense as a result of a failure to act if the following elements are established:

1. An offense was committed;
2. Either
   2.1: the persons committing the offense were under the command of the accused, that is, the accused had the authority to issue orders to them not to commit illegal acts and the authority to see that offenders were punished; or
   2.2: the persons committing the offense were under the control of the accused, that is, the accused had a duty to ensure that they complied with the law, the ability to prevent them from committing illegal acts and the ability to see that the offenders were punished;
3. Either
   3.1: the accused had notice of commission of the offense.
      The notice may be either:
      3.1.1: Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
      3.1.2: Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission; or
   3.2: the accused should have known of the commission of the offense but has displayed such serious personal dereliction as to constitute willful and wanton disregard of the possible consequences;
4. The accused has failed to take such appropriate measures as are within his power to direct the persons under his command or his control and to prevent the commission of offenses; and
5. The accused has failed to take appropriate measures to punish the perpetrators.

In order to assess the potential culpability of individual superiors it is necessary to collect evidence on the following points, among others:

1) the commission of the offense;
2) the nature of the superior - subordinate relationship between the accused and the perpetrators (military, paramilitary, other), (direct superior in chain of command, superior in rank only), (executive authority, staff officer);

3) the means available to the accused to exercise control over the perpetrators (authority to issue binding orders, authority to take or recommend disciplinary measures, types of disciplinary measures available);

4) the state of knowledge of the accused before, while, and after offenses were committed;

5) the routine or extraordinary systems available to provide information to accused, effectiveness of systems and relevant information provided;

6) the notice of alleged offenses provided to accused by external sources — NGO’s, U.N., press, other;

7) the measures taken by accused to prevent commission of offense or to punish those responsible; and

8) the extent of accused’s participation in the commission of the offense. Did he or she plan, instigate, order, commit or otherwise aid and abet in the planning, preparation or execution of the offense?

It is clear that, under the existing international law doctrine of command responsibility, as reflected in the Tribunal Statute, political, paramilitary and bureaucratic superiors may be held liable for a failure to control their subordinates as well as for acts they have themselves committed. After the World War II cases involving the doctrine of military command responsibility, it was possible to develop a relatively precise word picture of the doctrine as it applied to military operations. It is not unreasonable to hope that proceedings before the Tribunal will add flesh to the skeleton of the doctrine of command responsibility as it applies to political and other leaders.

46. See generally Parks, supra note 20.