**Command Responsibility**
The Mens Rea Requirement

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February 2005

**Introduction**

The modern doctrine of command responsibility can be defined as ‘the responsibility of’ commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control. [1] This responsibility is based on a failure to prevent or punish subordinates for their unlawful actions. One of the controversial aspects surrounding recent developments of the doctrine has been the level of knowledge that commanders must possess before they become criminally responsible. Whilst it is accepted that actual knowledge of subordinates' crimes is sufficient, debate has centred on the appropriate level of "constructive" knowledge required to warrant individual criminal responsibility. [2]

Two different formulations of "constructive knowledge" have emerged. The stricter standard assesses whether the commander should, in the circumstances, have known of his subordinates unlawful actions, thereby placing him under a proactive duty to keep informed of troops' activities. Under a more lenient standard of "constructive knowledge", the commander is held responsible only where he fails to discover his subordinates' actions from information already available to him. Both tests have received support in post-World War II (“WWII”) jurisprudence on command responsibility, hence the status of customary international law in regard to the applicable mens rea standard for command responsibility remains ambiguous and contentious.

Part I of this paper attempts to trace the development of the command responsibility doctrine from early origins to its applications in post-WWII jurisprudence, and its codification in Additional Protocol I to the Geneva Conventions of 1949. [3] Particular emphasis will be placed on the various theories of "constructive knowledge" that were proposed.
Part II will examine the interpretation of command responsibility by the International Criminal Tribunal for the former Yugoslavia ("the ICTY"), stressing the disagreement among the judgements as to the requisite mens rea standard.

Part III will consider the knowledge requirement in Article 28(a) of the Rome Statute of the International Criminal Court ("the ICC"). [4] and will highlight the potential uncertainty surrounding the interpretation that may be adopted by the ICC.

Part IV will consider the justifications for adopting a stricter "should have known" standard, and will conclude with the suggestion that this standard is more appropriate for promoting the accountability of commanders for the actions of their subordinates.

I: The Development of the Doctrine of Command Responsibility

I. A. The Origins of Command Responsibility

The origins of command responsibility date back centuries. In around 500 B.C., Sun Tzu wrote in Ping Fa - "the Art of War" - about the duty of commanders to ensure that subordinates conduct themselves with a certain level of civility in armed conflict. [5] In 1439, Charles VII of France issued the Ordinance of Orleans, which imposed blanket responsibility on commanders for all unlawful acts of their subordinates, without requiring any standard of knowledge. The first "international" recognition of commanders' obligations to act lawfully occurred during the trial of Peter von Hagenbach by an ad hoc tribunal in the Holy Roman Empire; Von Hagenbach was convicted of murder, rape, and other crimes which 'he as a knight was deemed to have a duty to prevent.' [6] The Tribunal did not, however, explicitly rely on a doctrine of command responsibility. [7]

The principle of command responsibility was further developed during the US Civil War. Article 71 of General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field" (known as the "Lieber Code") imposed criminal responsibility on commanders for ordering or encouraging soldiers to wound or kill already disabled enemies. The first attempt at codifying the principle of command responsibility on a multinational level was The Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land. [8] Article 1 of the Annex to the Convention stated that an armed force had to be 'commanded by a person responsible for his subordinates', but did not further detail commanders' particular obligations.
Undoubtedly, these early mentions of command responsibility constitute 'the foundational root of the modern doctrine.' [9] However, the theory of command responsibility based on a failure to prevent subordinates' crimes only became recognized following World War I. The Allied Powers' Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties recommended the establishment of an international tribunal, which would try individuals for 'order[ing], or, with knowledge thereof and with power to intervene, abstain[ing] from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.' [10] This recommendation constituted a 'revolutionary advance in international jurisprudence', [11] because it advocated command responsibility on the basis of an omission, as well as direct orders, [12] and explicitly recognized that a commander can only be criminally liable for such an omission if he has some specific knowledge of his subordinates' unlawful actions. However, since the tribunal did not try any cases on the basis of command responsibility for a failure to prevent crimes, the knowledge requirement was not developed further until the post-WWII military trials.

I. B. Post-WWII Developments Concerning the Mens Rea of Command Responsibility

Although the statutes of post-WWII military tribunals did not include provisions on command responsibility, the tribunals developed the doctrine 'in the perceived need to hold superiors liable for crimes committed by their subordinates.' [13] Importantly, post-WWII judgements began to explicitly discuss the appropriate knowledge requirement for imposing command responsibility. However, the cases differed in their approaches to this issue, creating 'considerable ambiguity as to what constitutes the exact mens rea standard.' [14]

The first international trial where a commander was charged on the basis of responsibility for an omission was In Re Yamashita before the United States Military Commission. [15] General Yamashita was in command of the 14th Area Army of Japan in the Philippines, where his troops committed atrocities against hundreds of civilians. Yamashita was charged with 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes.' [16] In finding Yamashita guilty, the Commission espoused a stricter new standard by which to judge a commander, stating that where 'vengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable.' [17] Some authors have argued that the Commission imposed a strict liability standard on Yamashita. [18] Others have suggested that the Commission believed that Yamashita either knew of his troops' atrocities, or that he must have known" in the circumstances. [19] The Commission's reference to
a failure to "discover" criminal acts has also been interpreted as setting a "should have known" standard. [20] The vague formulation of the mens rea in Re Yamashita set the stage for a long-standing debate about the standard of knowledge required to establish command responsibility.

Post-WWII trials following Re Yamashita clearly accepted that a commander's actual knowledge of unlawful actions is sufficient to impose individual criminal responsibility. However, judgments continued to be rather ambiguous in their formulations of the requisite standard of "constructive knowledge". In the High Command Case, [21] the United States Military Tribunal held that in order for a commander to be criminally liable for the actions of his subordinates 'there must be a personal dereliction' which 'can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part' [22] tantamount to 'a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.' [23] The High Command Case clearly rejected the concept of strict liability. [24] However, it is less than clear exactly what level of negligence the Tribunal was advocating. Several authorities have interpreted the Tribunal's statement as supporting a "should have known standard" based on a commander's positive duty to know the actions of his subordinates. [25] Others have argued that the tribunal set a more lenient standard of knowledge, not requiring commanders to attempt to "discover" the misconduct of his soldiers. [26]

In the case of Hostage Case, [27] the US Military Tribunal stated that a commander is 'charged with notice of occurrences taking place within [occupied] territory'; [28] where he has received reports of crimes and he 'fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.' [29] In this formulation, the Tribunal appeared to limit the commander's duty to know to situations where he has already received some information about his subordinates' unlawful actions. Nevertheless, there are suggestions in the academic literature that the Tribunal did not necessarily exclude a general duty to know. [30] Notably, the Tokyo Tribunal was more explicit about imposing a strong "should have known" standard of knowledge on commanders. For example, in the trial against Admiral Toyoda, the Tribunal declared that the principle of command responsibility applies to the commander who 'knew, or should have known, by use of reasonable diligence' of his subordinates' unlawful actions. [31]

In summary, post-WWII jurisprudence expanded the parameters of command responsibility, imposing liability on commanders for their failure to prevent the commission of crimes by their subordinates. The cases explicitly discussed the requisite standard of mens rea, and were unanimous in the finding that a lesser level of knowledge than actual knowledge may be sufficient. However, the
jurisprudence created some confusion about the exact standard of constructive knowledge that is required to impose responsibility.

1. C. Codification: Additional Protocol I

The Additional Protocol I ("AP I") of 1977 to the Geneva Conventions of 1949 was the first international treaty to comprehensively codify the doctrine of command responsibility. Article 86(2) state that 'the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from 'responsibility' if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about 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 requires a commander to 'prevent and, where necessary, to suppress and report to competent authorities' any breaches of the Conventions and of AP I.

Article 86(2) is the first international provision to 'explicitly address the knowledge factor of command responsibility'. [32] A literal interpretation of this provision only imposes criminal liability on a commander where he could have learned of subordinates' unlawful conduct from information already available to him. Following this interpretation, the knowledge factor cannot be satisfied where the commander negligently 'failed to establish a proper system of communication and reporting procedures.' [33] However, as discussed in the next section, there is again debate as to the meaning of Article 86(2), and whether it can be interpreted to espouse a stricter "should have known" mens rea standard.

II. The Application of Command Responsibility by the ICTY

The establishment of the ICTY by the Security Council [34] has led to further international jurisprudence on the doctrine of command responsibility. The ICTY is limited to applying customary international law, [35] and therefore has interpreted the mens rea standard applicable to command responsibility as it existed in customary law at the time of commission of alleged offences.

Article 7(3) of the ICTY Statute states that the fact that the crimes 'were 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.' [36] There are two standards of knowledge encompassed by Article 7(3): "knew" and "had reason to know". "Knew" refers to actual knowledge, which can be established either directly or through circumstantial evidence. [37] The meaning
of "had reason to know" has been perhaps the most contentious aspect of command responsibility before the ICTY, and has received conflicting interpretations in the cases The Prosecutor v. Delalic et al ("the Celebici case") and The Prosecutor v. Blaskic.

The ICTY first considered the scope of command responsibility in the Celebici case. In particular, The Trial Chamber assessed the standard of "constructive knowledge" at customary law in order to interpret the term "had reason to know" under Article 7(3) of the ICTY Statute. The Trial Chamber found that post-WWII jurisprudence established a strict "should have known" requirement. However, the Trial Chamber held that the knowledge requirement at customary law was changed by AP I, because "[a]n interpretation of the terms of this provision in accordance with their ordinary meaning’ leads to the conclusion, confirmed by the travaux préparatoires, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.' Thus, the ICTY concluded that "had reason to know" under Article 7(3) requires the commander to have ‘had in his possession information of a nature, which at the least, would put him on notice of the risk of ‘offences by indicating the need for additional investigation in order to ascertain whether’ crimes were committed or were about to be committed by his subordinates.' Notably, the Trial Chamber commented that it made no findings on the present state of customary law, which may have changed following the adoption of the Rome Statute of the International Criminal Court.

In the Blaskic case, the ICTY again considered the meaning of "had reason to know" under Article 7(3). The Blaskic Trial Chamber agreed with Celebici that the jurisprudence following WWII established a customary law position that imposed on superiors a proactive duty to remain apprised of the acts of subordinates. However, the Blaskic Trial Chamber reached a different conclusion on the mens rea standard required by AP I, and thus the status of customary law following its adoption. The Trial Chamber interpreted Article 86(2) within the context of AP I, and in particular, in conjunction with Article 87. The Tribunal referred to the International Committee for the Red Cross Commentary to AP I, which states that Article 87 imposes a duty on commanders to be 'constantly informed of the way in which their subordinates carry out the tasks entrusted to them, and to take the necessary measures for this purpose.' It was held in order to give effect to Article 87, Article 86(2) had to encompass a duty to know, whereby ‘ignorance cannot be a defence [if] the absence of knowledge is the result of negligence in the discharge of [the commander’s] duties.' Consequently, the Blaskic Trial Chamber found that "had reason to know" in Article 7(3) of the ICTY Statute also imposes a stricter "should have known" standard of mens rea.
The disagreement between the Celebici and Blaskic Trial Chambers as to the customary law meaning of "had reason to know" was settled by the decision of the Appeals Chamber in Celebici, which is binding on the Trial Chambers. [44] Interestingly, the Appeals Chamber disagreed with both Trial Chambers in respect of the status of customary law established by post-WWII jurisprudence. The Appeals Chamber held that there is '[no] consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.' [45] Therefore Article 86(2) represented a consolidation and elucidation of the mens rea standard of command responsibility. The Appeal Chamber concurred with the Celebici Trial Chamber in its interpretation of Article 86(2), holding that the ordinary meaning of the provision indicated that the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates. The findings of the Celebici Appeals Chamber were recently confirmed by the Appeals Chamber in Blaskic, [46] which stated that 'the Celebici Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know" under Article 7(3). [47] Nevertheless, the conflicting findings of the ICTY in respect of the customary status of the knowledge standard reinforce the continuing debate as to the appropriate level of mens rea for command responsibility.

III. Command Responsibility Under The Rome Statute of the ICC

The doctrine of command responsibility has recently been codified in Article 28 of the Rome Statute of the ICC. Article 28(a) imposes individual responsibility on military commanders for crimes committed by forces under their effective command and control if they 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.' [48]

Interpreted literally, Article 28(a) adopts the stricter "should have known" standard. Notably, the Trial Chamber in Celebici strongly suggested that the language of Article 28(a) may reasonably be interpreted to impose an affirmative duty to remain informed of the activities of subordinates. [49] However, given the example afforded by the ICTY's conflicting interpretations of the knowledge requirement in Article 86(2) of AP I, it cannot be assumed that a literal interpretation of Article 28(a) will be adopted by the ICC. In fact, the meaning of the phrase 'owing to the circumstances at the time, should have known' in Article 28(a) has already become a point of contention within international law literature. [50]
IV. What Standard of Mens Rea Should be Adopted by the International Criminal Court?

The opinion of this paper is that the ICC should interpret Article 28(a) literally to adopt a "should have known" mens rea standard for command responsibility of military superiors. This standard ‘objectively evaluates the commander's particular position and attributes to him the knowledge that would have been reasonable for him to possess’. [51] The main advantage of this stricter knowledge requirement is that it serves as a deterrent, giving incentive to a commander to be aware of what his subordinates are doing. [52] The more lenient standard, which only imposes a duty to investigate once the commander has been put on notice by receiving some general information, would allow superiors to argue that they are not criminally responsible for their subordinates' crimes because, having negligently failed to carry out their duty to institute a proper reporting system, they never received reports of these subordinates' actions. This standard may in fact discourage commanders from instituting appropriate monitoring and communication systems in order to avoid receiving information, which would put them on notice. Moreover, it may even ‘encourage a commander to destroy documents that would prove his awareness of war crimes, thereby escaping punishment'. [53] Such possibilities must be guarded against in order to promote the 'preventative basis of international humanitarian law'. [54]

Commentators against the stricter "should have known" standard argue that this knowledge requirement 'is not acceptable because it places too heavy a burden on commanders to be informed of every action that occurs in their territory.' [55] However, given that military commanders generally assume their position voluntarily, [56] this proactive duty is arguably justifiable. It has also been suggested that the "should have known" standard is too imprecise to operate in the context of individual criminal responsibility. [57] However, in applying the "should have known" test, a Court can take into consideration various specific factors, such as the commander's position in the chain of command, their proximity to the situation, the reasonable possibility of making inquiries, and the reliability of information reaching the commander. This test recognizes that there are realistic limitations on what a commander should have known in a particular situation, whilst at the same time promoting 'vigilance on the part of leaders in preventing 'violations of humanitarian law.' [58]

Conclusion

The knowledge element of command responsibility has been a point of contention in international law since WWII. The ambiguous formulations emerging from post-WWII jurisprudence have led to continuous re-
characterization of the appropriate standard of "constructive knowledge". This much is evident from the conflicting interpretations of the knowledge requirement reached by the Trial Chambers of the ICTY in Celebici and Blaskic. The doctrine of command responsibility plays a fundamental role in 'regulating the behaviour of superiors and their subordinates in times of war' and it is essential for the doctrine's effective operation to arrive at a precise formulation of its mens rea requirement. [59] The "should have known" standard should be adopted in order to ensure greater accountability of superiors for the actions of their subordinates in times of war.

Endnotes


2 The present paper is concerned with the individual criminal responsibility of military commanders, and discussion of civilian leaders' obligations is outside the scope of the present discussion.

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3.


7 Ibid.

8 The Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land 36 Stat. 2277, 1 Beavens 631.

9 Womack, supra note 3 at 117.
10 Burnett, supra note 2 at 81 (quoting Committee on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar., 19, 1919, reprinted in (1920) 14 American Journal of International Law 95).


12 Burnett, supra note 2 at 81


15 Womack, supra note 3 at 120.

16 In Re Yamashita, 327 U.S.1 (1946) 13-14.


18 Womack, supra note 3 at 122; see also Matthew Lippman, ‘Conundrum of Armed Conflict: Criminal Defences to Violations of the Humanitarian Law of War’ (1996) 15 Dickinson Journal of International Law 1, 75, 89 (‘The judgment appeared to impose strict liability on military officers. Clearly, Yamashita was not cognizant of and could not have been aware of each and every crime committed under his command.’).

19 Stryszak, supra note 10 at 4.

20 Crowe, supra note 7 at 207.


22 Ibid at 76.
23 Ibid.

24 Womack, supra note 3 at 128.

25 Stryszak, supra note 10 at 49 cf. Womack, supra note 3 at 128.

26 See for example Womack, supra note 3 at 128.

27 ‘Trial of Wilhelm List and Others’ ("The Hostage Case"), 8 Law Reports of Trials of War Criminals 35.

28 Ibid at 71

29 Ibid.

30 Stryszak, supra note 10 at 51.


32 Stryszak, supra note 10 at 60; see generally Geneva Conventions Relative to the Protection of Civilians in Times of War, 75 UNTS 287.

33 Stryszak, supra note 10 at 61.

34 See Security Council Resolution 808, UN SCOR 48th Sess., (1993), which established the ICTY.


36 The ICTY has interpreted Article 7(3) to include three elements, which must be proven for imposition of command responsibility: i). the existence of a superior-subordinate relationship; ii). the superior knew or had reason to know that the criminal act was about to be or had been committed; and iii). the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof. These requirements were established in The Prosecutor v. Zejnil Delalic, Zdravko Music, Hazim Delic and Esad Landzo , Case No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998 (hereinafter 'Celebici Trial Chamber Judgement '). Confirmed in The Prosecutor v Timohir Blaskic, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000 (hereinafter 'Blaskic Trial Chamber Judgement ' ) para 294; The Prosecutor v Zlatko Aleksovski , Case. No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, para 69 (hereinafter 'Aleksovski Judgement '); The
Prosecutor v Dario Kordic and Mario Cerkez, Case no. IT-95-14/2, Judgment, Trial Chamber, 26 February 2001, para 401; The Prosecutor v Dragoljub Kunarac and Radomir Kovac, Case No. IT-96-23, Judgement, Trial Chamber, 22 February 2001, para. 395. The present discussion is concerned with the mens rea element of command responsibility. For a discussion on the remaining two elements, see Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 American Journal of International Law 573.

37 The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para 241 (hereinafter "Celebici Appeals Chamber Judgement"); Celebici Trial Chamber Judgement, para 386; Blaskic Trial Chamber Judgement, para 307; Aleksovski Judgement, para 80; Kordic Judgement, para 427.

38 Celebici Trial Chamber Judgement, paras.387-390.

39 Ibid, para. 393.

40 Ibid, para 383.

41 Ibid, para 393.


43 Ibid, para.332.

44 The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para 113 referring to the binding nature of Appellate decisions.

45 Celebici Appeals Judgement, para. 229.

46 The Prosecutor v Timohir Blaskic, Case no. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 (hereinafter "Blaskic Appeals Chamber Judgement").


48 Article 28(b) of the Rome Statute is concerned with the superior responsibility of civilian leaders.

49 Celebici Trial Chamber Judgement, para 393.

Stryszak supra note 10 at 61.

Ibid at 63

Ibid.

Keith supra note 50 at 633.

See for example Womack supra note 3 at 128.

Stryszak supra note 10 at 64.


Wu and King, supra note 13 at 290.

Mitchell, supra note 12 at 410.