

4-1-2018

## Standards in Command Responsibility Prosecutions: How Strict, and Why?

Michael J. Sherman

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

---

### Suggested Citation

Michael J. Sherman, Standards in Command Responsibility Prosecutions: How Strict, and Why?, 38 N. Ill. U. L. Rev. 298 (2018).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact [jschumacher@niu.edu](mailto:jschumacher@niu.edu).

# Standards in Command Responsibility Prosecutions: How Strict, and Why?

MICHAEL J. SHERMAN<sup>1</sup>

*The attached article looks at the concept of command responsibility – the idea that a commander may be held liable for crimes committed by his or her soldiers, even if the commander did not order these crimes to be committed, and may not have been aware of the criminal activity at all. It examines command responsibility prosecutions attached to a number of different conflicts: World War II, the Yugoslavian and Rwandan genocides, and the Sierra Leonean civil war. It also discusses proposed standards for command responsibility prosecutions set out by the African Union and the UN (both in the International Criminal Court and in UN peacekeeping operations).*

*As the article demonstrates, the standards used for prosecuting command responsibility cases in these various settings have differed significantly, making for important differences in the ability to hold the accused accountable. I propose one factor that helps predict how easy or difficult it will be to prosecute command responsibility cases: the extent to which those who write the standards have reason to fear that they themselves could be held liable under the standards they are establishing. If they have little to fear, then the rule setters will make it relatively easy to prosecute these cases. If they are worried, then it will be correspondingly harder to bring command responsibility prosecutions. I then discuss the implications of this conclusion for the legitimacy of international law in this area.*

BACKGROUND .....	300
NUREMBERG: TWO CASES .....	306
ICTY: MIXED SIGNALS.....	313
ICTR: AKAYESU, MUSEMA, AND EXTENDING THE NOTION OF “COMMANDER” .....	317
CREATION OF THE ICC.....	321
ICC IN PRACTICE: COMMAND RESPONSIBILITY LANGUAGE AND THE <i>BEMBA</i> RULING .....	322
SIERRA LEONE: THE INFLUENCE OF ICTY.....	326
A WORD ABOUT THE MALABO PROTOCOL.....	339
CONCLUSION .....	341

---

1. LL.M. Georgetown University Law Center; J.D. The University of Michigan. The author is an attorney with the federal government. The views expressed here are solely his own. The author wishes to thank Professor Jane Stromseth for comments on an earlier version of this article, and his colleague Jutha Saovabha for a useful suggestion on a prior draft.

*Command responsibility* is the term given to a legal concept which states that a commander bears some degree of accountability for the actions of his or her underlings. This is hardly a novel proposition when it comes to, for example, evaluating the performance of a senior officer's platoon in battle. It is a relatively newer idea in the context of assigning blame and initiating prosecutions against a senior officer for human rights violations committed by his or her soldiers. However, it is by now generally accepted that a commander can and may be held to account for such crimes, even if s/he did not participate in them, order them, or have actual knowledge that they were taking place. Command responsibility prosecutions have taken place in a number of fora, including the international tribunals established to address atrocities committed in World War II, and more recently in the former Yugoslavia (ICTY),<sup>2</sup> Rwanda (ICTR),<sup>3</sup> and Sierra Leone (SCSL),<sup>4</sup> as well as the broader jurisdiction International Criminal Court (ICC).<sup>5</sup> In addition, the Malabo Protocol to the Statute of the African Court of Justice and Human Rights has a command responsibility provision,<sup>6</sup> though the Protocol has not received enough ratifications to come into effect as of yet.

While there is general acceptance of the idea of command responsibility itself, there is no single accepted definition of what it encompasses, or what standards should be applied in cases against commanders. Some differences in meaning may be minor, while others may be more significant. This paper examines some of these variations and what motivates them. In particular, I will suggest that the less those setting the rules for command responsibility feel that they are themselves at risk of being subject to prosecution, the more expansively they will define the term so as to apply to others.<sup>7</sup> This has some troubling implications for the legitimacy of the prosecutions that follow, not only in an abstract sense, but in terms of the perception of these international

---

2. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, S.C. Res. 827 [hereinafter ICTY Statute].

3. See Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, S.C. Res. 955 [hereinafter ICTR Statute].

4. See Statute of the Special Court for Sierra Leone art. 6(3), Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute].

5. See Rome Statute of the International Criminal Court art. 28, July 17, 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

6. See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 15, 2014, STC/Legal/Min/7(1) Rev. 1, Art. 46(B) [hereinafter Malabo Protocol].

7. This phenomenon may apply to the definitions used for other crimes as well, though this article is primarily concerned with how this plays out with respect to command responsibility.

tribunals by the local populations, as well as the ability of countries that have suffered these mass atrocities to move forward and develop their own legal systems.

This paper will look at the doctrine of command responsibility in the following way: I will begin with a brief background discussing its development. I will then examine how the charge of command responsibility has been used in several different tribunals: the tribunal established by the United States to try Japanese General Tomoyuki Yamashita at the close of World War II; two cases against a large number of senior Nazi officers from what came to be known as the Subsequent Nuremberg Proceedings (which were also American run); tribunals launched by the UN Security Council in response to massive war crimes in the former Yugoslavia and Rwanda; the more comprehensive mandate ICC; and the “hybrid” tribunal established in response to the civil war in Sierra Leone. In addition, I will also discuss the proposed command responsibility provision in the Malabo Protocol.

#### BACKGROUND

In a 1973 article, military lawyer Major William Parks traces some of the history of the concept of command responsibility.<sup>8</sup> As he notes, the idea of command responsibility (though more so in the broader sense of a superior being responsible for the performance of his troops) can be found as far back as Sun Tzu.<sup>9</sup> Command responsibility as it is discussed here—the responsibility of a superior for crimes committed by his or her underlings—exists in the works of Hugo Grotius,<sup>10</sup> who laid the early groundwork for much of modern international law. Grotius, writing in the early seventeenth century, commented that “we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime.”<sup>11</sup> Parks also makes mention of what we would think of as something close to a modern command responsibility prosecution from as long ago as the 15<sup>th</sup> century, a case of an Austrian knight being convicted for failing to prevent the commission of crimes.<sup>12</sup>

Moving to more recent times, Parks details the inclusion of command responsibility concepts in American military documents from early in our history. He even points out the court martial, during the Black Hawk War, of

---

8. See William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

9. See *id.* at 3-4.

10. See *id.* at 4.

11. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 523 (Francis W. Kelsey trans.) (1925).

12. See Parks, *supra* note 8, at 4-5.

one Captain Abraham Lincoln after his soldiers broke into the officers' whiskey supplies.<sup>13</sup> On the international front, the annex to the Fourth Hague Convention (passed in 1907) included language mandating that, to be considered a legitimate fighting force, a military unit had to be "commanded by a person responsible for his subordinates,"<sup>14</sup> thereby seeming to imply the idea of command responsibility without stating it explicitly.<sup>15</sup>

Thus, it would be inaccurate to describe command responsibility as a purely post-WWII construct. But it is fair to say that the importance of the concept and its use in a variety of settings has increased since 1945. The United States held one of the first important post-WWII command responsibility trials when it prosecuted, and ultimately executed, General Yamashita for crimes committed by forces under his command in the Philippines.

General Yamashita was charged with "unlawfully disregard[ing] and fail[ing] to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes"<sup>16</sup> in the Philippines during a period which extended for several months. There is no doubt that Japanese troops, ostensibly under Yamashita's control, carried out horrendous offenses, including killing an estimated 33,000 civilians and committing hundreds of rapes.<sup>17</sup>

When the general's appeal of his conviction reached the United States Supreme Court, the Court cited the aforementioned Fourth Hague Convention as "plainly impos[ing] on petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."<sup>18</sup> Chief Justice Stone's opinion explained that the law of war's "purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the

13. See *id.* at 6. The future president was sentenced to two days carrying a wooden sword. See *id.* (internal citation omitted).

14. Convention Respecting the Laws and Customs of War on Land [hereinafter Fourth Hague Convention] art. 1, Oct. 18, 1907, 36 Stat. 2277, 1910 WL 19348. See also Parks, *supra* note 8, at 11.

15. Though one commentator suggests that this language in the Convention was not meant to establish a duty of command responsibility on superior officers, but was directed to distinguishing regular armies, which had formal command configurations, from loose bands of irregular fighters (some of which existed during the American Civil War), which lacked such structures and were intended to be excluded from the category of legitimate fighting forces. See ALLAN A. RYAN, *YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY* 65 (2012).

16. *In re Yamashita*, 327 U.S. 1, 7 (1946).

17. See WILLIAM C. PETERS, *Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from My Lai to Haditha and Beyond*, in *CRIMES OF STATE PAST AND PRESENT: GOVERNMENT-SPONSORED ATROCITIES AND INTERNATIONAL LEGAL RESPONSES* 174 (David M. Crowe, ed., 2011) (internal citations omitted).

18. *Yamashita*, 327 U.S. at 16.

commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”<sup>19</sup> But while the Chief Justice tried to pass off the Court’s ruling as a simple application of existing principles, there was something new about the prosecution of Yamashita: “Prior to 1945 . . . there were . . . apparently no recorded cases of prosecution for simply allowing a crime to take place or for not reporting one afterward.”<sup>20</sup>

Furthermore, as Allan Ryan points out, if the term “permitting” in the charging document was read to mean “allowed to happen,” as opposed to “actively gave approval for,” then Yamashita was arguably guilty simply by virtue of the fact that the atrocities took place at all. Under this theory, a form of strict liability, the commission of war crimes constituted per se proof that Yamashita had failed to control his troops, regardless of any consideration of steps he had, or could have, taken to prevent the wrongdoing.<sup>21</sup>

In a biting dissent, Justice Frank Murphy lambasted the procedural defects in Yamashita’s trial (including, but not limited to, the fact that the general was hit with 59 additional charges on the day his trial began, with no continuance given in order to give his counsel the opportunity to prepare a defense to those charges).<sup>22</sup> He also ridiculed the assertion that Yamashita had, in fact, anything resembling control over the combatants who committed the atrocities, arguing that the prosecution’s case could best be summed up as follows: “We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. . . . Our standards of judgment are whatever we wish to make them.”<sup>23</sup> Thus, while Murphy did not challenge the basic notion of command responsibility, he did suggest that its standards could not be applied against a commander whose army was in the end stages of a losing battle (not because Murphy thought that the soon to be defeated side should be able to get away with anything, but rather that, given the facts on the ground over the relevant period, there was no realistic way in which Yamashita could have prevented the atrocities committed by the soldiers nominally under his control).

---

19. *Id.* at 15.

20. RYAN, *supra* note 15, at 64. This fact is consistent with Ryan’s assertion that the language in the Fourth Hague Convention had not been intended or previously read as establishing command responsibility as the US military tribunal had applied it against General Yamashita.

21. *See id.* at 62.

22. *See Yamashita*, 327 U.S. at 33 (1946) (Murphy, J. dissenting).

23. *Id.* at 34-35.

Was Justice Murphy correct? Yamashita asserted a number of claims in his defense: first, he had arrived in the Philippines as commander only a few weeks before the beginning of the American invasion, hardly enough time to assess the situation and to organize and assert control over his troops.<sup>24</sup> Furthermore, while Yamashita was officially the head of all Japanese forces in the Philippines, given the extreme level of animosity and infighting between the Japanese army and navy, it was not clear to what degree the general truly exercised control, especially over the latter.<sup>25</sup> Japanese communications technology was substandard (even for the times), meaning that it would be difficult for the general to receive word of atrocities, much less to respond with orders to desist.<sup>26</sup> The inability to be in touch was exacerbated by Yamashita's decision to divide his forces into three groups and to head out of urban areas and into the mountains, terrain that he hoped would make it easier for a smaller army to defend against an invading force,<sup>27</sup> but a battle plan that made contact with his troops that much more difficult.

As Ryan notes, though the charging document listed the offenses committed by Japanese forces in horrifying detail, “[t]here was no assertion that Yamashita had committed any of the crimes, had ordered any of the crimes, or had acquiesced in any of the crimes; indeed, there was no allegation that he knew about any of the crimes.”<sup>28</sup> At his trial, the general denied having given any orders to murder civilians<sup>29</sup> and denied receiving information of such crimes taking place.<sup>30</sup> Moreover, he had given orders to the navy to abandon Manila,<sup>31</sup> so he had no reason to think his forces were there in the first place, much less there and committing atrocities.

Perhaps Yamashita was lying.<sup>32</sup> Or maybe even taking his account as accurate he should still have been held accountable, that he had to have done *something*, and that at a minimum it was irresponsible of him to make it even harder for his troops to communicate and then throw up his hands and say “sorry, I didn’t know.” But even so, given the available precedents, Murphy could reasonably claim that convicting Yamashita on the record presented to

---

24. See RYAN, *supra* note 15, at 32-33. Yamashita had spent the previous two years in relative exile, commanding Japanese forces in Manchuria, a far less important posting. See *id.* at 30.

25. Yamashita, 327 U.S. at 33.

26. See *id.* at 42-43.

27. See *id.*

28. ALLAN A. RYAN, YAMASHITA’S GHOST: WAR CRIMES, MACARTHUR’S JUSTICE, AND COMMAND ACCOUNTABILITY 65 (2012).

29. See *id.* at 162.

30. See *id.* at 211.

31. See *id.* at 164.

32. See Parks, *supra* note 8, at 25-30 (discussing evidence against Yamashita).

the tribunal went far beyond the standards of the laws of war previously recognized by the United States.<sup>33</sup>

This is an important point. To some degree, the use of a harsh standard by which to judge General Yamashita simply reflects “victor’s justice;” the idea that the winning side in a war gets to decide who was at fault (and naturally determines that those on the losing side were). America had won a war that Japan had started, and intended to punish the Japanese, legal niceties notwithstanding.<sup>34</sup> But as we will see, more modern instances of war crimes courts are not such clear examples of prosecution of the losers by representatives of the state that had been their direct opponent in an armed conflict. These contemporary tribunals are not so easily chalked up as the revenge of victorious direct combatants. Thus, I believe that there is more to the story than just the winning side settling scores. What I think needs to be asked is to what degree do those establishing the statutes have reason to fear that they will be subject to the same sets of rules. If the answer is that they do not have much to fear, then it is likely that they will establish standards more probable to result in conviction. If, on the other hand, those writing the regulations have reason to think they could be subject to them, they will establish a higher requirement for culpability.

The reason this is somewhat different from classic notions of “victor’s justice” is that as time has gone by, command responsibility has become a more accepted and better understood concept. Whereas, in the initial Nuremberg trials, Nazi defendants could argue that they were being tried for acts they had no reason to think would be considered criminal,<sup>35</sup> by the time the Rome Statute was passed in 1998 (a statute that had no retroactive application,<sup>36</sup> thereby eliminating the *ex post facto* concerns that existed at Nuremberg), command responsibility had long since been recognized as a basis for charges under international law, whether one dated its establishment to the Fourth Hague Convention, the First Additional Protocol to the 1949 Geneva Convention,<sup>37</sup> or to the case law that emerged from the Yamashita and Nazi trials, all of which preceded the recent tribunals discussed below. Thus, while in most of our cases we do not have classic victor’s justice (the Yamashita trial comes the closest), we do have situations where the side making the rules

---

33. See *Yamashita*, 327 U.S. at 35.

34. It was, presumably, no coincidence that Yamashita’s trial concluded on December 7, 1945. See *id.* at 5.

35. Obviously, this was a hotly disputed contention.

36. See Rome Statute, *supra* note 5, at art. 24(1).

37. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, 42-43, article 86, reprinted in 16 Int’l Legal Materials 1391, 1428-29; Timothy Wu and Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in American Law*, 38 HARV. INT’L L. J. 272, 276 n.24 (1997).

considers the risk of being held to those same regulations, with a corresponding impact on how the statutes are written and/or interpreted.

In the case of the victorious American army, conviction of a Japanese general by procedures set by the American military itself did not present much risk that these standards would be employed by other countries against the United States.<sup>38</sup> The military did not indicate that it was setting rules that were intended to apply internationally. Quite the contrary, in fact. As Ryan describes, the bylaws that were to govern post-war trials against the Japanese were simply left to the discretion of General MacArthur.<sup>39</sup> He issued a series of orders about these cases, one of which dealt specifically with proceedings to be undertaken against General Yamashita.<sup>40</sup> Thus, the legal standard employed was a creation of MacArthur's, and a *sui generis* one at that, specially designed to target the winner's defeated opponent.<sup>41</sup> It is not surprising that a guideline created in this manner was prosecution-friendly. Nor was there likely to have been much concern that its rules would be used against Americans. At the end of a war in which Americans viewed themselves as having acted virtuously, the possibility that Americans could ever be subject to prosecution for acts (or omissions) similar to those that formed the basis of the charges against Yamashita must have seemed remote.

Not surprisingly, when Americans were eventually in the position of being accused of committing war crimes (and, in particular, crimes involving command responsibility), they were not judged by MacArthur's rules for Yamashita. In the aftermath of the My Lai massacre, when US military of-

38. As Lawrence Rockwood describes in *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility*, to some degree this may simply be because violations of the laws of war by the United States were not even reported or prosecuted in the first place. Rockwood mentions the massacre of several hundred unarmed Korean civilians early in the Korean War near the villages of Im Ga Ri and Joo Gok Ri. This crime took place while General MacArthur was the American commander, meaning that he would have been found liable under any standard at all close to the one applied to General Yamashita. But the crime was simply covered up. See LAWRENCE P. ROCKWOOD, *WALKING AWAY FROM NUREMBERG: JUST WAR AND THE DOCTRINE OF COMMAND RESPONSIBILITY* 96-97 (2007); see also Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman, or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 552-55 (2008) (describing the events and noting that a US Army investigation of the incident revealed a "high-level document" stating that the army had a policy of shooting approaching civilians in South Korea).

39. See RYAN, *supra* note 15, at 60. So, not only was a member of the losing side tried by a member of the winning side, a defeated general was tried at the direction of a general from the winning side who he had faced in battle. *Id.*

40. See *id.* at 61.

41. Furthermore, as Ryan points out, MacArthur felt a special affinity for the Philippines (where he had spent much of his life) and its people. Thus, he particularly wanted to be sure that someone was held to account for what had happened there. See *id.* at 60.

fficers were faced with command responsibility charges for offenses committed by American soldiers in Vietnam, the military justice system employed a much less prosecution-friendly standard than that which had been used to convict General Yamashita. While Lieutenant William Calley was convicted for his role in the atrocities, he had taken direct part in the killings. His superior, Captain Ernest Medina, was acquitted of a command responsibility charge after his court-martial judge instructed the jurors that the prosecution would have to meet an actual knowledge standard (as opposed to knew or should have known) in order to convict.<sup>42</sup> Also escaping charges were the most senior leaders of the brigade and division.<sup>43</sup>

As Michael Smidt notes, the main reason that Medina's case was evaluated under an actual knowledge standard was that he was only charged with violating the Uniform Code of Military Justice, and not with violating international law.<sup>44</sup> Which is to say, while the United States prosecuted Japanese and German defendants for violations of international law for committing war crimes, when it came to American soldiers alleged to have massacred civilians (or failed to stop such massacres by their subordinates), the defendants were not even charged with, much less convicted of, breaking international law.

Thus, the American case is perhaps an extreme example of the more general point: the criteria a tribunal establishes for command responsibility are likely to bear some relationship to the chance that those writing the guidelines have reason to believe the standards could be used against them in the future. If the chance is slim, then the rule makers will be happy to create an easy to meet threshold for command responsibility. If the chance is greater, then the crime will be correspondingly harder to prosecute. The Medina trial also demonstrates a corollary to this principle, which we will see further examples of below: another way to avoid the risk of conviction, regardless of the substance of the law in question, is simply to exempt yourself from the law's coverage to begin with.

#### NUREMBERG: TWO CASES

While the most notable Nuremberg defendants were senior Nazi leaders, people such as Hermann Göring, Joachim von Ribbentrop, and Albert Speer, who were held responsible for the planning and carrying out of some

---

42. See PETERS, *supra* note 17, at 178; see also Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Order*, 164 MIL. L. REV. 155, 193 (2000) (discussing the judge's trial instructions).

43. See PETERS, *supra* note 17, at 178.

44. See Smidt, *supra* note 42, at 194-95.

of the more notorious of the Nazi crimes,<sup>45</sup> there were also some prosecutions that invoked a concept of command responsibility. These cases, however, took place as a supplement to the main Nuremberg trials. Unlike the prosecutions jointly brought by the four allied powers (the US, the Soviet Union, Great Britain, and France), the two command responsibility prosecutions were brought by American prosecutors as part of a series of cases known as the Subsequent Nuremberg Proceedings, and the cases were heard in front of a panel of American judges.<sup>46</sup> The two command responsibility cases from this group were *United States v. von Leeb* (the “High Command Case”), and *United States v. List* (the “Hostage Case”).

Wilhelm von Leeb and his thirteen<sup>47</sup> co-defendants were described as “former high-ranking officers in the German Army and Navy, and officers holding high positions in the German High Command (OKW).”<sup>48</sup> They were charged with crimes against peace, war crimes, and crimes against humanity.<sup>49</sup> As Valerie Hébert points out, the US viewed “the crime of aggressive war [as] the supreme crime,”<sup>50</sup> thus some of the charges pertained to the fact of Germany’s invasion of other countries in the first place, wholly apart from the sorts of crimes that are commonplace in war and that are closer to what we now think of as war crimes (killing or abusing civilians, mistreatment of POWs, etc.). The reasoning behind this was the belief that “the problem of war crimes had to be attacked at its root: aggressive war.”<sup>51</sup> Some of the charges against the High Command defendants related to the German decision to invade the Soviet Union, known as Operation Barbarossa. The prosecution introduced evidence that several of the defendants had been in attendance at a meeting with Hitler in which he outlined the plan for the invasion, which was “to be a total war of destruction.”<sup>52</sup>

Other charges pertained to transgressions more akin to conventional war crimes: the Commissar Order, by which certain Red Army soldiers were to be executed immediately upon capture, rather than taken prisoner,<sup>53</sup> and the Commando Order, which similarly called for the immediate execution of Allied soldiers captured while in the midst of “special missions,”<sup>54</sup> were each

45. Göring and von Ribbentrop received death sentences; Speer pled guilty and was sentenced to twenty years.

46. See VALERIE GENEVIÈVE HÉBERT, *HITLER’S GENERALS ON TRIAL 1* (2010).

47. One of whom committed suicide during the trial. See U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals*, Vol. XII at 1 (1949) [hereinafter *Reports of Trials*, Vol. XII].

48. *Id.*

49. *See id.*

50. HÉBERT, *supra* note 46, at 1.

51. *Id.* at 72.

52. *Id.* at 77.

53. *See id.* at 79.

54. *See id.* at 79-80.

sources of charges. Additionally, there were orders to kill civilians in towns the Germans wanted cleared,<sup>55</sup> as well as directives dealing specifically with the treatment of Jews and Romani.<sup>56</sup>

Whereas in the other cases discussed in this Article, the question was whether, and to what degree, a given superior was responsible for actions taken by subordinates acting to some respect of their own accord, here there were actual orders from senior military officers to commit violations of international law. Under these circumstances, the issue for the tribunal was figuring out the extent of an officer's guilt for giving a particular order, or passing along an order given by a superior. Professor Hébert writes that "[f]or staff officers, guilt was relatively simple to identify: these were the men who composed and disseminated flagrantly criminal orders . . . . As for field commanders . . . they did not enact these orders themselves. However, by virtue of their rank, they were held responsible."<sup>57</sup>

The court also attempted to evaluate how much responsibility could be attributed to a particular local commander, and how much should be placed on forces outside the military chain of command, i.e. "the state." It explained that

it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will.<sup>58</sup>

The purportedly authoritative position of non-military officials contrasted the case from *Yamashita*, in which there was no non-military Japanese authority in the Philippines to speak of.<sup>59</sup>

The Hostage Case centered around reprisals against civilians in Nazi-occupied territories.<sup>60</sup> As with the High Command Case, the defendants were senior Nazi officers.<sup>61</sup> The indictment stated that the defendants had issued

55. See VALERIE GENEVIÈVE HÉBERT, *HITLER'S GENERALS ON TRIAL* 89 (2010).

56. See *id.* at 91-94.

57. *Id.* at 67.

58. *Reports of Trials, Vol. XII, supra* note 47, at 76; see also Parks, *supra* note 8, at 43.

59. See *Reports of Trials, Vol. XII, supra* note 47, at 544-45; see also Parks, *supra* note 8, at 43.

60. See U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals, Vol. XI*, at 759 [hereinafter *Reports of Trials, Vol. XI*].

61. See Parks, *supra* note 8, at 58, n.196. And as with the High Command Case, one of the defendants committed suicide during the course of the proceedings. See *id.*; see also *Reports of Trials, Vol. XI, supra* note 60, at 759.

orders which had resulted in the deaths of thousands of civilians, as well as looting, “wanton destruction” of towns, refusal of quarter to enemy soldiers, and deportations to concentration camps, all in violation of the Hague Convention of 1907.<sup>62</sup> As an example of the charges, defendant List was alleged to have personally received orders from Hitler pertaining to the suppression of resistance movements in areas held by the Nazis.<sup>63</sup> These orders included large scale reprisals for the deaths of any German soldiers, on the order of fifty or even one hundred to one.<sup>64</sup>

Part of the defense asserted that the defendants had been unaware of some of the reports of crimes committed by their subordinates: “We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission.”<sup>65</sup> But the court rejected this, maintaining that the German Army was well enough equipped to allow for communication even when a commander was away from headquarters.<sup>66</sup>

In both of these cases, the issues of command responsibility were tied up with claims of superior orders.<sup>67</sup> That is, the tribunals were simultaneously trying to determine the liability of individuals who may have given illegal orders as well as received them. But the judges were largely unsympathetic to defenses based on superior orders. In the first instance, a local commander was responsible for the acts of subordinates in the area: “The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility.”<sup>68</sup> And with regard to a claim based on superior orders, the Hostage tribunal ruled that this was not a legitimate defense to carrying out illegal actions, that the rejection of this defense was a position “adopted by civilized nations extensively.”<sup>69</sup> Similarly, the High Command court stated that

---

62. See U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals, Vol. VIII*, at 35-36 [hereinafter *Reports of Trials, Vol. VIII*].

63. See *id.* at 38-39.

64. See *id.* at 39. As Parks notes, wholly apart from the command responsibility aspects of the case, the Hostage Case is best known as a trial on the law of reprisal. See Parks, *supra* note 8, at 59.

65. See Parks, *supra* note 8, at 59; see also *Reports of Trials, Vol. XI, supra* note 60, at 1259.

66. See *Reports of Trials, Vol. XI, supra* note 60, at 1259-60; see also Parks, *supra* note 8, at 59.

67. See *Reports of Trials, Vol. VIII, supra* note 62, at 50.

68. See *id.* at 69.

69. *Id.* at 50.

Under such circumstances to recognize as a defense . . . that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged in the Indictment was the guilt of Hitler alone . . . . To recognize such a contention would be to recognize an absurdity.<sup>70</sup>

In the end, both courts reached somewhat mixed verdicts: some charges were upheld, some were not, while some defendants were acquitted outright. In the High Command case, two defendants were acquitted, while the rest were sentenced to terms ranging from time served to life imprisonment.<sup>71</sup> Similarly, in the Hostage Case, two defendants were acquitted, with the others convicted and sentenced to terms up to life imprisonment.<sup>72</sup> No one was sentenced to death, as Yamashita had been. Eventually, those convicted were released early on a variety of grounds; by 1955, none of the defendants from either case remained in prison. Professor Hébert points out that most of these releases were undertaken as a means of cementing good relations between the US and West Germany (an especially pressing concern during the early years of the Cold War), rather than out of a sense that the paroles were justified in their own right.<sup>73</sup>

Why did the German cases have such different verdicts than Yamashita's? Given the facts as they have been presented, it would be easy to make the case that the Nazi defendants, many of whom specifically gave or carried out illegal orders, were more culpable than Yamashita had been (after all, he had not been accused of ordering atrocities),<sup>74</sup> with even more serious consequences. So why were they treated more leniently? Several explanations present themselves. First is the passage of time: Yamashita's trial began in the Fall of 1945, when the signatures on Japan's surrender papers were hardly dry. By contrast, the two German trials began in 1947, more than two years after V-E Day. Perhaps this allowed for tempers to cool a bit.

Secondly, the Nazi cases were heard by civilian legal professionals, rather than military officers. Of the six people who made up the two panels,

---

70. *Reports of Trials, Vol XII, supra* note 47, at 71.

71. *See id.* at 95. The two who were sentenced to life imprisonment were found not only to have enforced some of the illegal orders, but to have played roles in creating them as well. *See HÉBERT, supra* note 46, at 153.

72. *See Reports of Trials, Vol. VIII, supra* note 62, at 76.

73. *See HÉBERT, supra* note 46, at 155 (“[T]he necessary prerequisite for any [West German] contribution to the defense of the West was the restoration of German military honor. This required . . . the release of all military men convicted of war crimes.”).

74. *See* ALLAN A. RYAN, *YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY* 65 (2012).

five were judges and one an experienced practitioner.<sup>75</sup> This greater training may well have benefitted the defendants, as their cases were heard by individuals trained to make careful analyses of legal principles and to take defense arguments seriously.<sup>76</sup> It need hardly be added that the fact that these six lawyers were not part of a command structure including General MacArthur was an advantage to the defendants.

Finally, racism may have played a role in the harsher treatment of Yamashita. In the words of John Dower, “[i]n the United States and Britain, the Japanese were more hated than the Germans before as well as after Pearl Harbor.”<sup>77</sup> It is not surprising that the greater negativity toward the Japanese that existed in the general population would be reflected amongst the military officers deciding Yamashita’s fate, as well as on the Supreme Court. Thus, Yamashita may simply have faced a higher level of animosity when on trial than did the Nazi officers.

While perhaps not handling the German defendants as severely as the military court had treated Yamashita, the tribunals still held the Nazi officers to standards that would not be applied to American servicemen at My Lai two decades later. Again, the My Lai court imposed an actual knowledge requirement but the Hostage tribunal rejected a defense claim that German officers could not be held responsible if they were not at Headquarters to receive word of illegal orders.<sup>78</sup> Thus, as with the trial of General Yamashita, an American court applied a rule to judge (and, for the most part, convict) non-American defendants that would not serve as a binding precedent on American actions.

In the aftermath of the World War II trials, Additional Protocol I to the 1949 Geneva Convention attempted to codify command responsibility in international law. Article 86 of the protocol states:

75. The High Command Tribunal consisted of Presiding Judge John C. Young, former Chief Justice of the Colorado Supreme Court, Judge Winfield Hale of the Tennessee Court of Appeals, and Judge Justin Harding, formerly of the US District Court for the District of Alaska. *See Parks, supra* note 8, at 38. The Hostage Case was heard in front of Presiding Judge Charles F. Wennerstrum of the Iowa Supreme Court, Judge Edward F. Carter of the Nebraska Supreme Court, and George J. Burke, a practitioner and former prosecutor from Michigan. *See id.* at 59 n.198; *see also* William B. Treml, *Burke Family Law Legacy to Continue*, ANN ARBOR NEWS, Aug. 30, 1986, <http://oldnews.aadl.org/taxonomy/term/8169> [<https://perma.cc/GX8Q-4EP8>].

76. *See Parks, supra* note 8, at 64 (“The *High Command* and *Hostage* cases are of greater value than *Yamashita* in that the respective opinions rendered therein are the product of judicial minds rather than of lay jurors, and prepared under less emotive circumstances; the blaze of war had died sufficiently to permit juristic scholarship providing necessary light for future interpretation rather than mere heat.”).

77. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 8 (1986); *see generally id.* at 77-93 (discussing virulence of racially based attitudes towards the Japanese, in contrast to views of Germans).

78. *See supra* notes 65-66 and accompanying text.

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 that 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.<sup>79</sup>

Article 87 adds to this, with a specific reference to the duties 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 report to competent authorities breaches of the Conventions and of this Protocol.<sup>80</sup>

As we will see below, this language, especially from the second paragraph of Article 86, would find its way (at least in part) into several of the statutes for future tribunals.

---

79. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, 42-43, article 86, *reprinted in* 16 Int'l Legal Materials 1391, 1428-29 [hereinafter Additional Protocol I] (The English and French versions of this provision do not completely match up, leading to some disagreement about the actual terms of this provision); see Timothy Wu and Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in American Law*, 38 HARV. INT'L L. J. 272, 276 n.24 (1997) (discussing International Committee of the Red Cross Commentary on the Protocol) (internal citation omitted) (The US has not ratified this Protocol).

80. Additional Protocol I, *supra* note 79, at article 87(1).

## ICTY: MIXED SIGNALS

In the early 1990s, as reports of the growing humanitarian crisis in the former Yugoslavia became increasingly prominent, the UN Security Council responded with a series of resolutions.<sup>81</sup> The first of these, Resolution 764, passed on July 13, 1992, noted that all parties to the fighting were bound to comply with their commitments under International Humanitarian Law (IHL), and stated that those who ordered or committed grave breaches of the Geneva Conventions would be held individually responsible for their actions.<sup>82</sup> This would be followed a month later by Resolution 771, which condemned continuing violations of IHL and demanded that all parties observe their IHL obligations.<sup>83</sup> 771 also called upon member states to collect information they had pertaining to IHL violations and to make that information available to the Security Council.<sup>84</sup>

This resolution was followed in short order by Resolution 780, which called for an “impartial Commission of Experts” that would “examine and analyse” the information gathered pursuant to 771.<sup>85</sup> Once established, the Commission quickly issued an interim report, noting the massive human rights violations taking place in the former Yugoslavia, and raising the prospect of a criminal tribunal to prosecute the wrongdoers.<sup>86</sup> Finally, in February 1993, the Security Council passed resolution 808, which established just such a tribunal, what came to be known as ICTY.<sup>87</sup>

Resolution 808 called upon the Secretary-General’s office to submit proposals for the creation of the new court.<sup>88</sup> It did so, and suggested a proposed governing statute for ICTY. The Secretary-General’s report was adopted, without change, in Resolution 827, passed on May 25, 1993.<sup>89</sup> It had taken barely a year from the first Security Council resolution to the establishment of a whole new international tribunal. By UN standards, this was remarkably quick. As Morris and Scharf tell it, there was more debate about

---

81. See, e.g., MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL: A COMPANION* (2002); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, VOL. I (1995).

82. S.C. Res. 764, ¶ 10 (July 13, 1992).

83. S.C. Res. 771, ¶ 2-3 (Aug. 13, 1992).

84. See *id.* at ¶ 5.

85. S.C. Res. 780, ¶ 2 (Oct. 6, 1992).

86. See MORRIS & SCHARF, *supra* note 81, at 28-29.

87. See S.C. Res. 808, ¶ 1 (Feb. 22, 1993).

88. See *id.* at ¶ 2.

89. See S.C. Res. 827 (May 25, 1993).

the creation of the Commission of Experts in Resolution 780<sup>90</sup> than there was about what became ICTY's governing rules.<sup>91</sup>

Surely at least part of the reason for the Council's ability to move expeditiously was the fact that the Secretary-General's report "clearly distinguished the Security Council's decision to establish an ad hoc tribunal of limited scope and purpose from the efforts . . . to establish a permanent international criminal court."<sup>92</sup> In other words, Council members could afford to move swiftly and decisively because they were creating rules to apply to someone else, not to themselves, at least initially. Since ICTY would be a creation of the Security Council, and because it was the first major war crimes tribunal since Nuremberg, there was certainly the possibility that its rulings would have precedential value beyond the former Yugoslavia.<sup>93</sup> Perhaps not surprising for a UN creation, the tribunal would meet in The Hague, rather than in the directly affected lands.

The ICTY statute contains the following language on command responsibility:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute [these articles set out a list of crimes the tribunal intended to prosecute, including grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity] 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.<sup>94</sup>

This is fairly straightforward language. A superior can be held responsible if s/he a) knew or should have known that subordinates were about to commit any of the listed crimes; or b) had already committed them; and c) the superior either failed to take necessary steps to prevent the crimes; or d) did not punish the perpetrators post hoc. It is close to, though not exactly the

---

90. See MORRIS & SCHARF, *supra* note 81, at 25 (describing the debate as "particularly acrimonious.").

91. See *id.* at 33 (noting "a strong hesitancy to open the draft statute to modification.").

92. *Id.* (internal citation omitted).

93. And it appears that ICTY's rulings have been influential in other fora. See *infra* notes 220-51 and 281-84 and accompanying text.

94. ICTY Statute, *supra* note 2, at article 7(3).

same as, the language from Geneva Additional Protocol I quoted above: “knew or had reason to know” (ICTY) vs. “knew or had information which should have enabled them to conclude” (Geneva).<sup>95</sup>

It is interesting to consider whether Yamashita could have won his case under this standard. If one accepts the factual premise of Murphy’s dissent and Yamashita’s own claims at trial, then even if Yamashita knew that his soldiers were about to (or had) committed horrible atrocities (and probably would until they were killed or captured), it would likely have been impossible for him to have taken any “necessary steps” to prevent or punish these crimes, given the deteriorating military conditions for the Japanese. Arguably, the provision imposes a strict liability standard: a commander is obligated to take “necessary and reasonable measures.” Yamashita might well have responded that there was nothing he could “reasonably” have done (and it is almost certainly the case that the standard – prosecution friendly as it was to begin with – was in some respects irrelevant: Yamashita was going to be convicted, no matter what).

There are two cases worth exploring from ICTY: the *Tadić* decision and the combined *Kordić and Čerkez* ruling. *Tadić* is not a command responsibility case, but it provides some useful context to the tribunal’s overall operations.

Duško Tadić was charged with having personally committed a large number of crimes, including torture, rape, and murder.<sup>96</sup> This case is important in this discussion because of one of the legal issues the case raised, and how the court addressed it. Prosecuting Tadić was complicated by the fact that though he was an ethnic Serb, he was of Bosnian nationality, as were his victims. Because of this shared nationality, a case could be made that his victims did not qualify as “protected persons” for purposes of the Geneva Conventions, and the conflict would not be considered an international armed conflict.<sup>97</sup> The prosecution maintained that there was a sufficiently strong link between the armed forces of the rump Serbian republic, Republica Srpska, in which Tadić served, and the Yugoslavian (i.e. Serbian) army, so as to make the conflict in effect between Bosnia and Serbia.<sup>98</sup>

How to resolve this question? At the time of the decision, the leading case on whether Country A could be considered to have sufficient control over irregular forces in Country B to turn a seemingly internal conflict between Country B and its rebels into an international conflict between Country

---

95. The Geneva Additional Protocol also has language calling on commanders to punish those responsible post hoc, if atrocities have been committed. See Additional Protocol I, *supra* note 79, at article 87(3).

96. Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

97. See *id.* at ¶ 578.

98. See *id.* at ¶ 584.

A and Country B was an International Court of Justice (ICJ) decision, *Nicaragua v. United States*.<sup>99</sup> In this case, Nicaragua sued the United States over American support for the Contras. In its ruling, the ICJ held that in order to transform the Nicaraguan government's fight with the Contras into an international armed conflict with the US, it would have to be demonstrated that the US exercised "effective control" over the Contras (which the court then went on to say had not been shown).<sup>100</sup>

The "effective control" standard seemed to establish a fairly high (though not impossible) standard to meet, and in fact, the Trial Chamber found that the threshold had not been satisfied.<sup>101</sup> As a result, Tadić's victims could not be considered "protected persons."<sup>102</sup> However, when the case reached the appellate level, the Appeals Chamber rejected the ICJ benchmark and ruled that a showing of "overall control" would be sufficient (which it then ruled had been established).<sup>103</sup> The court explained that "a State must be held accountable for acts of its organs"<sup>104</sup> and that "the whole body of international law on State responsibility is based on a realistic concept of accountability."<sup>105</sup> In the current situation, if an "organized group" is "under the overall control of a State, it must perforce engage the responsibility of that State for its activities."<sup>106</sup>

As to the ICJ's "effective control" standard, the ICTY panel explained that "the *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished."<sup>107</sup> Thus, this incident specific court was willing to contradict the broader mandate ICJ to issue a ruling that would make it easier to convict those brought in front of it, thereby suggesting that the specialized nature of the tribunal might be leading to a more prosecution-friendly jurisprudence.

However, when ICTY subsequently heard a command responsibility case, in the combined *Kordić and Čerkez* ruling it did not continue on this path, instead reverting to the use of "effective control" when ruling on the responsibility of individuals for criminal acts under the theory of command

---

99. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14 (June 27).

100. *Id.* at ¶ 115.

101. *See* Tadić, No. IT-94-1-T, at ¶ 607.

102. *See id.* at ¶ 608.

103. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber, ¶ 122 (Int'l Crim. Trib. for the Former Yugoslavia 1997).

104. *Id.* at ¶ 121.

105. *Id.*

106. *Id.* at ¶ 122.

107. *Id.* at ¶ 117 (emphasis in original).

responsibility.<sup>108</sup> Dario Kordić and Mario Čerkez were Croats charged with a large number of crimes against Bosnian Muslims, including murder, inhuman treatment, use of human shields, pillaging, and destruction of religious institutions.<sup>109</sup> Applying the “effective control” benchmark, the trial chamber found that Čerkez, but not Kordić, had sufficient commander responsibilities to be found liable under the command responsibility provision of the ICTY statute.<sup>110</sup>

In going back to the effective control standard the court relied on the ruling of an earlier ICTY trial of four defendants, known collectively as the Čelebići defendants (for the prison camp at which the crimes were committed), which had also employed the effective control standard.<sup>111</sup> Thus, the new ground broken in *Tadić* did not translate into a reconsideration of the effective control standard for command responsibility, even though a specialized court like ICTY revealed itself to be willing to apply more prosecution friendly guidelines in a different setting.

#### ICTR: AKAYESU, MUSEMA, AND EXTENDING THE NOTION OF “COMMANDER”

The Rwanda tribunal, like its Yugoslavian counterpart, was a creation of the Security Council, in this case Resolution 955.<sup>112</sup> As with Resolution 827, which established ICTY, ICTR was established relatively quickly after the onset of atrocities and was also the culmination of a (by UN standards) rapid fire series of Security Council resolutions on the deteriorating situation in Rwanda. Resolution 812, passed on March 12, 1993, called for a cease-fire between the Rwandan military and the forces of the Rwandese Patriotic Front.<sup>113</sup> Eight hundred and twelve would be followed by Resolution 846 in June,<sup>114</sup> 872 in October (which established a peacekeeping operation),<sup>115</sup> and 891 in December.<sup>116</sup>

---

108. Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2- T, Trial Chamber, ¶ 415 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (On appeal, the prosecution did not even challenge this portion of the Trial Chamber's ruling); see Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2- A, Appeals Chamber, ¶ 826 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004)).

109. See *Kordić and Čerkez*, Trial Chamber, at ¶ 6.

110. See *id.* at ¶¶ 841, 843.

111. Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Chamber, ¶ 378 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

112. S.C. Res. 955 (Nov. 8, 1994).

113. S.C. Res. 812 (Mar. 12, 1993).

114. S.C. Res. 846 (June 22, 1993).

115. S.C. Res. 872 (Oct. 4, 1993).

116. S.C. Res. 891 (Dec. 20, 1993).

By April 1994, as the situation worsened, the Council stated in Resolution 912 that it was “appalled” at the “large-scale violence in Rwanda.”<sup>117</sup> On May 13, the Secretary-General issued a report on the situation,<sup>118</sup> which would promptly be followed by Resolution 918, which “strongly condemn[ed]” the ongoing violence<sup>119</sup> and imposed an arms embargo on Rwanda.<sup>120</sup> Shortly thereafter, on May 31, the Secretary-General issued another report, this one advocating an investigation of the situation in Rwanda in order to assess responsibility for the manifest violations of international law.<sup>121</sup> On July 1, Resolution 935 called for a Commission of Experts – similar to the one requested pertaining to the former Yugoslavia in Resolution 780 – that would examine the relevant evidence.<sup>122</sup> Finally, on November 8, the Council passed Resolution 955, which established ICTR.<sup>123</sup> Less than two years had passed from the Council’s first resolution on Rwanda, and less than a year since the genocide had begun in earnest.

As with ICTY, the Council established a tribunal that would not be held in the country where the atrocities occurred, instead being set up in Arusha, Tanzania. The rules it operated under were similar to ICTY’s, perhaps not surprising given how close in time the two courts were created. ICTR’s provision on command responsibility matched the language from ICTY cited above.<sup>124</sup>

There are two command responsibility decisions from ICTR that bear examination, both involving civilians. The first, and more well-known case, is that of Jean-Paul Akayesu, while the second is the prosecution of Alfred Musema.

There is nothing in the aforementioned command responsibility language that explicitly limits it to members of the military. The statute speaks of “superior” and “subordinates,” designations which exist outside the military context. And yet as an intuitive matter, the doctrine seems to address military, rather than civilian relationships. For one thing, members of the military are more likely to have the capacity to carry out large scale atrocities. For another, such crimes tend to occur during situations of military conflict, when the affected area, to the extent that there is a governing force at all, may

---

117. S.C. Res. 912 (Apr. 21, 1994).

118. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Rwanda* (May 13, 1994).

119. S.C. Res. 918 (May 17, 1994).

120. *See id.* at ¶ 13.

121. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Rwanda*, U.N. Doc. S/1994/640 (May 31, 1994).

122. S.C. Res. 935, para. 1 (July 1, 1994).

123. S.C. Res. 955, para. 1 (Nov. 8, 1994).

124. *See* S.C. Res. 955, art. 6(3) (Nov. 8, 1994).

well be under some form of military control.<sup>125</sup> Finally, and perhaps most importantly, the nature of superior-subordinate relationships tend to be very different in the military than in civilian life: in general, military superiors exert far more authority over their subordinates than do their civilian counterparts. In light of this, it may make more sense to hold those superiors responsible for the actions of the people over whom they wield this greater level of control to a degree that we would not when it comes to civilian superior-subordinate relationships.

Thus, extending the concept of command responsibility to civilian relationships is a largely new development. As one writer has pointed out, it cannot be claimed that application of superior (i.e. civilian) responsibility is a norm of customary international law.<sup>126</sup> In its *Akayesu* ruling, the ICTR Trial Chamber was clearly aware of the fact that it was treading on relatively new ground. It wrote, “The Chamber . . . finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious.”<sup>127</sup>

Still, Akayesu might have seemed a good candidate for the court to test this new extension of the command responsibility doctrine. He was the bourgmestre of his commune, a position roughly equivalent to a mayor.<sup>128</sup> As such, he had command of local law enforcement and was the chief executive official in the area.<sup>129</sup> Under these circumstances, perhaps it would not have appeared to be such a huge leap to extend command responsibility coverage. But the court ruled that the prosecution had not proven a superior-subordinate relationship between Akayesu and local forces that committed atrocities in the area.<sup>130</sup> As a result, it refused to convict him under the command responsibility portion of the statute (though he was convicted of several charges for direct participation<sup>131</sup> and is currently serving a life sentence).

125. Though, as referenced above, the Nuremberg tribunal considered the issue of whether a military commander had control over a certain area, or whether “the state” itself might exercise some degree of control. *See supra* note 58 and accompanying text.

126. *See* Yaël Ronen, *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 VAND. J. TRANSNAT’L L. 313, 316 (2010). Again, this contrasts it from command responsibility in the military context, which was established as a crime under customary international law before ICTR came into being. *See, e.g., Delalić*, Case No. IT-96-21-T, Trial Chamber, at ¶¶ 333-343. It is instructive to note that among the sources that the ICTY trial chamber relied on in reaching this conclusion when trying the Čelebići defendants were the US Army Field Manual and the British Manual of Military Law. *See id.* at ¶ 341. This underscores the point that command responsibility was initially primarily thought of as something that applied to military commanders.

127. *Prosecutor v. Akayesu*, Int’l Crim. Trib. for Rwanda, Case No. ICTR-96-4-T, Judgment, ¶ 491 (Sept. 2, 1998).

128. *See id.* at ¶ 3.

129. *See id.* at ¶ 4.

130. *See id.* at ¶ 691.

131. *See id.* at ¶ 179.

The court's hesitancy to extend command responsibility to cover a civilian in *Akayesu* makes its ruling in *Musema* all the more surprising. Unlike *Akayesu*, *Musema* was convicted both for personally participating in atrocities and on a command responsibility theory.<sup>132</sup> But *Musema* was even more of a civilian than *Akayesu*: he was not a government official; he did not control a law enforcement force, much less military troops. Instead, he managed a tea factory.<sup>133</sup>

To be fair, "managed a tea factory" understates things a bit. *Musema* received this position by presidential decree.<sup>134</sup> There were other indications that he had at least some political influence, and was not merely an anonymous middle manager in a random plant. The ICTR Trial Chamber described him as a "socially and politically prominent person."<sup>135</sup> It was because of this alleged special prominence that he was thought to have more than usual influence over his subordinates.<sup>136</sup> It was also the case that in Rwanda, a relatively high percentage of the killings were carried out by civilians, as opposed to the military.<sup>137</sup> And at a minimum, there was strong evidence that *Musema* had not only personally participated in atrocities, but had incited employees of the tea factory to do so as well.<sup>138</sup> Still, his ability to "command" anyone appeared to be considerably less than that of *Akayesu*, given *Akayesu*'s admission that he "had the power to assemble the population and that they obeyed his instructions,"<sup>139</sup> or the court's description of the bourgmestre as "the most powerful figure in the commune."<sup>140</sup> For whatever reason, the court in *Musema* took a broader view of command responsibility and civilians than it had previously taken in *Akayesu*.

The *Musema* decision moved the law significantly in a new direction.<sup>141</sup> More than that, the idea that civilians are liable to be prosecuted on command

---

132. See, e.g., Prosecutor v. *Musema*, Int'l Crim. Trib. of Rwanda, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 936 (Jan. 27, 2000).

133. See *id.* at ¶ 12.

134. See Cécile Aptel & Jamie A. Williamson, Case Note, *Prosecutor v. Musema: A Commentary on the Musema Judgment Rendered by the United Nations International Criminal Tribunal for Rwanda*, 1 MELB. J. INT'L L. 131, 132 (2000).

135. See *Musema*, No. ICTR-96-13-T, at ¶ 140.

136. See *Musema*, No. ICTR-96-13-T, at ¶ 894.

137. See Sean Libby, Comment, *[D]effective Control: Problems Arising From the Application of Non-Military Command Responsibility by the International Criminal Tribunal for Rwanda*, 23 EMORY INT'L L. REV. 201, 202 (2009) (internal citation omitted).

138. See, e.g., *Musema*, No. ICTR-96-13-T, at ¶ 890 (finding that he had "led and participated in an attack").

139. See *Akayesu*, No. ICTR-96-4-T, at ¶ 704.

140. *Id.* at ¶ 2.

141. See Ronen, *supra* note 126, at 324-25 (noting that ICTY prosecutions against civilians on command responsibility charges were unsuccessful, even though they involved civilians leading militias, rather than a more conventional civilian superior-subordinate relationship).

responsibility charges could greatly broaden the number and types of individuals who might find themselves in front of an international tribunal, even if in the immediate circumstance the ruling only affected the citizens of one particular country. It is fair to wonder whether a tribunal whose mandate was broader than individuals involved in one, and only one, conflict would have been so willing to extend the law's coverage in this manner.

### CREATION OF THE ICC

Unlike ICTY and ICTR, which were established in rapid fashion and in response to discrete events, the International Criminal Court was a long time in formation. Proposals for some sort of international criminal tribunal date back at least as far as the turn of the twentieth century.<sup>142</sup> Not surprisingly, both world wars spurred discussion of the idea of having a permanent international criminal court of some sort,<sup>143</sup> as did the creation of the UN.<sup>144</sup> In 1948, during the UN's infancy, the General Assembly passed Resolution 260, which invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organization by international conventions."<sup>145</sup> One possibility would have been to create a criminal docket within the ICJ, but the ILC recommended against this.<sup>146</sup>

It is not necessary here to trace the entire history of the formation of the ICC, but one point that is worth emphasizing is simply how long the whole process took. Even the first draft proposals for the court were not submitted until the early 1950s—which is to say that it took longer to produce initial drafts for the ICC than it did for ICTY and ICTR to be established from the time of the first Security Council resolutions on the situations in the former Yugoslavia and Rwanda, respectively. Also, the drafts were hardly the end of the process. By the time the Rome Statute was finalized, on July 17, 1998, just short of a half-century had elapsed since Resolution 260.<sup>147</sup>

---

142. See Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, FLETCHER F. WORLD AFF., Summer/Fall 1994, at 77, 82.

143. See *id.* at 82-83; see also Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK J. INT'L L. 223, 225-26 (1992).

144. See *id.* at 226-27.

145. G.A. Res. 260 (III), U.N. Doc. A/RES/3/260 (Dec. 9, 1948); see also Cavicchia, *supra* note 143, at 227.

146. See Cavicchia, *supra* note 143, at 227 (quoting G.A. Res. 260 (III), U.N. Doc. A/RES/3/260 (Dec. 9, 1948)).

147. Even then the ICC was not quite finalized, as the Rome Statute left unsettled the definition of "aggression," one of the crimes under the new court's jurisdiction. See Rome Statute, *supra* note 5, at art. 5(2).

It should not be surprising that it took this long to produce the Rome Statute. It sought to create something unprecedented—a criminal court to which all the world’s peoples would be subject, perhaps even against the wishes of a given defendant’s home government. Furthermore, the Rome Statute gives the ICC the power to investigate not only crimes committed in the course of an international armed conflict, but those perpetrated on a purely internal basis, i.e. by a government against its own nationals. Getting approval for a court with this type of jurisdiction would naturally be a major challenge for a world order steeped in notions of individual state autonomy. In the end, concerns over infringements on sovereignty proved to be too much for several important players on the world scene, including both China and the U.S., neither of which have ratified the Rome Statute.<sup>148</sup>

The ICC’s creation, and the refusal of countries like China and America to ratify it, stands in stark contrast to the formation of both ICTY and ICTR. The two country-specific tribunals were formed by a smaller body (the Security Council) in a relatively brief timeframe, with a mandate limited to a specific set of events, as opposed to the ICC, whose jurisdiction would be much wider. With ICTY and ICTR, the most directly affected governments—Serbia and Rwanda—did not have the choice of opting out of the tribunals established for their countries.

#### ICC IN PRACTICE: COMMAND RESPONSIBILITY LANGUAGE AND THE *BEMBA* RULING

Working from the theory that tribunals will be more pro-prosecution when the affected parties have little or no say in their creation suggests that the ICC should have had extremely high standards for command responsibility convictions. Since every country involved could theoretically find one of its nationals (and, perhaps especially, its leaders or senior officials) facing prosecution, these same countries would be wary of making it too easy to prosecute. Contrary to initial expectations, the statute contains some strong language on command responsibility. Article 28 reads as follows:

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

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective

---

148. *The States Parties to the Rome Statute*, INT’L CRIM. CT. (last visited Feb. 22, 2018), [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>149</sup>

In some respects, the ICC language is more forceful than ICTY or ICTR's. Under those two, a commander can be held responsible if he or she

---

149. *Id.* at art. 28.

“knew or had reason to know” that a subordinate was about to commit certain crimes.<sup>150</sup> With the ICC’s approach, a commander will be held liable if he or she knew, “or should have known” that such crimes were being (or were about to be) committed.<sup>151</sup> The ICC rendering of command responsibility appears to impose a higher burden on the commander to stay informed of what his or her troops are up to than does the ICTY or ICTR standard.

Additionally, the ICC statute effectively endorses and makes explicit what ICTR decided in *Musema*: civilians are subject to command (or “superior”) responsibility as well. While paragraph (a) of Article 28 refers to military commanders,<sup>152</sup> paragraph (b) covers “relationships not described in paragraph (a),” i.e. superior-subordinate relationships outside the military.<sup>153</sup>

However, in spite of this seemingly strong language, there are two key factors that make it harder to convict for command responsibility under the Rome Statute. The first is that, as already mentioned, countries can effectively take themselves out of the ICC’s jurisdiction by declining to ratify the treaty. The second is the presence in the Rome Statute of a causality provision. The introductory language to Section 28 states as one of the requirements for a command responsibility conviction not only that a commander not exercise sufficient control over those under his command, but that any ensuing crimes *must be a consequence* of this lack of restraint.<sup>154</sup>

This causality requirement puts the ICC in stark contrast to ICTY, which on multiple occasions, including the aforementioned Čelebići trial, explicitly rejected a causation element.<sup>155</sup> Similarly, ICTR did not include causality as a requirement in a command responsibility decision.<sup>156</sup> The causality prerequisite adds a significant barrier to command responsibility prosecutions by the ICC.

It is too soon to make definitive judgments on the importance of the causality requirement condition. For one thing, it is hard to say much about

150. ICTY, *supra* note 2, at 7(3); ICTR, *supra* note 3, at 6(3).

151. Rome Statute, *supra* note 5, art. 28(a)(1).

152. See Rome Statute, *supra* note 5, art. 28(a).

153. *Id.* art. 28(b). Though the knowledge standard for civilians is higher than for military commanders: for the latter, it is known or should have known, while for the former it is known, or consciously disregarded information about atrocities. See *id.* art. 28(a)(i) and b(i).

154. See *id.* art. 28(a).

155. See *Prosecutor v. Delalić*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber Case No. IT-96-21-T, ¶ 378 (1998); see also, e.g., *Prosecutor v. Blaškić*, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-14-A, ¶ 77 (2004); see also ALEXANDRE SKANDER GALAND, ET AL., INTERNATIONAL CRIMINAL LAW GUIDELINES: COMMAND RESPONSIBILITY 83-84 (2<sup>nd</sup> ed. 2016) (discussing ICTY’s rejection of a causality requirement).

156. See *Garland*, *supra* note 151, at 83, n.305 (referencing the *Bagilishema* decision, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, (June 7, 2001), which discusses the required elements for command responsibility).

cases that were not brought in the first place. The ICC issued its first command responsibility ruling in 2016, in the case of Jean-Pierre Bemba, a Congolese politician and former rebel leader.<sup>157</sup> Because of the newness of the causality requirement to these types of prosecutions, the ICC was writing on something of a blank slate. The court ruled that “but for” causality was not required in order to satisfy Article 28.<sup>158</sup> Instead, it set the benchmark as “crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes.”<sup>159</sup> In applying this standard to the facts at hand, the court faulted Bemba for not reacting vigorously enough to initial reports of crimes being committed by forces under his control.<sup>160</sup>

What could he have done differently? Among other things, the court suggested Bemba might have provided instruction to his troops about their obligations under IHL.<sup>161</sup> Were anything like this sort of instruction or training requirement imposed on rebel leaders, it would greatly increase the chances of command responsibility prosecutions under the Rome Statute. Since rebel forces are generally going to be less organized and less well trained in comparison to their regular army counterparts, there is a smaller chance that they will be cognizant of things like their IHL obligations.<sup>162</sup> Thus, the court’s suggestion is consistent with the idea that those who make the laws—in this case states, even a large group of them—feel freer to impose standards that they are less prone to be at risk of violating. Ultimately, Bemba was convicted of several violations of the Rome Statute and sentenced to eighteen years in prison. However, his appeal remains pending, so it is possible that the Appeals Chamber will disagree with the Trial Chamber and establish different standards for causality.

---

157. See *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment pursuant to Art. 74 of the Statute, (Mar. 21, 2016). Because the court found that Bemba operated as a military commander at the time the crimes were committed, the case did not provide the court an opportunity to utilize the Rome Statute’s provision on civilian superior responsibility. See *id.* at ¶ 697.

158. *Id.* at ¶ 211.

159. *Id.* at ¶ 213.

160. *Id.* at ¶ 726.

161. See *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment pursuant to Art. 74 of the Statute, ¶ 729 (Mar. 21, 2016).

162. See Geert-Jan Alexander Knoops, *The Transposition of Superior Responsibility onto Guerilla Warfare Under the Laws of the International Criminal Tribunals*, 7 INT’L CRIM. L. REV. 505, 511 (2007) (“[O]ne can say that overall criterion to determine the (ir)regularity of military forces is the quality and intensity of organizational training . . .”).

## SIERRA LEONE: THE INFLUENCE OF ICTY

Sierra Leone is a former British colony that achieved independence in 1961. For the next three decades, it was controlled by “an almost uninterrupted succession of despotic leaders who secured their place by military coup, and the establishment of a one-party system and widespread patronage, allowing for unrelenting personal enrichment on the part of the ruling elite.”<sup>163</sup> In 1991, the country was invaded from across its border with Liberia by the Revolutionary United Front (RUF), a group led by Foday Sankoh.<sup>164</sup> The decade-long civil war that followed was known especially for two things: the participation of child soldiers in the fighting<sup>165</sup> and the extensive use of amputations. Nicole Fritz and Alison Smith wrote that “[i]n a decade in which atrocities had become almost commonplace, Sierra Leone’s conflict was still shocking. Horror registered at the signature amputations, the thousands of children press-ganged into the service of the respective armed factions, and the fact that they at times seemed the cruelest of combatants.”<sup>166</sup> Liberian President Charles Taylor, whose prosecution before the Special Court for Sierra Leone (SCSL) is discussed below, became a chief ally of the RUF,<sup>167</sup> likely at least in part because of the presence in Sierra Leone of diamond mines he wished to have access to.<sup>168</sup> Over the next decade, through multiple failed peace negotiations, the war would continue; by the end of

---

163. Nicole Fritz and Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 *FORDHAM INT’L L. J.* 391, 393 (2001); see also Ato Kwamena Onoma, *Transition Regimes and Security Sector Reforms in Sierra Leone and Liberia*, 656 *ANNALS AM. ACAD. POL. & SOC. SCI.* 136, 139 (2014) (describing the country as being ruled by a “corrupt one-party system” during this period).

164. See Onoma, *supra* note 163, at 139.

165. Though this conflict is hardly unique in making use of child soldiers. According to Child Soldiers International, several countries (as well as many non-state actor groups) continue to make use of child soldiers. See *Where Are Child Soldiers?*, CHILD SOLDIERS INT’L, <https://www.child-soldiers.org/where-are-there-child-soldiers> [https://perma.cc/38JN-QDSG] (last visited Feb. 10, 2018).

166. Fritz and Smith, *supra* note 163, at 393.

167. *Id.* at 394.

168. *Id.* at 399. The indictment that would eventually be filed in SCSL stated that “[t]o obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, [Taylor] provided financial support, military training, personnel, arms, ammunition, and other support and encouragement to the RUF . . . .” *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Indictment, ¶ 20 (Mar. 3, 2003). This original indictment would be amended twice. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-PT, *Prosecutor’s Second Amended Indictment* (May 29, 2007) [hereinafter *Taylor Amended Indictment*].

large-scale hostilities in 2002, there were estimates as high as 75,000 dead,<sup>169</sup> with many more wounded and/or displaced.<sup>170</sup>

Like ICTY and ICTR, the Special Court for Sierra Leone was established to address human rights abuses in one particular location. However, it was different than the Yugoslavian and Rwandan tribunals in a number of important ways: first, it was established at the request of the Sierra Leonean government itself rather than due to concern from the international community as a whole. In June, 2000 (while the conflict was still ongoing) President Alhaji Ahmad Tejan Kabbah wrote to the Security Council, requesting the formation of a special court for the country.<sup>171</sup> The President sought the creation of such a court as a means of bringing to justice the leaders of the RUF, whom President Kabbah held responsible for the long conflict.<sup>172</sup>

The Council responded two months later with Resolution 1315, which endorsed the idea of a Sierra Leonean tribunal.<sup>173</sup> However, unlike ICTY and ICTR, what became SCSL was not created as an organ of the Security Council. Instead, the Court was established as a “hybrid” court, with judges coming both from the international community and Sierra Leone itself,<sup>174</sup> though the international judges would be in the majority in both the three-judge trial chambers and the five-judge appeals chambers.<sup>175</sup> While the chief prosecutor would be from the international community, he would be assigned a deputy from Sierra Leone.<sup>176</sup>

169. See Charles C. Jalloh, *The Law and Politics of the Charles Taylor Case*, 43 DENVER J. INT'L L. & POL'Y 229, 243 (2015). 75,000 people were roughly 1.7% of the country's total population in 2002. See *Sierra Leone Population*, WORLDOMETERS.INFO, <http://www.worldometers.info/world-population/sierra-leone-population/> [<https://perma.cc/4AN3-3TQS>] (last visited Feb. 10, 2018).

170. See Jalloh, *supra* note 169, at 243. See also Charles C. Jalloh, *Assessing the Legacy of the Special Court for Sierra Leone*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 5 (Charles C. Jalloh, ed. 2014) (estimating 70,000 dead and 2.6 million displaced).

171. See Charles C. Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH J. INT'L L. 395, 398 (2011) (internal citation omitted).

172. *Id.* President Kabbah's letter stated that the “purpose” of a court for Sierra Leone would be “to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone . . . .” See President of the Republic of Sierra Leone, Annex to the Letter dated Aug. 9, 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000).

173. See S.C. Res. 1315, U.N. Doc. S/Res/1315 (Aug. 14, 2000). See also Jalloh, *supra* note 169, at 399.

174. See *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, art. 2, 2178 U.N.T.S. 137 (Jan. 16, 2002) [hereinafter *Special Court Agreement*].

175. *Id.*

176. *Id.* art. 3.

Another significant difference from ICTY and ICTR would be location: while those courts had met outside the countries involved, SCSL was established to meet in Sierra Leone itself. The court would be set up in the capital city of Freetown. Having a locally-situated court may well have had a positive impact on local reactions to the tribunal's operations. Public opinion research has shown far more positive attitudes among the Sierra Leonean population toward SCSL than Serbs or Croats feel about ICTY (which is not to say that the location of the respective courts is the only or even primary causative factor in this difference).<sup>177</sup> Serbians, in particular, viewed ICTY as biased against them,<sup>178</sup> while many people viewed the court as an American-dominated tribunal merely attempting to prosecute those the United States saw as enemies.<sup>179</sup>

Finally, under the terms of Resolution 1315, SCSL's jurisdiction was limited in two important respects: first, it would only prosecute "persons who bear the greatest responsibility for" serious violations of international humanitarian law and Sierra Leonean law."<sup>180</sup> Thus, mid or low-level offenders, who may well have committed serious crimes, but whose offenses did not rise to the status of wholesale attacks on the Sierra Leonean government, would escape punishment. In a report he issued on SCSL's formation, then UN Secretary-General Kofi Annan advocated for the broader term "persons most responsible," which, as he pointed out, would have allowed for prosecution in some circumstances of those between the ages of fifteen and eighteen.<sup>181</sup> As Arzt notes, this jurisdictional limitation drove a fair amount of the opposition to the court that opinion research documented, though more on the part of NGO personnel than on members of the populace at large.<sup>182</sup> The "greatest responsibility" provision might seem like a strange constraint. As I suggest below in discussing the Malabo Protocol, to the extent that senior

---

177. See Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 231-33 (2006). Though note that one commentator asserted that there was a distinct North/South divide in Sierra Leone when it came to attitudes about the court. See Peter Penfold, *Will Justice Help Peace in Sierra Leone*, GUARDIAN (Oct. 19, 2002) <https://www.theguardian.com/world/2002/oct/20/sierraleone.theworldtodayessays> [https://perma.cc/HA5C-YD2A].

178. See Stuart Ford, *Fairness and Politics at the ICTY: Evidence From the Indictments*, 39 N.C. J. INT'L L. & COM. REG. 45, 46 (2013) (citing survey results showing that roughly 80-90% of Serbs saw ICTY as "biased and untrustworthy") (internal citation omitted).

179. *Id.* (noting accusations that ICTY was "a scam designed to punish those that the United States viewed as its enemies").

180. See S.C. Res. 1315, art. 2.

181. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 29-31, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter Secretary-General's Report].

182. See Arzt, *supra* note 177, at 233.

officials are involved in the writing of rules for tribunals, they will act to protect themselves.<sup>183</sup> Here, the reverse seems to have happened. Why?

The “greatest responsibility” restriction appears initially to have been part of an attempt to create a court that was, in the words of Judge Antonio Cassese, “lean and agile as well as inexpensive . . .,” a response to perceived flaws with ICTY and ICTR (including allegedly bloated budgets and trials that dragged on for long periods).<sup>184</sup> More specifically, it served as a means of dealing with two issues. First, it was an attempt to address the question of how to handle crimes committed by child soldiers. There was a fair amount of disagreement about whether to prosecute child soldiers. Significant numbers of them indeed committed horrible crimes—the Secretary-General’s report notes that some child soldiers were “feared by many for their brutality . . .,”<sup>185</sup> but there were serious questions about the voluntariness of their actions, especially given the methods of “recruitment” that had been employed for them in the first place.<sup>186</sup> The “greatest responsibility” language in effect solved this problem, as no matter how bad the crimes committed by child soldiers, a reasonable argument could be made that they were not among those with the “greatest responsibility,” given how they ended up in various fighting forces as well as the more general issue of what is sensible to expect

---

183. See *infra* notes 255-80 and accompanying text.

184. Antonio Cassese (Independent Expert), Report on the Special Court for Sierra Leone, ¶ 29 (Dec. 12, 2006).

185. Secretary-General’s report, *supra* note 181, at ¶ 32; see also, e.g., Lucia H. Seyfarth, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 14 CHI. KENT J. INT’L & COMP. L. 117, 124 (2013) (“[C]hild soldiers are also perpetrators of some of the most violent crimes in these conflicts.”); Joshua A. Romero, *The Special Court for Sierra Leone and the Juvenile Soldier Dilemma*, 2 NW. J. INT’L HUM. RTS. 8, 12 (2004) (“[J]uvenile soldiers [in Sierra Leone] earned a reputation throughout the region as fearless and bloodthirsty killers.”); Ismene Zarifis, *Sierra Leone’s Search for Justice and Accountability of Child Soldiers*, 9 NO. 3 HUM. RTS. BRIEF 18, 19 (2002) (“Under physical and psychological duress, child combatants committed widespread and systematic atrocities.”).

186. See, e.g., Stephanie H. Bald, Note, *Searching for a Lost Childhood: Will the Special Court for Sierra Leone Find Justice for its Children?*, 18 AM. U. INT’L L. REV. 537, 549 (2002) (“[A]s evidenced by the abuses committed in Sierra Leone, forced recruitment often becomes systematic due to the lack of serious legal ramifications armed groups face.”). The author further observes that “desperation, rather than military zeal, most often pushes children to become soldiers.” *Id.* at 550.

from teenagers. Even though SCSL's statute would have allowed for prosecutions of those over the age of fifteen,<sup>187</sup> the prosecutor declined to bring cases against anyone under eighteen.<sup>188</sup>

Second, the "greatest responsibility" limitation acted as a way to manage the somewhat precarious funding mechanism established for SCSL. Unlike ICTY and ICTR, SCSL was funded by voluntary donations from member states,<sup>189</sup> despite strong objections to this method from the Secretary-General, who called for funding through assessed contributions.<sup>190</sup> Not surprisingly, relying on optional contributions led to a budget that Professor Jalloh has described as "shoestring,"<sup>191</sup> and which was a fraction of ICTY and ICTR's.<sup>192</sup> Jalloh further suggests that budgetary concerns led the Prosecutor to interpret the "greatest responsibility" language too narrowly.<sup>193</sup>

The other main restriction on the court's jurisdiction was temporal. SCSL was only given jurisdiction over crimes committed after November 30, 1996,<sup>194</sup> the date of the signing of the first (failed) peace accord between the government and the RUF,<sup>195</sup> even though the conflict had started five and a half years earlier.<sup>196</sup> The temporal restriction may well have been at least in part an attempt to cope with the court's limited resources. The Secretary-General's report on the formation of SCSL expressed his concern that "the prosecutor should not be overburdened nor the Court overloaded."<sup>197</sup>

187. See SCSL Statute, *supra* note 4, at art. 7(1). Even though the statute would have allowed prosecuting children of this age, it was clear that if such prosecutions occurred at all, the defendants were to be treated differently than adults: "Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child." *Id.*

188. See David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81, 84 (2010).

189. See Special Court Agreement, *supra* note 174, at art. 6.

190. See Secretary-General's Report, *supra* note 181, para. 71; see also Jalloh, *supra* note 169, at 402; Fritz & Smith, *supra* note 163, at 418.

191. Jalloh, *supra* note 169, at 413; see also Cassese, *supra* note 179, para. 249 ("The current practice of an international Court begging for money from donor countries, exhausting its resources, and coming back again for another handout should be stopped. This practice undermines the authority of the Court, decreases efficiency, and wastes resources.").

192. See Fritz & Smith, *supra* note 163, at 420 (noting the differences between ICTY's (\$108 million) and ICTR's (\$93 million) 2001 budgets and the \$15 million raised for SCSL).

193. *Id.* at 421-22.

194. See S.C. Res. 1315, art. 1(1) (Aug. 14, 2000).

195. See Secretary-General's Report, *supra* note 181, 27; see also Fritz & Smith, *supra* note 163, at 410.

196. See Jalloh, *supra* note 169, at 403.

197. Secretary-General's Report, *supra* note 181, para. 25; see also Fritz & Smith, *supra* note 163, at 411. Fritz and Smith point out that this choice of date caused a bit of a

These differences aside, the formation of SCSL had at least one important quality in common with the creations of ICTY and ICTR: it was accomplished fairly quickly, even though the tribunal's establishment was negotiated with representatives of the affected country. The agreement for the formation of SCSL and the accompanying statute for the court were finalized in January, 2002, roughly eighteen months after President Kabbah's initial request to the Security Council.<sup>198</sup> The SCSL's command responsibility language is essentially the same as ICTY's and ICTR's:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>199</sup>

Notably, the command responsibility provision did not apply to Article 5 of the SCSL statute, which listed several crimes specifically as violations of Sierra Leonean law.<sup>200</sup> The SCSL statute contained a few other provisions specific to the situation as it had unfolded there. In particular, it had explicit language calling for the prosecution of individuals who had recruited or used child soldiers (defined as those under the age of fifteen).<sup>201</sup> The statute also did not assert jurisdiction over individuals under the age of fifteen at the time of crimes they were alleged to have committed, thereby immunizing this group of juvenile combatants.<sup>202</sup>

The SCSL heard four significant command responsibility cases. The most notable of these (not necessarily because of the legal doctrine, but because of the defendant's crimes and reputation) was the prosecution of Libe-

---

divide in perceptions of the court between those closer to the capital city of Freetown, which did not suffer from much violence during the time excluded by the agreement, and the country's outer provinces, in which the fighting had started much earlier. *See id.* at 411-12; *see also* Jalloh, *supra* note 169, at 454 ("Furthermore, the limited temporal jurisdiction of the SCSL (covering only the latter half of the war) meant that certain prosecutions could only take place with respect to certain crime bases in major centers like the capital, Freetown. This was to the detriment of earlier incidents in the rural parts of Sierra Leone.").

198. *See* Special Court Agreement, *supra* note 174.

199. SCSL Statute, *supra* note 4, at art. 6(3).

200. *Id.* at art. 5.

201. *Id.* art. 4(c).

202. *Id.* art. 7(1).

ria's Charles Taylor. Taylor was charged on eleven separate counts, including acts of terrorism, murder, sexual violence, cutting off limbs, conscription of child soldiers, enslavement, and looting.<sup>203</sup> (Foot note?) As the indictment stated, these were crimes that violated Common Article 3 of the Geneva Conventions and also constituted Crimes Against Humanity as well as violations of IHL.<sup>204</sup> Controversially, despite the emphasis on having a locally based tribunal, the decision was made to hold Taylor's trial in The Hague.<sup>205</sup> This was said to be for security reasons, though many were not satisfied with this explanation.<sup>206</sup> This different treatment of Taylor did not end with the trial location: while everyone else convicted by SCSL was imprisoned in Africa, Taylor is serving his sentence in Britain.<sup>207</sup>

Taylor's indictment notes that he was being accused of liability under both Articles 6(1) and 6(3) of the SCSL statute.<sup>208</sup> The former assigns responsibility to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" covered by the statute,<sup>209</sup> while the latter is the command responsibility provision quoted above. As Professor Jalloh points out, Taylor "reportedly never set foot in Sierra Leone during the time the offenses for which he was charged were perpetrated,"<sup>210</sup> meaning that he had to be charged with ordering the commission of the listed crimes and/or failing to take steps to prevent his subordinates from carrying them out. The case was also complicated by the fact that Taylor had been President of Liberia for roughly six years, starting in August, 1997,<sup>211</sup> meaning that he was head of state during most of the time covered by the charges.<sup>212</sup>

Though Taylor was eventually convicted of all of the charges against him, the SCSL trial chamber ruled that he was only liable under certain portions of Article 6(1). The court found that Taylor was not guilty of participating in a joint criminal enterprise,<sup>213</sup> but was guilty of aiding and abetting the commission of the offenses charged in the indictment, as well as planning the execution of these crimes.<sup>214</sup> The court also ruled that he could not be

203. Taylor Amended Indictment, *supra* note 168, at 5-32.

204. *Id.* at 3-8.

205. See Jalloh, *supra* note 169, at 235.

206. *Id.*

207. *Id.*

208. Taylor Amended Indictment, *supra* note 168, at paras. 33-34.

209. SCSL Statute, *supra* note 4, at art. 6(1).

210. Jalloh, *supra* note 169, at 232.

211. See Taylor Amended Indictment, *supra* note 168, at para. 3.

212. Though all of the charges included at least some time before he became President.

*See id. passim.*

213. See Judgement para. 6900, Prosecutor v. Taylor, Case No. SCSL-03-01-T (May 18, 2012) [hereinafter Taylor Trial Judgment].

214. *Id.* at para. 6994.

convicted of instigating<sup>215</sup> the charged crimes or ordering their commission,<sup>216</sup> the latter because while he was found to have a position of authority within the RUF, his views on their activities were of an advisory nature, and were not automatically carried out.<sup>217</sup>

In light of this portion of the ruling, it is perhaps not surprising that the court declined to hold Taylor liable under the command responsibility provision.<sup>218</sup> To the trial chamber, the key issue was whether it could be demonstrated that Taylor had “effective control” over the troops that had committed the acts in question.<sup>219</sup> With regard to individual rebel leaders, the court held that while Taylor was clearly a person of influence, this influence was not sufficiently great so as to turn these leaders into his subordinates.<sup>220</sup> And as to rebel forces, the court found that it could not be established that Taylor retained effective control over them once they crossed the border from Liberia into Sierra Leone.<sup>221</sup> In relying on the effective control standard, the SCSL trial chamber was following in the footsteps of the aforementioned ICTY rulings.<sup>222</sup> Taylor was sentenced to fifty years in prison,<sup>223</sup> a punishment which was upheld on appeal.<sup>224</sup> The prosecution does not appear to have challenged the use of the effective control standard; the appeals chamber references it merely in passing.<sup>225</sup> The *Delalić* and *Kordić and Čerkez* rulings, discussed above, are included in the Table of Authorities appendix to the appellate chamber’s opinion.<sup>226</sup>

Though Taylor was acquitted of command responsibility liability, there were three successful prosecutions under Article 6(3): *Prosecutor v. Fofana et al.*,<sup>227</sup> *Prosecutor v. Sesay et al.*,<sup>228</sup> and *Prosecutor v. Brima et al.*<sup>229</sup> In the first of these, the two defendants were leaders of the Civil Defense Forces

---

215. *Id.* at para. 6972.

216. *Id.* at para. 6973.

217. *Id.*

218. *See* Judgement para. 6986, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T (May 18, 2012).

219. *Id.* at para. 6978.

220. *Id.* at paras. 6980-83.

221. *Id.* at para. 6984.

222. *See supra* notes 108-111 and accompanying text.

223. *See* Sentencing Judgement at 40, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T (May 30, 2012).

224. *See* Appeal Judgement, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, at 305 (Sept. 26, 2013).

225. *See, e.g., id.* at para. 1999.

226. *See id.* at 324-25.

227. *Prosecutor v. Fofana et al.*, Case No. SCSL-04-14-T (Sierra Leone Aug. 2, 2007).

228. *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T (Sierra Leone Mar. 2, 2009).

229. *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T (Sierra Leone June 20, 2007).

(CDF), a group that had fought in support of President Kabbah's government,<sup>230</sup> which at one point had been deposed by a rebel group, the Armed Forces Revolutionary Council (AFRC).<sup>231</sup> But the other two cases, like the Taylor prosecution, were brought against those associated with rebel groups.

Moinina Fofana and his co-defendant, Allieu Kondewa, were charged with crimes against humanity, war crimes, and violations of IHL.<sup>232</sup> As is common in these cases, the prosecution advanced theories of liability tied to both Articles 6(1) and 6(3) of the court's statute.<sup>233</sup> The court, however, again relying on ICTY precedents, explained that it would not hold the defendants liable under 6(3) where liability was already shown under 6(1).<sup>234</sup> Turning to ICTY case law, the court laid out three criteria for a finding of command responsibility: existence of superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to take place or already had; and the superior failed to take necessary and reasonable measures to prevent the act or punish the perpetrators after.<sup>235</sup> The court further explained that a superior could be said to have control either *de facto* or *de jure*, and again endorsed the ICTY "effective control" standard for determining if such a relationship existed.<sup>236</sup> The tribunal emphasized that command responsibility is not a strict liability offense.<sup>237</sup> In the end, the court relied on both articles of the statute to find the defendants guilty, so the availability of a command responsibility analysis was by no means superfluous. The trial chamber turned to Article 6(3) to find each defendant guilty of some of the charges in the indictment.<sup>238</sup> One twist on the jurisprudence of the trial, Kondewa's status as a witch doctor, and the effect this had on CDF soldiers, is discussed below.<sup>239</sup>

Issa Hassan Sesay, Morris Kallon, and Augustine Gbao were senior members of the RUF.<sup>240</sup> Sesay, who himself had been forcibly recruited into the RUF as a teenager,<sup>241</sup> rose at one point as high as acting leader of the

230. See *Fofana*, *supra* note 227, at ¶¶ 1-2. The case originally had three defendants, the most notable of whom was Samuel Hinga Norman, a senior official in the Sierra Leonean government and head of the CDF. *Id.* at ¶ 1. Hinga Norman died after the trial was completed, but before judgment could be rendered, *id.* at ¶ 4, and thus is largely, though not completely, omitted from the opinion.

231. *Id.* at ¶ 11.

232. *Id.* at ¶ 108.

233. Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, ¶¶ 204, 232 (Sierra Leone Aug. 2, 2007).

234. See *Fofana*, *supra* note 227, at ¶ 251.

235. *Id.* at ¶ 235.

236. *Id.* at ¶¶ 236-38.

237. *Id.* at ¶ 242.

238. *Id.* at ¶¶ 846, 903.

239. See *infra* notes 261-67 and accompanying text.

240. See *Sesay*, *supra* note 228, at ¶ 4.

241. See *Seyfarth*, *supra* note 185, at 119.

group,<sup>242</sup> while both Kallon<sup>243</sup> and Gbao<sup>244</sup> were described as “senior officer[s] and commander[s]” of the RUF. The three were indicted on multiple counts of crimes against humanity, war crimes, and violations of IHL<sup>245</sup> under both Article 6(1) and 6(3) theories of responsibility.<sup>246</sup> The *Sesay* trial chamber stuck to the same standards for command responsibility as had the *Fofana* court.<sup>247</sup> And as with the *Fofana* trial, the court issued a split verdict: not guilty of some charges, guilty of others under Article 6(1), and guilty of still others under Article 6(3).<sup>248</sup>

The trial of Alex Tamba Brima, Ibrahim Bazy Kamara, and Santigie Borbor Kanu<sup>249</sup> unfolded in somewhat similar fashion. The three were members of the pro-rebel group AFRC. The amended consolidated indictment of the three describes each of them as “senior member[s] of the AFRC,” alleged that they participated in the coup against President Kabbah, and further alleged that they had commanded forces that had, among other things, carried out attacks on civilians.<sup>250</sup> As with the *Sesay* and *Fofana* rulings, the court found the defendants guilty of some charges, mostly under Article 6(1), but with each defendant, the trial chamber also used Article 6(3) to convict.<sup>251</sup>

In one sense, the most significant part of SCSL’s work was that it convicted Charles Taylor, who had been a sitting head of state while committing many of the crimes for which he was prosecuted. The decision to indict him was extremely controversial.<sup>252</sup> But he was out of office by the time of his conviction, so at least the court was not attempting to imprison a currently in power ruler.

As noted above, in making its rulings, SCSL relied heavily on the work of ICTY,<sup>253</sup> so it should not be surprising that its decisions followed already

242. See *Sesay*, *supra* note 228, at ¶ 42.

243. *Sesay* Amended Indictment at ¶ 24, Prosecutor v. *Sesay et al.*, Case No. SCSL-04-15-PT (Sierra Leone Aug. 2, 2006).

244. *Id.* at ¶ 29.

245. See *Sesay*, *supra* note 228, at ¶ 6. Two other, more senior members of the RUF, Foday Sankoh and Sam Bockarie, were also indicted by SCSL, but died before they could be brought to trial. See *id.* at ¶ 5.

246. See *Sesay* Amended Indictment, *supra* note 243, at ¶¶ 38-39.

247. See *Sesay*, *supra* note 228, at ¶¶ 285-89.

248. *Id.* at ¶¶ 677-87.

249. See Prosecutor v. *Brima et al.*, Case No. SCSL-04-16-T (Sierra Leone June 20, 2007).

250. See *Brima* Amended Indictment at ¶¶ 22-30, Prosecutor v. *Brima et al.*, Case No. SCSL-04-16-PT (Sierra Leone May 13, 2004).

251. See *Brima*, *supra* note 249, at ¶¶ 2113-23.

252. See *Jalloh*, *supra* note 169, at 250-52.

253. See Secretary-General’s Report, *supra* note 181, at ¶¶ 64-65. The Secretary-General’s report on the formation of SCSL explicitly calls for the new court to receive assistance from ICTY and ICTR personnel, so some level of influence from the prior courts was inevitable.

established case law, even if SCSL was in no formal sense bound by ICTY precedent. The court's main jurisprudential contribution seems to have been the application of established principles to different, and somewhat difficult, factual situations. In particular, when it comes to command responsibility, SCSL was faced with applying previously established benchmarks, most notably the "effective control" rule, to situations involving irregular forces, whose command structures to some degree lacked the formality of more regularly constituted armies. In his chapter in the edited collection *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, Harmen van der Wilt explores how the SCSL trial chambers discussed above handled this question.<sup>254</sup> An accompanying chapter examines how the court dealt with claims of command responsibility based upon Kondewa's status as a witch doctor.<sup>255</sup>

Van der Wilt describes the problem as how to handle defendants "wielding power over armies and military groups displaying rather distinct levels of organization."<sup>256</sup> In its *Brima* ruling, the trial chamber wrote that "[i]n a conflict characterised by the participation of irregular armies or rebel groups, the traditional indicia of effective control . . . may not be appropriate or useful."<sup>257</sup> If the "traditional indicia" would not work, what factors might the court consider? Whether the superior "had first entitlement to the profits of war," or "exercised control over the fate of vulnerable persons," or "had independent access to and/or control of the means to wage war," among other things.<sup>258</sup> Van der Wilt charges that the choice of these criteria was "strongly engrafted upon the evidence available to the Chamber,"<sup>259</sup> suggesting results-oriented jurisprudence aimed at achieving and justifying convictions. But just as the court seemed about to engage in creating a significantly different standard for irregular armies, it caught itself and moved quickly back toward criteria used to assess command responsibility in more conventional military situations: "the key traditional indicia of effective control remain central," especially the alleged superior's ability to issue orders and to take disciplinary action.<sup>260</sup>

---

254. See Harmen van der Wilt, *Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 144-58 (Charles C. Jalloh, ed. 2014).

255. See René Provost, *Authority, Responsibility, and Witchcraft: From Tintin to the SCSL*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 159-80 (Charles C. Jalloh, ed. 2014).

256. Van der Wilt, *supra* note 254, at 148.

257. *Brima*, *supra* note 249, at ¶ 787; see van der Wilt, *supra* note 254, at 149.

258. *Brima*, *supra* note 249, at ¶ 788; see Van der Wilt, *supra* note 254, at 149.

259. Van der Wilt, *supra* note 254, at 149.

260. See *Brima*, *supra* note 249, at ¶ 789; see also Van der Wilt, *supra* note 254, at 149.

Why did the court step back from a bolder stance? Perhaps because, ultimately, it did not need to go that far to impose liability. As van der Wilt notes, the court ruled that the AFRC “had a functioning chain of command” sufficient to decide that Brima had “effective control” for a command responsibility conviction.<sup>261</sup>

The question of whether Allieu Kondewa could be held liable under a command responsibility theory on the basis of his perceived authority as a witch doctor of course presented an even more novel question of law. As René Provost writes,

Kondewa did not hold a political or military role of the type that normally attracts responsibility for the act of another. Kondewa was instead the witch doctor for the CDF, officiating initiation ceremonies for new fighters in the Kamajors secret society and administering lotions and potions to make fighters invisible and invincible to bullets.<sup>262</sup>

But Kondewa’s authority was not solely a question of his alleged mystical powers. Provost states that “no important decision was reached without the agreement of” Kondewa and his (initially) two co-defendants, Moinina Fofana and Sam Hinga Norman.<sup>263</sup> Furthermore, none of the Kamajor soldiers of the CDF “would dare participate in a battle without the blessing of their High Priest.”<sup>264</sup> Thus, there was good reason to view Kondewa as an individual in a position to exercise “effective control” over subordinates, even if in a rather non-traditional manner.

Once again, however, the trial chamber took a somewhat conservative line on this issue. The court ruled that in general, whatever authority Kondewa derived from the Kamajors’ belief in his mystical powers, this clout did not extend to an ability to prevent violations of international law or to punish such violations.<sup>265</sup> For the one instance in which the court did find Kondewa liable under Article 6(3), it was because of the particular factual situation: one local commander who considered himself subordinate to Kondewa, which gave Kondewa the requisite authority to be said to have “effective control.”<sup>266</sup> This exception aside, “[m]ere ‘psychological’ or spiritual power

261. See *Brima*, *supra* note 249, at ¶ 1723; see also Van der Wilt, *supra* note 254, at 150.

262. Provost, *supra* note 255, at 164.

263. *Id.* at 166.

264. *Id.*

265. See *Fofana*, *supra* note 227, at ¶ 853; see also Provost, *supra* note 255, at 168, n.33.

266. See *Fofana*, *supra* note 227, at ¶¶ 868-872; see also Provost, *supra* note 255, at 168-69.

over people will not suffice to sustain a finding of criminal liability. . . . Kondewa only incurred criminal responsibility as a superior when his mystical powers over the Kamajors solidified in a more concrete capacity to issue orders by virtue of his being integrated in the chain of command.”<sup>267</sup> Interestingly, this ruling on Kondewa’s ability to “command” on the basis of psychological/spiritual influence leads van der Wilt to suggest that ICTR’s ruling in *Musema* lowered the bar for command responsibility too much.<sup>268</sup>

Thus, in at least two instances where the Sierra Leone court could have broken new ground, the tribunal took a more cautious path. This would seem to be at least in part due to the influence of ICTY’s rulings. While in *Tadić*, ICTY looked as though it might strike out on its own in some areas of international human rights jurisprudence, when it came to command responsibility decisions, the court instead acted somewhat conservatively, not applying new or looser standards. Apart from ICTY’s influence, it may also be the case that being a hybrid court—formed through negotiations between Sierra Leone and the UN, and including judges from Sierra Leone and the rest of the world—moderated SCSL’s rulings.

Probably the strongest evidence for the influence of the impact of the rule-makers on the court’s jurisprudence was that international peacekeepers sent to the area were largely exempt from SCSL’s jurisdiction for any violations of international law they committed; the accountability for their conduct being primarily the responsibility of their home states.<sup>269</sup> It was only if the home state was unwilling or unable to prosecute that SCSL could assert jurisdiction and even then only with the Security Council’s permission.<sup>270</sup> Thus, it was unlikely that peacekeepers were ever at serious risk of prosecution, if for no other reason than attempting to do so might make countries unwilling to contribute forces to future operations.<sup>271</sup>

This was not an issue of mere theoretical importance. As David Scheffer points out, UN forces were alleged to have, among other things, engaged in summary executions of rebels.<sup>272</sup> Their immunity from SCSL jurisdiction damaged the perception of the court’s legitimacy among Sierra Leoneans,<sup>273</sup>

267. Van der Wilt, *supra* note 254, at 156.

268. *Id.*

269. See SCSL Statute, *supra* note 4, at art. 1(2) (stating that crimes by peacekeepers “shall be within the primary jurisdiction of the sending State.”).

270. *Id.* at art. 1(3).

271. See, e.g., Celina Schocken, Note, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436, 446 (2002).

272. See David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT’L L. REV. 319, 323 (1999).

273. See Vincent O. Nmehielle & Charles C. Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 121 (2006). Similarly, at least part of the reason for negative views of ICTY was that court’s decision not to consider whether interna-

though the question of how to address wrongdoing by UN peacekeepers is certainly not limited to Sierra Leone.<sup>274</sup> SCSL was the first of the tribunals considered here to be established with the participation of the home country, so perhaps there was more reason to think that accountability for the UN would be part of the discussion. But it did not come to pass. As will be discussed further below when looking at the Malabo Protocol, one way of avoiding the issue of command responsibility is simply to make yourself immune from prosecution.

### A WORD ABOUT THE MALABO PROTOCOL

In 2014, the African Union added an additional protocol (which became known as the Malabo Protocol) to the Charter of the Union's Statute of the African Court of Justice and Human Rights. This Charter was established by African countries themselves to govern their own conduct going forward. According to the theory proposed here, this method of creation of the Charter and Protocol would suggest a particularly high-level requirement for command responsibility. Not only, as with the ICC, was this something created by the countries which it would govern, but it was created by a relatively small subset of them, thereby reinforcing the immediacy of the threat of prosecution.

The results strongly suggested that the risk of liability weighed heavily on the Malabo Protocol's authors. Article 46(B) contains fairly standard rules on command responsibility, using language which is similar to the ICTY and ICTR statutes:

The fact that any of the acts referred to in article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to

---

tional law may have been violated by NATO intervenors during the alliance's bombing campaign. See, e.g., Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It*, 25 *FORDHAM INT'L L. J.* 95, 96 (2001) (criticizing ICTY and chief prosecutor Carla Del Ponte for refusing to investigate allegations against NATO forces); Robert M. Hayden, *Biased "Justice": Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 *CLEV. ST. L. REV.* 549, 551 (1999) (criticizing ICTY for "the failure to prosecute NATO personnel for acts that are comparable to those of Yugoslavs already indicted, and of failure to prosecute NATO personnel for *prima facie* war crimes.").

274. See *infra* notes 292-301 and accompanying text.

take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>275</sup>

Unlike with the ICC, there is no explicit causality requirement, which might make the Protocol appear relatively friendlier to accountability. However, Article 46(B) is preceded by Article 46(A), which states as follows:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.<sup>276</sup>

This is a rather momentous loophole. The idea that a head of state is (or should be) immune from liability is hardly a new concept in international affairs. Still, this provision goes against a tide that has moved toward the conclusion that eliminating impunity requires that no one be above the law. In the midst of peace negotiations in Sierra Leone, then UN Secretary-General Annan stated that the organization would not support amnesties for war crimes.<sup>277</sup> Citing the Secretary-General's report, Jane Stromseth notes that this is part of a relatively recent movement away from such amnesties.<sup>278</sup> Similarly, Mark Ellis comments that "[i]nternational practice has begun to exhibit a trend in favor of prosecution and away from granting amnesties for human rights violations."<sup>279</sup>

Thus, the immunity provision would seem to be a step back from this trend. The language may reflect anger in African countries over the controversial decision by the ICC to indict Sudanese President al-Bashir. But even

275. Malabo Protocol, *supra* note 6, art 46(B).

276. *Id.* art. 46(A).

277. See U.N. Secretary-General, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 7, U.N. Doc. S/1999/836 (July 30, 1999) ("I instructed my Special Representative to sign the [Lomé Peace Agreement] with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.").

278. See JANE E. STROMSETH, *Peacebuilding and Transitional Justice: The Road Ahead*, in *MANAGING CONFLICT IN A WORLD ADRIFT* 579 (Chester A. Crocker, Fen Osler Hampson & Pamela Aall eds. 2015); see also Jalloh, *supra* note 169, at 245-46 (discussing actions of Secretary-General's representative during Lomé negotiations).

279. Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability – The Role of International War Crimes Tribunals*, 2 J. NAT'L SECURITY L. & POL'Y 111, 116 (2006); see also JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 252 (2006) ("[T]he normative acceptability of amnesties for serious offenses is more contested today, both internationally and domestically.").

beyond immunity for heads of state, it extends this protection to “other senior state officials.” A somewhat *sui generis* exemption for one individual (or one office) has now been extended to a poorly defined (but potentially large) group of people.<sup>280</sup>

This does not, of course, wholly eliminate the possibility of command responsibility prosecutions. But, it does eliminate it for precisely the types of individuals who presumably heavily influenced the writing of the Protocol in the first place. The lower-level commanders who remain liable under the Protocol’s command responsibility provision probably did not have a similar level of control over its creation. To put it another way, Professor Jalloh, in discussing the Charles Taylor prosecution, states that the case “affirms that when there is political will, no immunity will attach to a current or former president when he is tried before an international court for international crimes.”<sup>281</sup> In the writing of the Malabo Protocol, perhaps political will was lacking when it came to the possibility of being subject to one’s own rules. The Protocol has yet to be ratified by enough countries to come into force, so it is too soon to tell how it will be interpreted by the African court, or how broadly immunity for “other senior state officials” will be extended. But its immunity provision fits within what I have suggested we should expect.

#### CONCLUSION

I began by proposing that the differing standards employed for various iterations of command responsibility prosecutions could be tied to one variable in particular: how concerned were those creating a given standard with it potentially being used against themselves? If the answer was “not at all,” or “not very,” then a pro-prosecution rule was likely to be deployed. The greater the risk of the standard being applied more broadly, especially on those who created it, the higher the requirements that would be needed to prosecute command responsibility cases.

I believe the evidence supports this contention. The most obvious example of this, of course, is the Yamashita trial. The American military—or, rather, General MacArthur—developed rules out of whole cloth simply for the purpose of going after a senior Japanese military figure, one who had been a rival to MacArthur himself on the battlefield. As the facts described above demonstrate, the low benchmark for command responsibility was part of a scenario in which there was no real chance that General Yamashita was

---

280. It is possible to read the placement of a comma after the word “functions” as indicating that immunity will only exist while an individual is in office. But even that would be a significant restriction, especially in countries where free and fair elections are not guaranteed, reducing the changeover of high government officials.

281. See Jalloh, *supra* note 169, at 276.

going to be acquitted, due process/fair trial concerns be damned.<sup>282</sup> Furthermore, as the examples from the Korean and Vietnam wars demonstrate, the US was entirely unwilling to apply anything like the standards it used against General Yamashita to the conduct of its own soldiers, emphasizing that the Yamashita rules were a one-time, prosecution friendly setup. Similarly, while the rules applied by American-run tribunals in the two Nuremberg cases were not as punitive as those used against Yamashita, they were also not rules that the US was willing to apply against its own forces. Indeed, the US was either unwilling to admit the existence of crimes in the first place (as in the Korean example) or unwilling to admit that the crimes its personnel committed constituted violations of international law (as in My Lai).

A somewhat different example, but with an analogous outcome, comes to us from the Malabo Protocol. In this case, it was not the definition of command responsibility that was the issue. Rather, it was the explicit refusal by those writing the statute to apply it to themselves. Creating a high bar for command responsibility prosecutions is one way to lower the risk of prosecution; explicitly declaring yourself immune from the charge is even more effective.

The ICTY, ICTR, and ICC examples are less stark but also provide evidence supporting the general proposition. Since ICTY and ICTR were both set up as single-use tribunals, we might have expected them to be especially harsh in their treatment of command responsibility defendants. This expectation was not entirely borne out. Especially notable was ICTY's decision to retain the "effective control" standard for command responsibility prosecutions, even as it contradicted the ICJ and employed the lower "overall control" standard for state responsibility. In the case of ICTR, the issue was less the standard for command responsibility than its decision to employ it against a civilian, a decision which could have brought far more people under its control. Still, neither of these tribunals came close to the excesses of the Yamashita trial and the Malabo Protocol immunity provision, either in their treatment of defendants or in creating an escape clause for senior leaders.

It is useful, then, to compare ICTY and ICTR to the ICC. The ICC, of course, has the broadest mandate of any of the tribunals discussed here, and the largest number of participants who might be subject to its jurisdiction, including many of those who wrote the Rome Statute in the first place. As might have been predicted, unlike ICTY and ICTR, the Rome Statute included a causality requirement for command responsibility prosecutions, thereby raising the standard for cases tried under its provisions. Thus, the tribunal where those who created it had more reason to fear being subject to its rules did indeed produce a higher bar to winning command responsibility

---

282. Again, none of this is to suggest that General Yamashita definitively had clean hands, or had not been guilty of acts for which he could have been prosecuted, simply that his trial fell far short of basic notions of fairness.

cases. The fact that it took more than a decade after the ICC's creation for there to even be a command responsibility trial is telling, even if it is too soon to know what this truly indicates for the possibility of command responsibility prosecutions in the ICC over the long term.

SCSL raised somewhat different issues than the other tribunals. On the one hand, as noted above, it was heavily influenced by ICTY's jurisprudence. In that sense, its case law did not, by and large, create new jurisprudential developments (except for addressing how to handle cases involving those with alleged supernatural powers). But, it did help to demonstrate at least one respect in which the law is developing, namely the general trend against immunity for serious violations of international law, even for heads of state. However, it also showed a way in which the law has not changed: the immunity that the UN enforces for its own peacekeepers. As with the Malabo Protocol, immunity is an effective way of structuring the rules so as to avoid one's own accountability. This helps to give a more complete picture: in sum, taking all of these factors and tribunals into account, the evidence for the trend I suggested at the beginning is quite real.

Still, this does not mean that pure self-interest is all that is driving these decisions. Since command responsibility jurisprudence is fairly new and there is not yet a large body of case law on it, some of the different outcomes described here may simply reflect the fits and starts of an inchoate doctrine developing. As discussed above, SCSL was heavily influenced by ICTY. Adria De Landri suggests that on the whole ICTY's rulings have been especially influential in the development of command responsibility law, not only in tribunals with identical command responsibility provisions (including ICTR and Sierra Leone, as well as Cambodia's tribunal), but even in the ICC, whose statute has somewhat different language.<sup>283</sup> ICTY was the first of these courts to come into being, has had a relatively large caseload, and many of its personnel have gone on to work in other tribunals,<sup>284</sup> so it should not surprise us that its rulings have been influential. With regard to the ICC, whose command responsibility language is different, De Landri asserts that the court has ignored the dictates of its own statute in favor of relying on principles developed by ICTY,<sup>285</sup> a development she favors.<sup>286</sup>

So where do we go from here? In his speech at the 2017 Samuel Dash Conference on Human Rights, Gambian Chief Justice Hassan Bubacar Jallow made two comments particularly relevant to this analysis.<sup>287</sup> The Chief

283. See Adria De Landri, *Command Responsibility in the Tribunals: Is There a Hierarchy?*, 49 *CRIM. L. BULL.* 1, 1 (2013).

284. *Id.* at 9.

285. *Id.* at 9-10.

286. *Id.* at 10-11.

287. GEORGETOWN LAW, *2017 Samuel Dash Conference on Human Rights* (Apr. 3, 2017 9:00 AM), <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=31119>.

Justice was asked to predict the future of human rights prosecutions. He responded, *inter alia*, that he believed that the immunity provision in the Malabo Protocol would likely be struck down as inconsistent with the African Charter of Human and Peoples' Rights. He also stated that he believed that the days of wholly international, single event tribunals like ICTY and ICTR are behind us. Instead, the future will see more use of hybrid international/domestic tribunals. If he is correct, SCSL, or something close to it, would appear to be the wave of the future, as opposed to a repeat of ICTY or ICTR.

As to the first of these predictions, it would of course be a game changer for the Malabo Protocol if heads of state and senior officials end up subject to command responsibility prosecutions. If this happens, it will be interesting to see whether there is some sort of counter reaction, or an additional attempt to amend the Charter. As to the second, greater use of hybrid tribunals would potentially mean that rules would be influenced—as SCSL's were—both by the side generally more likely to be pro-prosecution (international), as well as by local interests wary of being prosecuted themselves. Perhaps this will create some sort of (uneasy?) balance, or perhaps some standard, be it the ICC's, ICTY's or otherwise, will eventually come to be accepted as the norm for these types of cases. Of course, there is also the chance that a government participating in establishing a tribunal to prosecute crimes committed in a war that it was involved in – but presumably emerged victorious from – will be motivated to be especially harsh in the hopes that the tribunal will come down hardest on its past opponents. But, it may not be possible to guarantee that tribunals operate in this manner. As discussed above, in the case of Sierra Leone, the court ended up prosecuting at least some cases against defendants who had fought for the government. Ironically, it was the international side that used its influence in setting up the rules to avoid prosecution, though again, that only applied to its own personnel and not to the participants on either side of Sierra Leone's civil war.

Regardless of which side is tinkering with the rules, we should be concerned by attempts to create overly severe rules for one situation or defendant that are not then applied consistently, or, conversely, attempts to simply exempt one side or participant from the rules altogether. In his "Letter From Birmingham City Jail," Dr. Martin Luther King, Jr. decried laws that people in power impose on others without applying to themselves, calling such statutes "difference made legal."<sup>288</sup> Those forming international tribunals should keep the principles he espoused in mind. Justice for individuals and groups affected by wars does not consist solely in seeing wrongdoers punished, but also in demonstrating to affected populations that fairness has prevailed. As Arzt's article discussed,<sup>289</sup> ICTY's work was not well received by either of

---

288. See MARTIN LUTHER KING JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 294 (James M. Washington ed., 1986).

289. See *supra* note 177 and accompanying text.

the directly affected sides—though it is certainly possible that nothing could have overcome the extreme polarization that existed. SCSL’s record in this regard is stronger, though here, too, there were some regional divides in feelings about the court.<sup>290</sup> Even if scrupulous attempts at holding everyone accountable to the same set of rules do not guarantee that a court’s work will be accepted, the absence of fairness is unlikely to go unnoticed. While this article has focused on the rules used by various tribunals, this is not the only fairness issue: the ICC has battled a perception from many in Africa that it focuses disproportionately, perhaps even exclusively, on human rights violations there.<sup>291</sup> In reaction to this, a small number of African nations have withdrawn from the ICC altogether.<sup>292</sup>

In promoting fairness, one problem the UN will need to take up (as mentioned above) that is not specifically a command responsibility issue is the phenomenon of crimes – especially gender based violence – committed by its own personnel serving in peacekeeping missions.<sup>293</sup> There are often significant jurisdictional hurdles to accountability for such crimes, in particular that the accused are typically immune from international prosecution,<sup>294</sup> leaving the UN in the position of doing little more than encouraging member

290. See *supra* note 177.

291. See David Bosco, *Why is the International Criminal Court Picking Only on Africa*, WASH. POST (Mar. 29, 2013), [https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f\\_story.html?utm\\_term=.455c0258750c](https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?utm_term=.455c0258750c) [<https://perma.cc/F5FT-3S7S>] (citing one African Union official describing the ICC as a “neocolonial plaything”). In a somewhat similar vein, as referenced above some commentators charged that ICTY’s docket was heavily influenced by American political interests. See Hayden, *supra* note 272, at 551 (alleging that ICTY “prosecutes only those whom the Americans want prosecuted”); see also Ford, *supra* note 178, at 46 (citing Hayden); see also *supra* notes 177-78 and accompanying text.

292. See Abraham Joseph, *Why Did South Africa, Burundi, and Gambia Decide to Leave the International Criminal Court*, WIRE (Jan. 11, 2016), <https://thewire.in/76869/why-did-south-africa-burundi-and-gambia-decide-to-leave-the-international-criminal-court/> [<https://perma.cc/H2ZU-2QNX>]. Under a new government, Gambia has now rescinded its decision to leave the ICC. See Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal From International Criminal Court*, NPR (Feb. 14, 2017), <http://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> [<https://perma.cc/MNE5-E6XQ>].

293. See, e.g., Elizabeth F. Defeis, *U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity*, 7 WASH U. GLOBAL STUD. L. REV. 185, 185-86 (2008) (“[T]he United Nations . . . now stands accused of egregious acts of sexual abuse and exploitation committed by U.N. peacekeepers and civilian personnel”); Melanie O’Brien, *Prosecuting Peacekeepers in the ICC for Human Trafficking*, 1 INTERCULTURAL HUM. RTS. L. REV. 281, 281 (2006) (“The 1990s saw a dramatic increase in the number of peacekeeping operations throughout the world. Unfortunately, there has also been a corresponding increase in the number of crimes committed by peacekeeping personnel.”).

294. See, e.g., Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions*, 27 BERKELEY J. INT’L L. 127, 147 (2009) (“[I]ndividual troop-contributing countries under the

states to address the problem seriously.<sup>295</sup> But, it need hardly be added that attempts by the international community to come into a country and tackle human rights problems will be viewed skeptically if the visitors engage in similarly egregious behavior and are not held liable. Michael Mersiades writes, “the management of the peacekeeper’s legitimacy is the best tool for maximizing local actor consent and preventing active opposition to peacekeeping operations.”<sup>296</sup>

The UN’s Department of Peacekeeping Operations has a manual on standards of conduct, *Accountability for Conduct and Discipline in Field Operations*,<sup>297</sup> which includes language that addresses the responsibilities of commanders. It states that “[m]anagers and commanders are responsible for taking steps to prevent and address misconduct on the part of their subordinates,”<sup>298</sup> and obligates supervisors to report misconduct.<sup>299</sup> But unlike the statutes discussed in this article, liability for UN commanders in peacekeeping operations in this regard is effectively limited to the possibility of a poor job performance review.<sup>300</sup> As with their subordinates, there is no real threat of criminal prosecution.

This lack of accountability (and the perception of unfairness that goes with it) is an especially important problem because the impact of an international court is often felt far beyond the community’s view of the tribunal’s own work. Professor Stromseth writes that “strengthening the rule of law depends on building people’s confidence that they will be protected from predatory state and non-state actors, that they can resolve disagreements fairly and reliably without resorting to violence, and that legal and political institutions will protect rather than violate basic human rights. Only then is the rule

---

status of forces agreements are solely responsible for the conduct and discipline of their own troops according to their own national laws and military regulations.”); Defeis, *supra* note 292, at 192 (“UN personnel enjoy functional immunity from prosecution by the host state which can only be waived by the Secretary-General, while members of military contingents are subject to the exclusive jurisdiction of their respective [home state]. Thus, discipline of offenders is uneven, and in many cases non-existent, thereby contributing to a culture of impunity.”).

295. See G.A. Res. 71/134, art. 8 (Dec. 13, 2016) (“strongly urg[ing]” member states “to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished.”).

296. Michael Mersiades, *Peacekeeping and Legitimacy: Lessons From Cambodia and Somalia*, 12 INT’L PEACEKEEPING 205 (2005).

297. See United Nations, Department of Political Affairs, Department of Peacekeeping Operations, Department of Field Support, *Accountability for Conduct and Discipline in Field Missions*, U.N. Doc. (Aug. 1, 2015).

298. *Id.* art. 14.1.

299. *Id.* art. 14.2.

300. *Id.* art. 14.3.

of law likely to take root.”<sup>301</sup> Thus, international actors—whether tribunal judges and prosecutors or peacekeeping officials—who are seen to operate fairly and consistently are important not only in a retrospective sense but prospectively as well. To the extent that those with an interest in avoiding prosecution can be kept from tinkering with the rules, so much the better, and the international community needs to reach some sort of resolution to address the crimes committed by UN personnel.<sup>302</sup> But, as cases like Yamashita’s demonstrate, those with nothing to fear should not be left to create unreasonable standards, either. In the aftermath of serious human rights violations, accountability and fairness are both required.

---

301. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law*, 38 GEO. J. INT’L L. 251, 252 (2007). Though what I have written here has focused on the work of international criminal tribunals, these are not the only mechanisms employed in countries where atrocities have taken place as a means of achieving some form of justice for the victims. Truth and reconciliation commissions have played a significant role in this process, typically in combination with courts. See, e.g., Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. & SOC. SCI. 269, 270 (2013) (“Since the 1980s, states have not just been initiating trials; they have also increasingly been using multiple mechanisms, including truth commissions, reparations, lustration or vetting, museums and other memory sites, archives, and oral history projects, to address past human rights violations.”); Stromseth, Wippman & Brooks, *supra* note 278, at 252 (“Advocates of the rights-based approach increasingly have recognized the need to supplement trials with noncriminal accountability mechanisms that offer alternatives to trials for lesser offenders.”).

302. See, e.g., Ndulo, *supra* note 294, at 159-60 (calling on states that contribute personnel to peacekeeping operations to ensure that their courts have jurisdiction over crimes committed by their own nationals during operations); Defeis, *supra* note 293, at 201 (supporting proposal to give jurisdiction to host state over crimes committed there by UN personnel); Catherine E. Sweetster, Note, *Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel*, 83 N.Y.U. L. REV. 1643, 1646 (2008) (advocating for a UN administered compensation scheme to victims); O’Brien, *supra* note 293, at 327-28 (discussing possibility of bringing peacekeepers before ICC, but concluding that better option is for UN and member states to take greater responsibility).