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COMMANDERS BEWARE: LAW OF WAR ACCOUNTABILITY  
FOR CONTRACTORS ON THE BATTLEFIELD

by

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## Introduction

In the near future, a battalion commander and a military contractor officer representative are sitting at a military joint article 32 investigative hearing in Baghdad facing Uniform Code of Military Justice charges relating to a violation of the law of war. The charges concern the unlawful killing of 12 Iraqi civilians by “civilian contractors.”<sup>1</sup> What is unique is that the two military officers are facing charges relating to their failure to ensure that the civilian contractors, employed by the Department of Defense and under the command and control of the military officers, abided by the law of war while operating in Iraq. Is this hypothetical scenario impossible or has the inclusion of contractors into the Department of Defense’s “Total Force,” and recent legislative efforts to place them under the disciplinary control of the military, resulted in an expansion of the doctrine of command responsibility for war crimes?

There is no dispute that contractors could be involved in law of war violations as reflected in a recent federal investigation into the killing of as many as 17 and wounding of as many as 24 civilians in Iraq by members of a private security company operating under contract for the United States government.<sup>2</sup> There also is no dispute that the military’s reliance on contractors is not likely to subside in the future. This is evident in the Department of Defense 2006 Quadrennial Defense Review Report, the Joint Staff’s Focused Logistic Campaign Plan, and the position of the Department of the Army foreseeing that, “the future battlefield will require ever-increasing numbers of often critical important contract employees.”<sup>3</sup> What is uncertain is to what extent military commanders and other military officers will be held personally accountable for war crimes committed by contractors.

This paper will discuss the issue of whether the increased use of contractors on the battlefield will result in situations where military commanders and staff will be personally

accountable for the contractors' failure to abide by the law of war. This discussion will start with a brief overview of the current state of affairs involving contractors on the battlefield. It will then provide a historical chronology on the concept of civilians accompanying the force and the legal constructs holding them accountable for their actions. It will then review the framework for the doctrine of command responsibility for war crimes, and will provide an analysis that taking such actions as making contractors a part of the Fourth Element of the "Total Force" and subject to the Uniform Code of Military Justice will result in an expansion of this doctrine. Finally, the paper will make recommendations on how senior military leaders should address the increased responsibility through training and monitoring of contractors to ensure their compliance with the law of war.

### **State of Affairs Involving Contractors on the Battlefield**

A recent newspaper headline stating that the "Pentagon Sees One Authority Over Contractors" is reflective of the progression in placing contractors under the single control of the military during times of war and contingency operations. In addressing contractor supervision in Iraq in response to an allegation that Blackwater Worldwide contractors wrongfully killed and wounded civilians, Robert M. Gates, the United States Secretary of Defense, "is pressing for the nearly 10,000 armed security contractors now working for the United States government in Iraq to fall under a single authority, most likely the American military."<sup>4</sup> Although Defense Secretary Gates did not specifically state that the military should be the single authority, he is being "told by senior American commanders in Iraq that there must be a single chain of command overseeing the private security contractors working for a variety of United States government agencies in the war zone. The commanders argue that the military is best positioned to be that single authority."<sup>5</sup> With this background in mind, the Department of Defense recently

entered into a Memorandum of Agreement (MOA) with the Department of State providing coordination between the two departments on the command, control, and discipline of private security contractors operating in Iraq.<sup>6</sup> This trepidation for contractors on the battlefield by the military is being echoed in Congress where, “Members are concerned about transparency, accountability, and legal and symbolic issues raised by the use of armed civilians to perform security tasks formerly performed by the military, as well as possible long-term effects on the military.”<sup>7</sup>

Although these concerns center on the recent reports of private security companies wrongfully killing and wounding innocent civilians in Iraq and Afghanistan, both Congress and the military have recognized that increased command, control, and accountability are required for all contractors accompanying United States Forces overseas. Undoubtedly, neither Congress nor the military envisioned the vast number of contractors existing side-by-side with service members in the theaters of operation. During the course of Operations Enduring Freedom and Iraqi Freedom, there has been an increasingly reliance on contracting firms. In fact, “By the United States Central Command’s count at the end of 2006, there were nearly 100,000 contractors operating in Iraq alone.”<sup>8</sup> According to State and Defense Department figures, this number increased during 2007 to more than 180,000 civilians (including Americans, foreigners and Iraqis) working under contracts with the United States.<sup>9</sup>

The increased number of contractors on the battlefield corresponded with concerns for contractor accountability. “A lack of strict accountability in case of an abuse by a contractor could severely undermine goodwill toward the United States or incur liability on the part of the United States for a breach of its international obligations.”<sup>10</sup> Congress has responded to this concern over accountability through recent expansion of federal criminal jurisdiction over

contractors, to include subjecting them to the military's Uniform Code of Military Justice (UCMJ). The next section will discuss how what was once limited military jurisdiction over a small number of civilians accompanying the military force has evolved into a situation where military commanders and staff could be criminally liable for a contracting force that is equal with, or even larger than, the size of the military force.

### **Historical Context of Civilians Accompanying the Force**

The presence of contractors accompanying the military force is not new, as civilians have been an integral part of military forces throughout history. The absence of civilians accompanying the military force was an exception rather than the rule from the days of the Greek Phalanx through today's modern armies.<sup>11</sup> Additionally, "For centuries, armies have exercised court-martial jurisdiction over civilians accompanying them in the field."<sup>12</sup> The United States is no different having civilians accompany the military force, starting from the War of Independence continuing through the current conflicts in Iraq and Afghanistan. The United States also has attempted to hold such civilians accountable under military law, first through the application of the Articles of War, and then the UCMJ.

#### *Articles of War*

During the early stages of the War of Independence, the Articles of War were promulgated extending military jurisdiction to certain civilians who were accompanying or serving with the military in the field. Article 63 provided that "all retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."<sup>13</sup> From the conception of the United States, it was non-contentious that citizens accompanying the military force were subject to orders and discipline of the military based on their relationship to the military force.

In 1806, Article 63 was expanded (and renumbered) to include language that “all persons whatsoever, serving with the armies of the United States” would be subject to military jurisdiction.<sup>14</sup> From this period through the early 1950s, federal courts repeatedly reaffirmed that civilians accompanying the military during time of war were subject to military jurisdiction. Court decisions arising from the Indian plains wars, World War I, and World War II were clear that civilians performing military-type duties while assigned to the military could be disciplined under the Articles of War.<sup>15</sup> Left unanswered was whether military commanders had any responsibility for the actions of these civilians that were subject to military jurisdiction.

### *Uniform Code of Military Justice*

After World War II, the Articles of War were superseded by the UCMJ in response to concerns by Congress that the military had abused the military justice system in disciplining service members during World War II. “It was unusual that they [service members] were afforded defense counsel and subsequently acquitted because at that time, there was no right to a defense lawyer and there were more than 60 general courts-martial convictions for each day of hostilities.”<sup>16</sup> The draconian application of the Articles of War to citizen-soldiers resulted in the enactment of the UCMJ, which became effective on 31 May 1951.<sup>17</sup> The UCMJ included specific language addressing when civilians accompanying the military force could be subject to military law. Under Article 2(a)(10) of the UCMJ (10 U.S.C. 802(a)(1)), which defines military court jurisdiction, civilians were subject to military law if they “were serving with or accompanying an armed force in the field in time of war.”<sup>18</sup>

After the enactment of the UCMJ, the United States Supreme Court further defined the application of military jurisdiction over civilians accompanying the military force. In 1957, the Supreme Court held that civilian dependents of service members could not be subject to the

UCMJ in times of peace for capital offenses committed overseas.<sup>19</sup> Three years later, the Supreme Court reaffirmed that civilians accompanying the force during peacetime could not be subject to the UCMJ due to Constitutional issues.<sup>20</sup> In 1970, the United States Court of Military Appeals (USCMA) held that the UCMJ has no jurisdiction over civilians serving with or accompanying the armed forces unless it was during a war formally declared by Congress. On at least two separate occasions, the USCMA refused to apply court-martial jurisdiction over civilians serving with the military force in Vietnam.<sup>21</sup>

### ***Loophole in Jurisdiction***

During this period, a loophole existed in the ability to hold civilians accountable for crimes committed overseas while accompanying or serving with the military force. The UCMJ did not apply without a declaration of war, and federal jurisdiction generally applied to crimes committed in the special maritime and territorial jurisdictions of the United States, not in foreign countries. The only recourse for holding a civilian accountable under these conditions was host nation laws. This jurisdictional mechanism was not often viable for numerous reasons. Occasionally the United States government would enter into a Status of Forces Agreement (SOFA) with the host nation providing the United States government exclusive criminal jurisdiction over its service members and civilians while stationed in the host nation.<sup>22</sup> Often a host nation could not prosecute a civilian for crimes committed due to the SOFA, and neither could the United States government, as there were limited provisions in federal law to allow jurisdiction for criminal acts committed outside the sovereignty of the United States.<sup>23</sup> A second reason for the loophole is that even in the absence of SOFA protections with the host nation, the host nation often did not prosecute due to ineffective domestic laws, lack of interest in prosecuting crimes committed by United States citizens on United States citizens, or the fact that

the civilian had been removed from the host nation before they could take action. A plausible third reason is the paternalistic attitude of certain United States government officials stationed overseas who had civilians working under contract for the United States government.

This last reason has been raised by various authors writing on the subject of contractors. One author contends that once a contracting firm receives a federal license and contract to operate in a foreign country, there is no specific oversight requirement in place by the United States government to monitor the contract or the contractors. “Many [United States embassy officials] see this as contrary to their job requirements. When asked whether his office would pursue the employees of the Airscan who had coordinated air strikes in Columbia in the 1980s that killed civilians, including nine children, one State Department official responded. ‘Our job is to protect Americans, not investigate Americans.’”<sup>24</sup> Another author raises the same issue when discussing a Congressional hearing on contractors in Iraq. During the hearing, government officials were not able to answer the question of whether they would recommend prosecuting a civilian contractor for murder. Based on this conversation, the author asserts, “In theory, it is the responsibility of the home countries of contractors to police them. In reality, this has translated to impunity.”<sup>25</sup>

Both the American public and Congress became overly aware of governmental inaction and legal loopholes during the 1990s with numerous media reports of contractor misconduct in the Balkans. Public outcry arose over reports of sex crimes committed by DynaCorp employees working under a Department of Defense contract in Bosnia.<sup>26</sup> None of the employees were ever prosecuted, but instead were spirited out of the country, away from local authorities. These instances of misconduct by contractors working for the military resulted in legislative action to close the perceived loophole that contractors working overseas for the military were not being

held accountable for serious criminal misconduct. Congressional concern coincided with an increase in contractors accompanying the military force during the Balkan operations. It was during the early 1990s that military outsourcing of certain combat service support functions became the norm. Brown and Root Services “won a contract from the United States Army’s LOGCAP (Logistics Civil Augmentation Program) to work with the military in planning the logistical side of contingency operations.”<sup>27</sup> Thereafter the boom was on for outsourcing both military and governmental functions to contracting firms, resulting in the increased presence of contractors in overseas military operations.

### ***Federal Jurisdiction Applicability Overseas***

One of the first attempts by Congress to apply federal jurisdiction over civilians committing crimes outside the United States was the War Crimes Act of 1996.<sup>28</sup> This act provided federal criminal jurisdiction over United States service members and nationals committing war crimes inside or outside the United States.<sup>29</sup> However, Congress’s primary response to contractor misconduct while employed by the military overseas is the Military Extraterritorial Jurisdiction Act (MEJA) of 2000.<sup>30</sup> This act is the first major attempt by Congress to deal directly with the jurisdictional issues relating to contractors working for the Department of Defense in overseas operations.

MEJA expanded the scope of federal jurisdiction to those persons employed by the armed forces outside the United States any offense that would be punishable by imprisonment for more than one year (felony offenses) if committed within the special maritime and territorial jurisdiction of the United States. MEJA defines “employed by the Armed Forces outside the United States” as civilians employed by the Department of Defense, Department of Defense contractors and their employees (including subcontractors at any tier), and civilian contractors

and employees (including subcontractors at any tier) from any other federal agency or provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.<sup>31</sup>

From the inception of MEJA, issues have been raised regarding its limitations in prosecuting contractors overseas. First, the Department of Defense was slow in promulgating implementing policy and procedure for the Act.<sup>32</sup> Second, it does not cover contractors engaged in non-military business activities. Third, it did not originally provide criminal jurisdiction over contractors working for other federal agencies. The latter issue came to light when it was determined that MEJA did not apply to contractors involved in prisoner abuse at Abu Ghraib as the contractors worked for the United States Department of the Interior rather than the Department of Defense.<sup>33</sup> Recognizing the existing loophole, Congress expanded MEJA to include all persons “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States.”<sup>34</sup> Despite the initial belief that MEJA was the legislative answer to holding contractors accountable for overseas misconduct, there has been very limited charging and prosecution of contractors under MEJA.<sup>35</sup>

In addition to MEJA, Congress created other federal criminal statutes to apply overseas. With the passage of the United States Patriot Act in 2001, federal jurisdiction applies to contractors working overseas where the crime occurred on the premises of United States diplomatic missions and property, irrespective of ownership, if used for United States government purposes.<sup>36</sup> As with MEJA, the Patriot Act has had limited success in holding contractors working overseas accountable. In fact, only one successful prosecution of a contractor for committing criminal acts overseas has occurred.<sup>37</sup>

### *Closing the Loophole - Expansion of UCMJ*

With the commencement of Operation Iraqi Freedom, there was a limited jurisdictional framework in place (War Crimes Act, MEJA and Patriot Act) to hold contractors accountable for criminal misconduct overseas. What was not perceived by Congress and the military was the incredible number of contractors that would end up accompanying the military force. In comparison, “During the first Gulf War, an estimated 9,200 contractors accompanied 500,000 American troops into the theater of operation. We had about one contractor for every 50 troops. In the current Iraq war, contractors actually outnumber troops. A recent analysis by the Associated Press showed that our government employs more than 180,000 contractors -- many of them armed -- and just 163,000 military personnel.”<sup>38</sup>

Reports of wide spread criminal misconduct, including contract fraud, commission of felony offenses, and violating the law of war, particularly the rules of engagement, in conjunction with public awareness that some contractors could not be prosecuted due to loopholes in federal jurisdiction and Iraqi governmental immunity, did not fall on deaf ears.<sup>39</sup> A five-word revision to 10 USC 802 (persons subject to the UCMJ) made contractors working for the Department of Defense in Iraq, Afghanistan, and any other contingency operations subject to the UCMJ. The UCMJ originally stated, “In time of war, persons serving with or accompanying an armed force in the field” would be subject jurisdiction.<sup>40</sup> The amendment changed this language to read as follows, “In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field” would be subject to jurisdiction.<sup>41</sup>

This change in the law is attributed to Senator Lindsey Graham who said, “It would give military commanders a more fair and efficient means of discipline on the battlefield by placing

civilian contractors accompanying the Armed Forces in the field under court-martial jurisdiction during contingency operations as well as times of war.”<sup>42</sup> With this change, a broader scope of contractors will be subject to military law. However, it will not result in an all-inclusive UCMJ jurisdiction for contractors as it too has limiting factors. The following prerequisites must occur before a contractor is subject to the UCMJ.

First, there must be a formal declaration of war by Congress or a contingency operation defined by law. A contingency operation is a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call or order to, or retention on, active duty of members of the uniformed services under certain sections of Title 10, United States Code, or any other provisions of law during a war or during a national emergency declared by the President or Congress.<sup>43</sup> Second, the civilian contractor must be serving with or accompanying an armed force. The phrase “serving with or accompanying the forces [has] been historically construed to require that the civilian’s presence must be not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel.”<sup>44</sup> An armed force is defined as the Army, Navy, Air Force, Marine Corps, and Coast Guard.<sup>45</sup> Third, the phrase “in the field” has been construed by the United States Supreme Court to mean serving “in an area of actual fighting at or near the battlefield where actual hostilities are underway.”<sup>46</sup> The Court of Military Review provides further guidance holding that whether an armed force is in the field “is determined by the activity in which it may be engaged at any particular time, not the locality where it is found.”<sup>47</sup>

Considering these requirements, it is clear that not all overseas military operations will subject contractors to UCMJ jurisdiction. Such military activities as overseas military exercises, humanitarian missions, and peace support operations that do not include hostile engagements would not trigger UCMJ jurisdiction. There is even a possibility that contractors in a declared war or contingency operation would not be subject to UCMJ jurisdiction if their employment functions did not contribute to military operations against an enemy opponent. However, this exception is questionable due to the asymmetrical nature of current warfare where all areas of the battlefield are involved in supporting the force and are susceptible to attack.

### ***Integral Part of the Total Force***

The evolution of contractors serving with the military has accumulated where “Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return.”<sup>48</sup> The military services recognize this with service specific orders, regulations, and directives addressing the subject of contractors accompanying the force.<sup>49</sup> The Department of Defense itself recently promulgated guidance on contract personnel accompanying the armed forces in Department of Defense Instruction 3020.41.<sup>50</sup> An indication that contractors are a fundamental part of the United States armed forces is their mention in the Department of Defense 2006 Quadrennial Defense Review (QDR) as an integral part of the Total Force. Specifically, the Department of Defense acknowledges that they “must carefully distribute the skills among the four elements of the Total Force (Active Component, Reserve Component, civilians and contractors) to optimize their contributions across the range of military operations from peace to war.”<sup>51</sup> Furthermore, the Joint Staff Focused Logistics Campaign Plan of 2004 states, “Contractors play an ever-growing role supporting deployed forces.”<sup>52</sup>

This recognition as part of the Total Force, together with the Department of Defense and service regulations directing that contractors generally receive the same support and rights afforded active duty military personnel during overseas operations, suggests a quasi-managerial relationship between the military and contractors. The addition of the military being able to discipline contractors through application of the UCMJ adds an important factor in determining whether military commanders can be held accountable for the actions of contractors relating to the law of war. The recent release of a Deputy Secretary of Defense Memorandum implementing the management of Department of Defense contractors and contractor personnel accompanying the armed forces during contingency operations outside the United States establishes a line of command, control, and discipline over contractors. It states in part, “Geographic Combatant Commanders are responsible for establishing lines of command responsibility within their Area of Responsibility (AOR) for oversight and management of DoD contractors and for discipline of DoD contractor personnel when appropriate.”<sup>53</sup> With this relationship in mind, the next section will review the legal doctrine of commanders’ responsibilities for war crimes to assist in determining whether military commanders and staff could be held personally accountable for war crimes committed by contractors under their command, control, and discipline.

### **Doctrine of Command Responsibility for War Crimes**

The idea of holding commanders responsible for war crimes committed by their subordinates is almost as old as the presence of civilians accompanying the military force. As far back as 500 BC, Sun Tzu wrote that a commander was responsible for the actions of his troops. “Recognizing the responsibility of the commander, he [Sun Tzu] also recognized the correlative duty of the commander to control his subordinates.”<sup>54</sup> From the times of Sun Tzu,

State leaders have held military commanders personally responsible for the misconduct of their troops during times of war. In 1439, King Charles VII of France issued a decree that “each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice...”<sup>55</sup> In 1474, the Archduke of Austria brought a knight to trial for presiding over a reign of terror, including murder, rape, perjury, and other crimes against the laws of God and man. The knight was convicted and sentenced to death for committing these crimes, “which as a knight and commander he had a duty to prevent.”<sup>56</sup> In 1621, King Gustavus Adolphus of Sweden directed that no officer under his command “...shall command his souldiers to do anything unlawful, which who so does, shall be punished according to the discretion of the judges...”<sup>57</sup> During this same period, the jurist and scholar Hugo Grotius wrote on the subject proposing that “...a community, or its rulers, may be held responsible for the crimes of a subject if they knew it and do not prevent it when they could and should prevent it.”<sup>58</sup> From these legal decrees and ethical writings, international consensus arose during the Middle Ages that military commanders have a duty not only for their own actions, but also for the actions of their subordinates.

### *The Early American Experience*

This concept of command responsibility for war crimes carried over from Europe to the new continent whereby colonial militias held their officers responsible for the conduct of their subordinates. In 1775, the Provisional Congress of Massachusetts Bay promulgated the Articles of War that included the requirement that all officers “shall keep good order...redress all such abuses or disorders which may be committed by any officer or Soldier under his command...”<sup>59</sup> This requirement was immediately incorporated in the American Articles of War of 1775 and

republished in 1776. Thus, “from the very beginning of American jurisprudence, a military commander had the duty and responsibility of controlling members of his command.”<sup>60</sup> Hence, military commanders were held personally accountable for the underlying acts if they participated or had actual knowledge and did nothing to prevent the acts.

This responsibility was reinforced during the Civil War with the Union’s promulgation of the Lieber Code (General Order Number 100). The Lieber Code not only addressed the protection of prisoners of war, it also held commanders responsible for ordering or encouraging the killing or intentional wounding of an enemy combatant either taken prisoner or wholly disabled.<sup>61</sup> Other high points in the development of the doctrine of command responsibility for war crimes occurred during the Philippine insurrection at the turn of the century. In 1901, an American military tribunal convicted a Filipino insurgent commander for “not just ordering a war crime, but also for permitting one to occur.”<sup>62</sup> As the United States entered the 21<sup>st</sup> Century, the doctrine of command responsibility was delineated in its Articles of War as well as reflected in the customary concept of command responsibility practiced in western nation states. However, there was not an international treaty or convention that recognized the doctrine of command responsibility for war crimes.

### *Early International Efforts*

The first international effort to codify the concept of command responsibility for war crimes occurred with the enactment of the Fourth Hague Convention of 1907. Article 3 of the Convention required that a “belligerent party which violates the provision of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming a part of its armed forces.”<sup>63</sup> The United States is a party to this treaty obligation that internationalized its domestic practice of holding military commanders

accountable for certain actions by their subordinates. Although the provisions of the Fourth Hague Convention “would not be the basis for post-World War I trials, they were important because they created internationally recognized obligations for commanders.”<sup>64</sup>

Upon conclusion of World War I, the victorious Allies established a Commission on the Responsibility of the Authors of War and on Enforcement of Penalties to address personal accountability for the initiation of the war and atrocities committed during the war. Although no one was charged under its authority, the Commission advanced the doctrine of command responsibility by proposing international tribunals address war crimes rather than domestic courts. “The Commission proposed that the international tribunal entertain charges against all authorities, civil or military...who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.”<sup>65</sup> The next major attempt by the international community to address command responsibility for war crimes was the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field. It recognized that a commander had “the duty...to provide for the details of execution of the foregoing articles [protection of wounded and sick] as well as for the unforeseen cases.”<sup>66</sup> Other than these two international attempts to address command responsibility for war crimes, “...the world entered World War II with very little treaty law on the doctrine of command responsibility.”<sup>67</sup>

Up to this point, military commanders bore general responsibility for the actions of their subordinates, in that they faced charges of failing to properly supervise, or would be required to pay compensation for the harm caused by their subordinates. If commanders themselves participated in law of war violations by ordering subordinates to carry them out, then they could

be charged for the actual underlying acts of their subordinates. The doctrine of command responsibility, however, would undergo a dramatic revision after World War II, and become a theory whereby commanders could actually be charged with the underlying acts of their subordinates even if they did not actually order or even had actual knowledge about the subordinates' actions.

### ***World War II Developments***

Out of the ashes of World War II arose the modern concept of command responsibility for war crimes that are accepted as customary international law and codified in international conventions and state domestic law. "It was during the war crimes trials themselves that the doctrine of command responsibility developed."<sup>68</sup> Although thousands of war crimes trials occurred at the end of World War II, this section will only address the cases that had direct bearing on the development of a commander's responsibility for his subordinate's commission of war crimes. For simplification, the war crimes trials will be distinguished between the Far East and the Nuremberg military commissions and tribunals.

### ***Far East Trials***

One of the first war crimes trials conducted at the conclusion of World War II involved Japanese General Tomoyuki Yamashita. General Yamashita was tried in the Philippines before a United States military commission during the fall of 1945. He was found guilty of war crimes committed by his subordinates and others under his control, and was sentenced to death. "This was the first time a military commander had been found guilty of war crimes committed by his soldiers because of his failure to adequately supervise them."<sup>69</sup> General Yamashita was held personally accountable for large-scale atrocities committed by forces under his direct and indirect command against civilians, internees, and prisoners of war.<sup>70</sup> The Military Commission

disregarded a defense of ignorance as the war crimes were “so extensive and widespread, both as to time and area, that they must either have been willfully permitted or secretly ordered by the accused.”<sup>71</sup>

Although the Commission appeared to find General Yamashita guilty on the basis of his actual knowledge that war crimes were being committed (personally ordering the commission of some of them), the Commission developed the legal standard of “known or must have known”. “The case is cited for the proposition that a commander is responsible for doing everything possible to prevent war crimes. In a case like this, where the atrocities were so widespread, the commission was willing to find that the commander ‘must have known’ what was going on, and to hold him criminally responsible for failing to act to prevent further violations and to punish violators.”<sup>72</sup> The Yamashita case is also noteworthy as it was reviewed by the United States Supreme Court, who denied Yamashita’s writ of habeas corpus, concluding “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>73</sup>

Other notable war crimes trials in the Far East were the Tokyo trials that spanned two years (1946-1948). The majority of the trials dealt with atrocities inflicted upon civilians and prisoners of war. “Before the Tribunal reached the evidence for each defendant, it clearly specified that it would apply a ‘should have known’ standard. Defendants would be responsible for maltreatment of prisoners if they knew of such crimes and failed to take steps to prevent them, or if they are at fault in having failed to acquire such knowledge.”<sup>74</sup> With this instruction in mind, the tribunals found several Japanese general officers guilty of war crimes for the actions of their subordinates. General Shunroko Hata, commander of forces in China, was found guilty for the large-scale atrocities committed by his forces. Although General Hata had issued orders

to his troops to conduct themselves in a soldierly manner and not abuse prisoners of war, the tribunal held “either Hata knew of these things [mass war crimes] and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war were obeyed.”<sup>75</sup>

In another case, General H. Kimura, Commander-in-Chief of the Burma Area Army, issued orders to his soldiers to conduct themselves properly and to refrain from maltreating prisoners. “He failed to ascertain, however, whether his troops were following his orders, which they were not, and the Tribunal found him responsible for those crimes.”<sup>76</sup> A third trial involved General Iwane Matsui, commander of the forces blamed for the Rape of Nanking. Although General Matsui too had issued orders to his troops to conduct themselves honorably, the Tribunal found that these orders “were of no effect...he [Matsui] knew what was happening...he had the power as he had a duty to control his troops and to protect the unfortunate citizens of Nanking.”<sup>77</sup> Although the three military commanders were found guilty as they “must have known” of the atrocities being committed by their subordinates, they could also have been found guilty on the developing legal standard of “should have known”.

These cases also underscore that a commander’s duty extends beyond just giving orders to his subordinates to abide by the law of war, and that commanders could be held accountable for being unaware of the commission of war crimes by his subordinates of which he should have known was occurring based on the information provided to him. “It was also not enough that a subordinate assured him that the orders were being followed if the commander received reports that such crimes might be occurring, or if he should have been put upon further inquiry as to whether those assurances were true or untrue.”<sup>78</sup> In Europe, similar standards for command responsibility also developed.

### *Nuremberg Trials*

In the European theater, military tribunals were using similar legal standards during the war crimes trials of German military commanders. Two of the most famous trials applicable to the doctrine of command responsibility are *United States v. Wilhelm List* (known as the “Hostage Case”) and *United States v. Wilhelm von Leeb* (known as the “High Command Case”). “Some writers suggest that these two cases are of greater importance than Yamashita because these decisions were rendered by professional jurists and long enough after the cessation of hostilities to give the judges adequate time to reflect on the issues.”<sup>79</sup>

The High Command Case involved the joint trial of thirteen German officers accused of implementing (through the transmission of orders) a Nazi extermination plan on the Eastern Front against civilians, Soviet political commissars, and enemy combatants (commandos) that was carried out by their subordinates. The Tribunal rejected a theory of strict liability in holding these officers accountable for war crimes committed by their subordinates. Rather, it determined that there must be personal dereliction of the officers, either “where the act is directly traceable to him or where his failure to properly supervise his subordinate constitutes criminal negligence... personal negligence amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”<sup>80</sup> The High Command Case also established that during military occupation, commanders have certain obligations to the civilian populace as “he is the instrument by which the occupancy exists. It is his army which holds the area in subjection.”<sup>81</sup>

The Hostage Case involved the joint trial of twelve German officers accused of vast war crimes (mostly reprisals and hostage taking) committed in the Balkans by their subordinates during German occupation. When discussing whether commanders were on notice of atrocities

being committed in their zones of responsibility, the Tribunal held that "an army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity...to believe a high ranking military commander would permit himself to get out of touch with the current happenings in the area of his command during wartime."<sup>82</sup> Although the Tribunal did not reach a standard of strict liability for a commander, it did broaden the concept of "must have known" to one of "should have known" dependent on the totality of circumstances available for a commander. This broadened theory of command responsibility would influence later cases on the subject.<sup>83</sup>

A third set of cases, categorized as the "Ministries Case," involved the authority and influence of Nazi government and business officials on implementing the Nazi's final solution to the Jewish "problem." Certain Nazi political leaders and businessmen were convicted based on the "rationale that persons in de facto control are responsible for persons under their power, irrespective of whether a military or civilian function was served."<sup>84</sup>

### ***Post-World War II Developments***

The international community entered the post war period with the doctrine of command responsibility for war crimes well entrenched in customary international law. A legal standard holding commanders responsible for the "known or should have known" actions of their subordinates developed during the war crimes trials and became the universal international norm. In 1956, the United States Army published Field Manual 27-10, The Law of Land Warfare (FM 27-10). Although not punitive in nature, the Manual states, "in some cases, military commanders may be responsible for war crimes committed by subordinate members of the

Armed Forces, or other persons under their control.”<sup>85</sup> The Manual also reflects the “known or should have known” standard by stating “The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”<sup>86</sup> The Manual, however, sets forth the international standard for command responsibility, not the UCMJ standard, which will be discussed below.

The first major conflict involving United States armed forces after promulgation of FM 27-10, was the Vietnam conflict. One of the most infamous war crimes occurring during this conflict was the My Lai massacre. Two cases arising from this incident are important in the application of the doctrine of command responsibility for war crimes. The first case involved Captain Medina who was charged with five criminal offenses, one charge being a principal under Article 77, of the UCMJ to the premeditated murder of not less than 100 Vietnamese civilians allegedly murdered by his subordinates.<sup>87</sup> Captain Medina was not formally charged with law of war violations, rather with violations of the UCMJ. This was consistent with United States policy that persons subject to the UCMJ will be normally prosecuted under a charge enumerated by the UCMJ for the offense rather than being generically charged for a war crime.<sup>88</sup>

Military prosecutors “alleged that Captain Medina knew exactly what was going on [his men murdering civilians] and that Medina had the power to stop the killing simply by making a radio call.”<sup>89</sup> Noteworthy about this case is that the trial judge did not elect to apply the “known or should have known” standard for command responsibility developed during the war crimes trials of World War II and promulgated in FM 27-10, but rather instructed the members of the court that the legal standard for accountability was that Captain Medina needed to have “actual

knowledge” that the atrocities were being committed by his men and thereafter took no action to prevent or stop the atrocities.<sup>90</sup> As Captain Medina was acquitted of all charges, some commentators believe the instruction by the military judge “is of little precedential value... [however] this case continues to be examined by scholars in determining the correct standard for command responsibility in domestic courts-martial settings.”<sup>91</sup>

Presently, under the UCMJ, a commander could not be charged with command responsibility under a “knew or should have known” standard. He could be charged as an actual principal, under Article 77, UCMJ, but this is more restrictive than the international standard of “knew, or should have known.” This latter standard is inconsistent with being charged as a principal under Article 77, which defines a principal as “any person punishable under this chapter who – (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter...”<sup>92</sup> However, under Article 92, UCMJ, a commander could be charged with an orders violation (failure to report), or dereliction of duty for failing to properly train and/or supervise his subordinates.<sup>93</sup>

The second case involved Major General Samuel Koster. General Koster was Captain Medina’s Division Commander and “was the subject of a military investigation for having failed to report known civilian casualties to higher authorities and for failure to insure a thorough investigation into the My Lai events.”<sup>94</sup> Although General Koster was not court-martialed, he received administrative discipline by the Secretary of the Army for failure to thoroughly investigate the incident. “There is no single area of administration of the Army in which strict concepts of command liability need more to be enforced than with respect to vigorous investigations of alleged misconduct...”<sup>95</sup> Although General Koster’s administrative discipline

is not judicial authority, it does offer insight into the thoroughness expected of a military commander in investigating alleged war crimes committed by subordinates.

In 1977, the international community attempted to codify the doctrine of command responsibility for war crimes. Article 86 of the Additional Protocol to the 1949 Geneva Conventions (Protocol I) holds superiors accountable for their subordinates if the superior knew, or had information enabling the superior to conclude, that his subordinates were either committing or were going to commit breaches of the Geneva Conventions (war crimes).<sup>96</sup> Article 87 specifically charges a military commander to prevent, suppress, and report war crimes involving members of their command or other persons under their control, as well as ensuring instruction is provided on the law of war. It also directs military commanders to take such steps as are necessary to prevent war crimes and where appropriate, to initiate disciplinary or penal action against those committing war crimes.<sup>97</sup> Although the United States Senate has not ratified Protocol I, many commentators consider both Article 86 and Article 87 as an expression of customary international law.<sup>98</sup> The language is also reflective in FM 27-10 holding commanders responsible for war crimes about which they had information.

During the 1990s, the international community imputed the doctrine of command responsibility developed by the World War II war crimes trials and codified in Protocol I as the prosecutorial matrix for superior-subordinate responsibility for war crimes and genocide committed in the Former Republic of Yugoslavia and in Rwanda. The framers of the International Criminal Tribunal For the Former Yugoslavia (ICTY) utilized the standard of “knew or had reason to know” in assigning superior-subordinate responsibilities for war crimes. A superior (civilian or military commander) was responsible if he or she “knew or had reason to know that the subordinate was about to commit such acts [war crimes] 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>99</sup> In the Celebici case, the Trial Chamber took issue with defining a superior-subordinate relationship, as some of the defendants were not traditional military commanders.<sup>100</sup>

Of importance to this paper was the discussion on “de jure” (official delegation of command) or “de facto” (right to control) relationship between a superior and a subordinate, and the requirement that there must be some evidence, either direct or circumstantial, to hold the superior accountable. For the principle of superior responsibility to apply, it is necessary that the superior have effective control over the persons committing the underlying war crimes, “in the sense of having material ability to prevent and punish the commission of these offenses.”<sup>101</sup> This superior authority could be either de facto or de jure in nature. Once a superior-subordinate relationship was established, then the superior would only be held accountable “if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.”<sup>102</sup> Upon appellant review, the Appeals Chamber of the ICTY affirmed this ruling on command responsibility holding that a commander is liable only if “information was available to him which would have put him on notice of offences.”<sup>103</sup>

A different legal standard for command responsibility was used at the trial level in the Blaskic case.<sup>104</sup> The Trial Chamber in this case extended the doctrine of command responsibility to an almost strict liability standard. They placed an affirmative duty on commanders to investigate the conduct of their subordinates regardless of whether they received any reports that subordinates were committing war crimes. Therefore, a commander would be held accountable for any war crimes committed by his subordinates based on a theory akin to simple negligence. However, the Appeals Chamber of the ICTY overturned this legal holding. It concluded that the

Trial Chamber's description of the doctrine was incorrect and that the "authoritative interpretation of the standard of 'had reason to know' shall remain the one given in the Celebici Appeal Judgment."<sup>105</sup>

Coinciding with the ICTY was the International Criminal Tribunal for Rwanda (ICTR). Its statute relating to command responsibility followed the ICTY holding that a superior was criminally responsible if, "...he or she knew or had reason to know that the subordinates were about to commit such acts [war crimes] 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>106</sup> One case of importance to the doctrine of command responsibility was *Prosecutor v. Kayishema*.<sup>107</sup> The Trial Chamber relied on the principles set forth in the Celebici case holding that "superior responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates."<sup>108</sup> It held that formal command structures are not necessary for finding superior responsibility as it is predicated on the actual power of the superior, "be it informal or formal, to influence or punish conduct."<sup>109</sup>

Both the ICTY and ICTR, through case law, provide further content on the doctrine of command responsibility. Each stand for the principle that a commander is liable where he knew or had reason to know that the subordinate was about to commit war crimes, or had done so, and the commander failed to take the necessary and reasonable measures to prevent such acts or to punish the subordinates committing the acts. From this development in case law, the international community further codified the doctrine of command responsibility in another international treaty, the Rome Statute of the International Criminal Court. Article 28 of the 1998 treaty applies a "knew or should have known" standard to military commanders.<sup>110</sup> While the United States is not a signatory to the treaty, Article 28 reflects the law derived from the war

crimes cases of World War II, in which the United States played a prominent role, and the international criminal tribunals. United States commanders are arguable subject to the Rome Statute of the International Criminal Court due to its universal jurisdiction.

In concluding this section on the doctrine of command responsibility, it is clear that military commanders can be held responsible for the actions of subordinate military and paramilitary forces. Under the UCMJ, commanders can be held responsible for the war crimes committed by their subordinate military personnel either as a principal, Article 77, UCMJ, or, under Article 92, UCMJ, for dereliction of duty (failure to properly train and/or supervise), and for an order violation (failure to report/investigate). If captured, United States military commanders could face the more liberal standard of “knew, or should have known”, and actually be held responsible for the underlying acts of their subordinates. A case can be made that military commanders can also be held accountable for war crimes committed by contractors under their command and control if a superior-subordinate relationship exists. The next section will analyze this proposition applying the established doctrine of command responsibility for war crimes.

### **Command Responsibility for Contractors**

Operations Enduring Freedom and Iraqi Freedom have resulted in a phenomenal growth in the number of contractors on the battlefield. According to a July 2007 news report, “there are some 182,000 [contractors] employed under the U.S. government contracts. Of these, some 127,000 are under DOD contracts, according to testimony at April 2007 congressional hearings.”<sup>111</sup> Prior to recent legislation placing this vast number of contractors under the UCMJ, the only recourse for military influence was through the contracting office. Usually the contracting officer or his representative would be the military’s point of contact for limited

supervision and addressing issues with the contract and the contractors. However, one interpretation of the recent change placing contractors under the jurisdiction of the UCMJ will result where the “military officer may no longer merely be the customer of contractors; he or she now may be their commander.”<sup>112</sup> Whether this proposition will result in command responsibility for war crimes committed by contractors will be analyzed in the following pages.

As previously noted, the doctrine of command responsibility allows military commanders to be held accountable for the criminal acts of their subordinates. This doctrine encompasses two different types of criminal accountability. The first is “direct or active command responsibility – where the leader takes active steps to bring about the crime, for example, ordering his subordinates to do something unlawful.”<sup>113</sup> This is the theory presently available under Article 77 of the UCMJ. In order for a commander to be held personally liable for the underlying acts of his subordinates, the commander must either have directly participated, aided, abetted, counseled, commanded, or procured the commission of the crime, or caused an act to be done which if directly performed by him would be punishable under the UCMJ. In the Medina case, the trial judge required active steps by the commander as indicated in his jury instruction that “a commander is also responsible if he has actual knowledge that the troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.”<sup>114</sup>

The second type, which can be found in international law, involves “indirect or passive command responsibility - indirect command responsibility arises from the culpable omissions of commanders or superiors...”<sup>115</sup> It is the one most commonly referred to when discussing the doctrine of command responsibility for war crimes, and is analogous to charging a military

commander under the UCMJ for his own actions such as failure to properly train and supervise his subordinates, as well as failing to report and investigate allegations of war crimes, except that unlike a charge under Article 92, the commander will be charged with the underlying war crime because he should have known of this subordinates' behavior and failed to take action to stop or correct it. This second type of command accountability will be the focus of this section as it is a distinct theory of criminal liability most likely to occur in the relationship between the military commander or staff and contractors under their command or control.

The doctrine of command responsibility can be broken down into three elements. In basic terms, the first element requires the existence of a superior-subordinate relationship of effective control; the second element requires the existence of a requisite mental state of the commander (knew or had reason to know of subordinate war crimes); and the third element requires the commander's failure to act (whether to train, prevent, investigate, or punish).<sup>116</sup> To hold a military commander criminally liable for commission of war crimes by a contractor, all three elements must be established. The first element, superior-subordinate relationship, is the most difficult to establish due to the historical affiliation between the military and contractors whereby military commanders have not had effective command and control of contractors working in their battle areas.

### ***Superior – Subordinate Relationship***

One scholar on the topic of command responsibility identifies three different types of command structure that occur during wartime.<sup>117</sup> The first is the operational commander who commands at the tactical or operational level of warfare, and is responsible for those acts committed by troops or other persons under his command and control. The second is the executive commander who is normally associated with being responsible for an occupied area

and is vested with supreme power through actions by his state and international law as an occupying force. The third type of command involves military commanders who are responsible for internment or prisoner of war facilities. An operational and executive commander can be distinguished as the former is responsible for the acts of subordinates under his command or control, the latter is accountable for all activities within the occupied area of responsibility.

Examples include General Yamashita, who was held accountable as an operational commander for the atrocities committed by his troops in the Philippines; General von Kuechler, who was held accountable as an executive commander for failing to ensure the protection of civilians in his occupied area of responsibility in the Soviet Union; and Zdravko Mucic, who was held accountable for atrocities committed at the Celebici internment camp. More recent examples involving internment or prisoner of war camps are the disciplinary actions taken against American military officers for detainee abuses at the Abu Graib detention facility in Iraq. One officer was court-martialed and two other officers received administrative discipline for their acts or omissions relating to detainee abuse committed by subordinate personnel in their chain of command.<sup>118</sup> Since these cases were governed by the UCMJ, the underlying offenses were not imputed to the commanders. Rather, the charges focused on failing to properly supervise their subordinates. Although all three types of command existed during certain phases of Operation Iraqi Freedom, and can be expected to exist in future wars and contingency operations, it is the operational commander in either a de jure or a de facto command relationship over contractors that is relevant to the premise of this research paper.

The establishment of a de jure command relationship is a matter of ascertaining a formal chain of command between the military commander and the contractor. Existing federal statutes and military orders and regulations establish this link between military commanders and military

subordinates, providing commanders the legal authority to command, control, and discipline.<sup>119</sup> Although no corresponding formal chain of command currently exists between military commanders and contractors, subjecting contractors to UCMJ jurisdiction and the promotion of military command and control over contractors is indicative of a de jure command relationship. Providing military commanders the ability to discipline contractors is an influential factor in determining a de jure command relationship as it grants authority to punish or deter someone from acts or omissions. If the United States government, through either legislative action or executive order, formally places contractors under the single command and control of the military, then authority and control, “the essence of command,” would exist.<sup>120</sup>

This would satisfy the first element of the doctrine of command responsibility, superior-subordinate relationship of effective control. However, as the United States government has yet to place contractors under the single command and control of the military in any of the current contingency operations, there is no clear establishment of a de jure command relationship. This is not uncommon as “de jure command is not the best determinant of actual authority, since problems of identification will arise when legislation is absent, obscure, or, even if available, it inadequately describes one's actual functions and the amount of authority actually exercised.”<sup>121</sup>

As a de jure command relationship is often difficult to identify, international law recognizes the existence of a de facto command relationship. “A superior-subordinate relationship may include military and civilian subordinates, and de facto and de jure superiors.”<sup>122</sup> A de facto command relationship does not require a formal military command or rank structure. It requires a superior-subordinate relationship where “superior means superior in capacity and power to force a certain act.”<sup>123</sup> It also does not require that the subordinate be a member of the armed force as Article 87 of Protocol I holds a military commander accountable

for troops under their command and “other persons under their control.”<sup>124</sup> International case law developed during the International Criminal Tribunals of the 1990s is consistent with this principle. Both the ICTY and ICTR discuss de facto command relationships between military commanders and civilians under their control, with both tribunals concluding, “Military commanders certainly have the power to influence or punish the conduct of civilians within their area of control, and therefore, can be held criminally liable for their failure to do so.”<sup>125</sup>

In determining whether there is a superior-subordinate relationship between military commanders and contractors, one must establish the existence of a de facto command relationship. Helpful in this analysis is a methodology utilized by Professor Ilias Bantekas in determining the existence of a de facto command relationship for the law of superior responsibility.<sup>126</sup> Bantekas offers three conditions that should be analyzed in determining the existence of a de facto command relationship.<sup>127</sup> The first factor to consider is the “power of influence.” The rationale in using this factor is that if one can influence the decision-making of another, then the influencer is a source of command authority. The legal basis for the nexus between influence and command authority is based on jurisprudence established during the World War II tribunals.<sup>128</sup> Under the current relationship between military commanders and contractors, military commanders do not necessarily have the power of influence over contractors. Rather than military commanders, contractors are influenced by the four-corners of their contract. It is unlikely that contractors can be influenced to perform activities outside the scope of the contract, particularly war crimes.

The second factor cited by Bantekas is the official ability to “issue orders” to a subordinate. Control over subordinates by signing orders affecting the subordinate is “indicative of some authority.”<sup>129</sup> Although authority to issue orders is a factor to be considered in

establishing a superior-subordinate relationship, it is limited to the type of order. As noted by the ICTY, ministerial orders do not necessarily prove command authority.<sup>130</sup> Additionally, if the order is unlawful, it is evidence of actual involvement by the superior in the commission of a war crime rather than establishing criminal liability under a theory of command responsibility. Traditionally, the military has had very limited authority to issue orders affecting contractors unless it related to the performance of the contract, and this authority was conducted through the contracting officer or the contracting officer representative.

One exception to this general rule involves contractors accompanying the military force. In Department of Defense Instruction 3020.41 (Contractor Personnel Authorized to Accompany the U.S. Armed Forces), military commanders have limited authority to issue orders to contractors. For example.

The ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), direct contingency contractor personnel to take lawful action as long as those actions do not require them to assume inherently governmental responsibilities barred under subparagraph 6.1.5. Contingency contractor personnel shall conform to all general orders applicable to DoD civilian personnel issued by the ranking military commander. Outside the assertion of criminal jurisdiction for misconduct, the contractor is responsible for disciplining contingency contractor personnel. Commanders have limited authority to take disciplinary action against contingency contractor personnel. However, a commander has authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restriction from installations or facilities.<sup>131</sup>

Although this authority is limited to exigent circumstances and certain situations such as enforcing administrative rules like General Order Number One or controlling access to military bases, one could argue that the subjection of the same contractors to the UCMJ will result in the military's ability to order and punish contractors to a similar degree as service members. This ability to issue orders coupled with the authority to punish could

establish a superior-subordinate command relationship under international law and will be discussed in further detail.

A third factor offered by Bantekas is “evidence from the distribution of tasks”. This factor is based on a premise that “It is the cumulative effect of evidence showing both subjugation to orders and respect for the authority of the accused that is necessary to convince a tribunal of the existence of a superior-subordinate relationship.”<sup>132</sup> In other words, one looks at the totality of circumstances surrounding the tasking relationship, or lack thereof, between a military commander and contractors operating within the military commander’s battle space. Consideration is given to the scope of tasks within the contract, and the ability of the military commander (or contracting officer) to control such tasks. In addition to reviewing the contract itself, one might look to regulatory practice of the military towards contractors in overseas operations. For example, the previously mentioned Department of Defense Instruction 3020.41 (Contractor Personnel Authorized to Accompany the U.S. Armed Forces) establishes an implied nexus between the military and contractors whereby the military has regulatory authority for limited management and support to contractors. Although restricted, the managerial duties include authority to decide whether a contractor is allowed in the area of operation in the first place, and whether the contractor can remain. Support services to contractors include arming of contractors and authorizing them to use deadly force, providing military uniforms for contractor use, and providing medical, dental, and legal services support under certain conditions.<sup>133</sup>

A fourth factor recognized under international law and noted by the ICTY in determining a superior-subordinate relationship is the authority of the superior to “punish” the subordinate. “The essential criterion is the ability of superiors to exercise ‘effective control’ over subordinates, meaning the ‘material ability to prevent and punish’ the commission of offences by

the subordinate.”<sup>134</sup> This factor is especially relevant with the recent legislative action submitting contractors to the disciplinary authority of the UCMJ. A military commander therefore has both certain regulatory authorities over a contractor as well as the authority to discipline a contractor for acts or omissions relating to the contractor’s conduct on the battlefield. Therefore, an argument can be made that under international law, a military commander now has a de jure superior-subordinate command relationship over contractors during declared war and contingency operations. Therefore, the first element of the doctrine of command responsibility, a superior-subordinate relationship, is established.

### ***Mental State of the Military Commander***

The second element to consider in establishing the doctrine of command responsibility is the “mens rea,” or mental state of the military commander. This will be fact specific, and hinges on whether the military commander knew, or had reason to know, that contractors under his control committed war crimes. This legal standard is recognized as customary international law, and is codified in Protocol I and the Rome Statute of the International Criminal Court. The United States recognizes the international standard in FM 27-10. “The term ‘knowledge’ denotes awareness as to the existence of a circumstance or awareness of it occurring...and may be established through direct or circumstantial [constructive] evidence.”<sup>135</sup>

Actual knowledge is normally attributed to “knew” through direct evidence that a military commander had in his or her possession information of a possible war crime. Constructive knowledge is normally attributed to “had reason to know” and can be established by circumstantial evidence. In determining whether a military commander knew, or had reason to know, of the commission of war crimes, consideration will be given to reports of war crimes

that are brought to his direct attention, are reported to his command headquarters, or are apparent during his visits to subordinates on the battlefield.<sup>136</sup>

Additionally, consideration will be given to the “number, type and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the modus operandi of similar illegal acts, the offenders and staff involved and the location of the commander at that time.”<sup>137</sup> This requirement is best expressed by the Military Commission’s written opinion in the Yamashita case, which held, “It is absurd...to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal act, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops depending upon their nature and the circumstances surrounding them.”<sup>138</sup>

The ongoing investigation of Blackwater Worldwide provides an example of how the “knew, or should have known”, standard could be applied to a military commander. There is some evidence that there was a systemic issue with Blackwater contractors shooting Iraqi civilians. “The Iraqi government has said that it knows of at least 20 shooting incidents involving security contractors, with more than half a dozen linked to Blackwater.”<sup>139</sup> If Blackwater Worldwide contractors were under the control of a military commander (an established superior-subordinate command relationship) and the commander knew, or should have know, of these numerous shooting incidents, then the commander could be held accountable under international law if the shootings were unlawful. The existence of knowledge (knew or had reason to know) segues into the third element for the doctrine of command responsibility, the failure to act.

### *Failure to Act*

In addition to the requirements of a superior-subordinate command relationship and the presence of knowledge (actual or constructive) of the commission of a war crime, it must be shown that the military commander failed to act upon his or her knowledge that a war crime is about to be committed or was committed by a contractor. This element includes failures to prevent war crimes, investigate war crimes, and discipline subordinates for commission of war crimes. All three are distinct legal obligations found in customary international law, treaties and conventions, and United States military regulations.<sup>140</sup>

The duty to prevent encompasses both a requirement to stop a possible war crime from being committed if on notice, as well as taking all necessary steps to ensure compliance with the law of war.<sup>141</sup> The former “establishes a duty to prevent at the moment subordinates are going (or “are about”) to commit a [war] crime.”<sup>142</sup> The latter can be construed as the duty to train subordinates on the law of war, and to properly supervise those subordinates. This requirement is mandated in the Department of Defense Law of War Program (DoD Law of War Program), and includes the requirement for law of war training to contractors that are accompanying the force.<sup>143</sup>

This program also mandates the requirement to report and investigate war crimes. The DoD Law of War Program imposes a duty to report “a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”<sup>144</sup> It further requires, “All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.”<sup>145</sup> These duties are also incorporated in individual service law of war programs.<sup>146</sup>

The failure to report suspected war crimes was an issue highlighted in the Peers Commission investigating the My Lai massacre. “One of the conclusions Peers drew following his My Lai investigation was that there was widespread failure to report suspected war crimes and civilian casualties, despite numerous directives and standing operating procedures (SOPs) requiring such reports.”<sup>147</sup> More recently, the duty to report war crimes is the basis behind the court-martial of a Marine Corps battalion commander who is accused of not reporting or investigating the allegation that his men unlawfully killed twenty-four Iraqi civilians.<sup>148</sup>

A current example of how a military commander could violate this duty to report and investigate possible, suspected or alleged war crimes committed by contractors is the ongoing Blackwater Worldwide investigation. There is some evidence that United States government officials shrugged off questions raised by the Associated Press regarding Blackwater contractors shooting civilians in 2005, two years prior to the current investigation. “In one instance, internal e-mails show that State Department officials tried to deflect a 2005 Los Angeles Times inquiry into an alleged killing of Iraqi civilians by Blackwater guards.”<sup>149</sup> If a military commander, contracting officer, or contracting officer representative had been in charge of these Blackwater contractors and balked at investigating the killing of civilians, the military officers could possibly be held accountable for failing to report and investigate the killings.

In addition to the duty to prevent and investigate war crimes, there is the additional duty to punish the perpetrators. The United States military recognizes this duty in FM 27-10, and the Department of Defense and service law of war programs direct, where appropriate, the disposition of cases involving alleged violations of the law of war by members of their respective military departments who are subject to court-martial jurisdiction.<sup>150</sup> This duty also is required under international law. Protocol I requires military commanders “where appropriate, to initiate

disciplinary or penal action against violators thereof.”<sup>151</sup> International criminal tribunals have essentially used identical provisions imposing a duty to “punish the perpetrators thereof.”<sup>152</sup> The most recent international codification of the doctrine of command responsibility, the Rome Statute of the International Criminal Court, also includes a provision imposing a duty on military commanders to “submit the matter [commission of war crimes by subordinates] to competent authorities for investigation and prosecution.”<sup>153</sup>

As a final point, this duty to punish violators of the law of war is one of the bases for expanding UCMJ jurisdiction over contractors. The United States Senator responsible for this expansion has said, “it would give military commanders a more fair and efficient means of discipline on the battlefield [by placing] civilian contractors accompanying the armed forces in the field under court-martial jurisdiction during contingency operations as well as in times of declared war.”<sup>154</sup> The first step in implementing UCMJ jurisdiction over contractors is the recently released Deputy Secretary of Defense memorandum authorizing commanders during contingency operations the “authority to disarm, apprehend, and detain Department of Defense contractors suspected of committing a felony offense in violation of the RUF [rules of force], or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures applicable to the courts-martial of military service members.”<sup>155</sup>

Considering these factors, a case can be made that military commanders now have a de jure command relationship over contractors accompanying the armed forces in contingency operations such as Operation Iraqi Freedom and Operation Enduring Freedom due to the presence of certain regulatory controls and the ability to discipline the contractors under the UCMJ. Consequently, military commanders will have a duty to ensure that they are vigilant of contractor activities relating to law of war violations, and take the necessary steps to prevent war

crimes through law of war training to contactors, properly supervising contractors, reporting and investigating possible, suspected or alleged law of war violations, and punishing violators as appropriate.

Military commanders should be mindful of contractor activity, particularly that of contractors providing security duties. As noted by one scholar writing on the growth of private military firms on the battlefield, “One of the fundamental issues from a normative standpoint is that the public good and the private firm’s good are not always identical. The organizing intent of a private company is to generate internal profit, whereas public agencies are more concerned with wider demands. That is, private companies as a rule are more interested in doing well than good.”<sup>156</sup> This possible dichotomy between the military mission and contractor performance is also highlighted by an expert in fourth generation warfare who notes that private security contractors will take steps necessary to fulfill their contract, such as threatening or intimidating civilians, that are detrimental to counterinsurgency efforts.<sup>157</sup> The current federal investigation into Blackwater Worldwide underscores this issue as security contractors allegedly killed 17 Iraqi civilians while responding to a distress call from a convoy under contract with Blackwater Worldwide.<sup>158</sup> A military commander’s possible personal liability for such acts is not limited to just United States civilian contractors accompanying the force, but also foreign contractors working for the Department of Defense in Iraq.<sup>159</sup> As reflected in the Deputy Secretary of Defense Memorandum, “DoD contractor personnel (regardless of nationality) accompanying U.S. armed forces in contingency operations are currently subject to the UCMJ.”<sup>160</sup>

In concluding this section, military commanders now have an additional legal duty of command responsibility for contractors operating under their command and control to abide by the law of war. Failure to do so could result in the military commander being held personally

accountable under the doctrine of command responsibility for war crimes committed by the contractors under international law, and under the UCMJ, could be held responsible for failing to properly train and supervise those contractors, and for failing to report and investigate any alleged violations.

## **Recommendations**

To address the issue of command responsibility for contractors in context to the phenomenal growth of contractors on the battlefield, affirmative steps must be taken to inform both military commanders and contractors of their responsibilities under the law of war. With this growth in mind, the immediate step necessary is to construct a comprehensive training program that advises the military commander of his or her possible accountability under the doctrine of command responsibility for contractor compliance with the law of war, and instructs all Department of Defense contractors, regardless of contract tier, on the law of war. The latter measure must then be documented in a centralized contractor personnel system.

The regulatory requirement is already in place for this type of training. As previously mentioned, the Department of Defense Law of War Program requires that military personnel and civilians accompanying the force receive law of war training. Specifically, it states that, “The law of war obligations of the United States are observed and enforced by the DOD components and DOD contractors assigned to or accompanying deployed Armed Forces.”<sup>161</sup> The requirement to provide law of war training to these contractors is delegated to the services. “An effective program to prevent violations of the law of war is implemented by DOD components.”<sup>162</sup> Finally, this training is required, regardless of the circumstance of contractor deployment with the military forces, as “Members of the DOD components comply with the law

of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>163</sup>

Although the United States Central Command requires all Department of Defense contractors deploying to the Central Command’s area of responsibility to go through a CONUS Replacement Center or utilize another type of forum to receive law of war training, there is no Department of Defense centralized contractor personnel data system documenting individual contractor completion of this training. Rather, current practice requires the contracting company to only verify that their employees (contractors) either have received some type of law of war training in the United States or in theater.<sup>164</sup> This practice differs from the military service requirement that unit or individual law of war training be formally documented in training records. As a matter of thoroughness, a similar documentation requirement should be maintained by the Department of Defense on individual contractors.

In the immediate term, the Department of Defense should institute a specialized law of war training curriculum for military commanders, contracting officers, contracting officer representatives, and Department of Defense contractors assigned to or accompanying the armed forces. Instruction to the military officers should include the roles and functions of contractors, and that the law of war applies to contractors under their control or supervision in the same manner that it applies to military personnel under their command. The military commander must be on notice through training that a de jure command relationship can exist between him and the contractors, and that the military commander must be just as attentive for possible war crimes committed by contractors as he is for war crimes committed by his troops. In a similar manner, the contracting officer, and particularly the contracting officer representative, must be on notice that their direct oversight of contractors puts them in an unique position of being the “eyes and

ears” for the military command.<sup>165</sup> Like a military commander, their failure to report a possible, suspected, or alleged war crime committed by a contractor under their supervision would constitute a violation of Article 92 of the UCMJ, either as an order violation or dereliction of duty.<sup>166</sup> Anecdotally, there are numerous incidents where military commanders did not even know that contractors would be performing crucial services in their battle space, let alone whether the contractors had received law of war training.<sup>167</sup>

In conjunction with training to military officers, all contractors assigned to or accompanying the armed forces must receive law of war training equivalent to the training provided to deploying military forces. Along with a requirement for pre-deployment training on the law of war, contractors should receive periodic reset training while in the theater of operations in a manner similar to military forces. A Department of Defense contractor personnel data system should be developed to document this training, to include the type, date, and location of the training.

To ensure contracting company compliance with these requirements, the Defense Acquisition Regulations System (DFARS) should be amended to include contract provisions requiring law of war training with a requisite reporting requirement to the Department of Defense of who received the training along with the date and location of the training. A similar change to the DFARS is currently under consideration relating to section 252.22-740 (Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States).<sup>168</sup>

## **Conclusion**

The expansion of UCMJ jurisdiction over contractors accompanying or serving with the armed forces during contingency operations is a major revision for military commanders’ responsibilities under the doctrine of command responsibility. It places the military commander

in a position of being held accountable for war crimes not only committed by subordinate troops, but also by civilian contractors under his command and control. As there is no indication that the use of contractors as part of the fourth element of the Total Force will subside, it is imperative that the Department of Defense focus on providing military commanders the necessary training to address the myriad of issues pertaining to contractors on the battlefield, including the commander's responsibilities under the doctrine of command responsibility. Failure to educate military commanders regarding the full breadth of these increased responsibilities would be a disservice to those we hold responsible for ensuring the law of war is applied and adhered to during military operations. In a complementary manner, it is imperative that contractors receive law of war training as dictated by the Department of Defense as it fulfills the governmental (and military commander) responsibility of preventing war crimes through training by all elements of the Total Force.

## Bibliography

1. *Additional Protocol I As Expressions Of Customary International Law*, Law of War Documentary Supplement, International and Operational Law Department, The United States Army Judge Advocate General's Legal Center and School
2. Annex to the Convention, Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907.
3. Apry, Justin, "Responsibility Of Military Commanders To Protect Civilians From Attacks By Other Civilians And The State Within Commander's Area Of Control", *Memorandum For The Office Of The Prosecutor*, Issue 19, Spring 2003.
4. Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, The American Journal of International Law, Vol. 93, No. 3., July 1999.
5. Chairman, Joint Chiefs of Staff, *Focused Logistics Campaign Plan*, 2004 Edition.
6. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Geneva, Article 26, 12 July 1929.
7. Danner, Allison M., and Martinez, Jenny S., "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", *International Law Workshop Paper 3*, University of California, Berkeley, 2004.
8. Davidson, Michael J. *Staff Officer Responsibility for War Crimes*, Military Review, Vol. 81 Issue 2, Mar/Apr 2001.
9. Department of Army Field Manual (FM) 27-10, *The Law of Land Warfare*, Washington, GPO, July, 1956.
10. Department of Army Field Manual 3-300.21, Preface, *Contractors on the Battlefield*, Department of the Army, Washington, GPO, January 2003.
11. Department of Army, *Contractors Accompanying the Force*, Army Regulation 715-9, Washington GPO, November 29, 1999.
12. Department of Army, *Army Training and Leadership Development*, Regulation 350-1, 3 August 2007.
13. Department of the Navy, Naval Warfare Publication 1-14M, *The Commanders Handbook on the Law of Naval Operations, IP 10-2*, July 2007. (Also referenced as MCWP 5-12.1 and USCG COMDTPUB P5800.7A).
14. Department of Defense Directive 5525.1, *Status of Forces Policy and Information*, GPO Washington DC, 7 August 1979.

15. Department of Defense Directive 2311.01E, *DoD Law of War Program*, Washington, GPO, 9 May 2006.
16. Department of Defense Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, Washington GPO, 3 March 2005
17. Department of Defense Instruction 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, Department of Defense Instruction 3020.4, Washington GPO, October 3, 2005.
18. Department of Defense, *Quadrennial Defense Review Report*, February 6, 2006.
19. Department of Defense, The Deputy Secretary of Defense Memorandum, *Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States*, Washington GPO, September 25, 2007.
20. Draft Defense Acquisition Regulations System, Part 252 – Solicitation Provision and Contract Clauses, Section 252.225-740, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, 28 March 2007.
21. Eckhardt, William G., *Command Responsibility: A Plea for A Workable Standard*, 97 *Military Law Review* 1 (1982).
22. Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, “Private Security Contractors in Iraq: Background, Legal Status, and Other Issues”, Congressional Research Service, Order Code RL32419, Updated July 7, 2007.
23. Fainaru, Steve, & Leonnig, Carol D, “Grand Jury To Probe Shooting By Guards”, *Washington Post*, November 20, 2007.
24. General Order No. 100, United States War Department, 24 April 1863.
25. Green, L.C., *Command Responsibility in International Humanitarian Law*, 5 *Transnational Law and Contemporary Problems* (1995).
26. Hanson, Victor Davis, “From Phalanx to Legion 350-250 B.C.”, in Parker, Geoffrey *The Cambridge History of Warfare*, Cambridge University Press, 2005.
27. Human Rights First, *Private Security Contractors At War: Ending the Culture of Impunity*, 2008.
28. Hunt, Steven R, “Envoy Lauds Blackwater Despite ‘Horrific’ Killings”, *Philadelphia Inquirer*, October 26, 2007.

29. *In Re Yamashita*, 327 U.S. 1 (1946)
30. *Kinsella v United States*, 361 US 234 (1960)
31. Landrum, Bruce D., *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 Military Law Review 293 (1995).
32. Lindemann, Marc, "Civilian Contractors under Military Law", Parameters, Autumn 2007.
33. Manual for Courts-Martial (MCM), United States.
34. Matthews, William, "Contractor Crackdown: Civilian Contract Employees Can Now Be Prosecuted Under The UCMJ", Armed Forces Journal, June 6, 2007.
35. Memorandum of Agreement (MOA) Between The Department of Defense And The Department of State On USG Private Security Contractors, dated 5 December 2007.
36. Merla, Renae, "Census Counts 100,000 Contractors in Iraq.", *The Washington Post*, December 5, 2007.
37. Mitchell, Andrew D., *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 Sydney Law Review 381, September 2000.
38. Miller, Christian, T, "Officials Balked On '05 Blackwater Inquiry", *Los Angeles Times*, 26 October 2007.
39. Parks, William H., *Command Responsibility For War Crimes*, 62 Military Law Review 1 (1973).
40. Peters, Wm C., *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, Brigham Young University Law Review 36 (2006).
41. *Prosecutor v. Delalic*, Judgment No. IT-96-21-T, November 16, 1998.
42. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
43. *Reid v. Covert*, 334 U.S. 1 (1957).
44. Rice, David, "Let's Rein In Rogue Contractors," *Miami Herald* (October 26, 2007).
45. Scahill, Jeremy, *Blackwater: The Rise of the World's most powerful Mercenary Army*, (National Books 2006).
46. Schmitt, Eric and Shanker, Thom, "Pentagon Sees One Authority Over Contractors", *The New York Times*, October 17, 2007.

47. Secretary of the Navy Instruction 3300.1B, *Law of Armed Conflict (Law of War) Program to Ensure Compliance by the Naval Establishment*, 27 December 2005.
48. Singer, Peter, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Cornell University 2003).
49. Smidt, Michael L., *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 *Military Law Review* 155 (2000).
50. Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 808 (1993).
51. Statute of the International Criminal Tribunal For Rwanda, adopted by Security Council Resolution 955 (1994).
52. Stockman, Farah, "Contractors in War Zones Lose Immunity", *Boston Globe* (January 7, 2007).
53. Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001.
54. The Rome Statute of the International Criminal Court, July 17, 1998.
55. *The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, Section 1088, Public Law 108 – 375, 28 October 2004.
56. *The John Warner National Defense Authorization Act for Fiscal Year 2007*, Section 552, Public Law 109-364, 17 October 2006.
57. Title 18, United States Code.
58. Title 10, United States Code.
59. Treaty of Versailles, June 28, 1919.
60. Turner, Lisa, "The Articles of War and the UCMJ - widespread court martial cases in World War II led to the enactment of the Uniform Code of Military Justice," *Aerospace Power Journal*, (Fall 2000).
61. United States Air Force Instruction 51-401, Training and Reporting to Ensure Compliance with the Law of Armed Conflict, 19 July 1994.
62. *United States v Averette* 19 USCMA 363
63. *United States v. Burney*, 21 C.M.R. 98 (1956)

64. *United States v. Medina* C.M. 427162 (1971).
65. Uniform Code of Military Justice, 10 USC 801 – 941.
66. United States Marine Corps Order 3300.4, Marine Corps Law of War Program, 20 October 2003.
67. United States Navy OPNAV Instruction 3300.52, Law of Armed Conflict (LOW) Program to ensure compliance by the U.S. Navy and Navy Reserve, 18 March 1983.
68. United States Government Accountability Office, Report to Congressional Committees, *Military Operations: High-Level DOD Action Needed To Address Long-standing Problems With Management And Oversight Of Contractors Supporting Deployed Forces*, GAO 07-145, December 2006.
69. United Nations War Crimes Commission, VIII Law Reports of Trials of War Criminals 34 (1948).
70. War Crimes Act of 1996, 18 USC 2441.
71. White, Josh, “Abu Ghraib Officer Cleared of Detainee Abuse,” Washington Post, August 29, 2007.
72. Winthrop, William, *Military Law and Precedents* 98 (1920).
73. Wu, Timothy & Kang, Young-Sung, *Criminal Liability for the Actions of Subordinates – Doctrine of Command Responsibilities and its Analogues in United States Law*, 38 Harvard International Law Journal 274, 1997.
74. Zielbaur, Paul and Glanz, James, “Under Siege, Blackwater Takes on Air of Bunker”, *The New York Times*, October 25, 2007.

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<sup>1</sup> For purposes of this research paper, the term “civilian contractors” will be used interchangeably to describe all civilian personnel accompanying or serving with the armed forces or employed by the United States Department of Defense in overseas wars and contingency operations.

<sup>2</sup> Zielbaur, Paul and Glanz, James, “Under Siege, Blackwater Takes on Air of Bunker”, *The New York Times*, October 25, 2007, pp. 1.

<sup>3</sup> Field Manual 3-300.21, Preface, *Contractors on the Battlefield*, Department of the Army, Washington, GPO, January 2003.

<sup>4</sup> Schmitt, Eric and Shanker, Thom, “Pentagon Sees One Authority Over Contractors”, *The New York Times*, October 17, 2007, pp. 1.

<sup>5</sup> *Ibid.*, 2007, pp. 1.

<sup>6</sup> See *Memorandum of Agreement (MOA) Between The Department of Defense And The Department of State On USG Private Security Contractors*, dated 5 December 2007. Copy on file with author.

<sup>7</sup> Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, “Private Security Contractors in Iraq: Background, Legal Status, and Other Issues”, Congressional Research Service, Order Code RL32419, Updated July 7, 2007.

<sup>8</sup> Merla, Renae, “Census Counts 100,000 Contractors in Iraq.”, *The Washington Post*, December 5, 2007.

<sup>9</sup> United States Contractors in Iraq Afghanistan News at <http://www.dba.com/news.html>, citing Miller, Christian T, “U.S. Troops Outnumbered in Iraq – By Contractors”, Los Angeles Times, n.d..

<sup>10</sup> Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, “Private Security Contractors in Iraq: Background, Legal Status, and Other Issues”, Congressional Research Service, Order Code RL32419, Updated July 7, 2007, pp. 31.

<sup>11</sup> Hanson, Victor Davis, “From Phalanx to Legion 350-250 B.C.”, in Parker, Geoffrey *The Cambridge History of Warfare*, Cambridge University Press 2005, pp. 30-46.

<sup>12</sup> Winthrop, William, *Military Law and Precedents* 98 (1920).

<sup>13</sup> *Ibid.*

<sup>14</sup> Peters, Wm C., *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, Brigham Young University Law Review 36 (2006).

<sup>15</sup> For example, see *In re Thomas*, (1869, ND Miss), 23 F Cas 931, No 1388, [Civilian clerk of paymaster of army was subject to army court-martial]; 14 Op Atty Gen 22, (1876), [Civilian employees serving with army in Indian country, during offensive or defensive operations, were subject to military jurisdiction under the Articles of War in effect during 1872; *Ex parte Falls* (1918, DC NJ), 251 F 415, [Civilian employed by military authorities in time of war and assigned as cook on vessel used to carry military supplies was subject to military law]; and *McCune v Kilpatric*, 53 F Supp 80 (1943). [Military voyage transporting troops during wartime was expedition in the field upon which persons accompanying the force or serving with forces would become subject to military law.]

<sup>16</sup> Turner, Lisa, “The Articles of War and the UCMJ - Widespread Court Martial cases in World War II led to the Enactment of the Uniform Code of Military Justice,” *Aerospace Power Journal*, (Fall 2000).

<sup>17</sup> Public Law 506, 81<sup>st</sup> Congress, c. 169 [sections] 1, 64 Stat.108; Title 50 USC (chap.22) [sections] 551. Additionally, the Manual for Courts-Martial (MCM), United States, 1951, was prescribed by Executive Order 10214 and became effective on 31 May 1951 giving effect to the UCMJ.

<sup>18</sup> Uniform Code of Military Justice, See Article 2 (a)(10) and United States Code Chapter 10, section 802(a)(10). Article 2 and 10 U.S.C 802 have been amended by § 522 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

<sup>19</sup> See *Reid v Covert*, 354 US 1, (1957).

<sup>20</sup> See *Kinsella v United States*, 361 US 234, 4 L Ed 2d 268, 80 S Ct 297 (1960). [Court held that civilians are protected by Article Three and the Fifth and Sixth Amendment of the United States Constitution].

<sup>21</sup> See *United States v Averette* 19 USCMA 363, 41 CMR 363 (1970), and *Zamora v Woodson* 19 USCMA 403, 42 CMR 5 (1970) [Court held that courts-martial have no jurisdiction over United States civilians serving with or accompanying armed forces, for purposes of 10 USCS § 802(10) [now 10 USCS §802(a) (10)] words "in time of war" mean war formally declared by Congress].

<sup>22</sup> United States Department of Defense Directive 5525.1, *Status of Forces Policy and Information*, GPO Washington DC, 7 August 1979. [Par. 4.6 applies to requests to foreign authorities not to exercise their criminal jurisdiction over civilians and dependents accompanying the force].

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- <sup>23</sup> There was limited federal jurisdiction for criminal acts committed by U.S. civilians outside the U.S., the Commonwealth of Puerto Rico, Guam and the Virgin Islands.
- <sup>24</sup> Singer, Peter, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Cornell University 2003), at pp. 239, citing a quote by U.S. State Department official in an article in the *East Indiamen* (New York: Time-Inc., 1980).
- <sup>25</sup> Scahill, Jeremy, *Blackwater; The Rise of the World's most powerful Mercenary Army*, (National Books 2006), at pp. 359-60, citing Transcript, "Hearing of National Security Emerging Threats and International Relations Subcommittee For The House Government Reform Committee (June 13, 2006).
- <sup>26</sup> Singer, Peter, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Cornell University 2003), at pp. 222.
- <sup>27</sup> *Ibid.*, pp.138.
- <sup>28</sup> War Crimes Act found at 18 United States Code §2441.
- <sup>29</sup> Under the Statute, War Crimes means any conduct: (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non- international armed conflict; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.
- <sup>30</sup> Public Law 106-523, 114 Stat. 2488 (2000), codified at 18 United States Code §3261-67.
- <sup>31</sup> 18 United States Code §3261-67.
- <sup>32</sup> Department of Defense Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, Washington GPO, 3 March 2005.
- <sup>33</sup> Stockman, Farah, "Contractors in War Zones Lose Immunity", Boston Globe (January 7, 2007).
- <sup>34</sup> See Section 1088 of the Ronald W. Reagan National Defense Authorization Act for FY05, Public Law 108 – 375, 28 October 2004.
- <sup>35</sup> Of the date of this article, only one contractor has been prosecuted under MEJA (child pornography) and one contractor formally charged for a violent crime. See Lindemann, Marc, "Civilian Contractors under Military Law", *Parameters*, Autumn 2007, pp. 87, citing "Abu Ghraib Contractor Sentenced for Child Porn," *Associated Press*, 25 May 2007, <http://www.msnbc.msn.com/id/18866442/>; and Human Rights First, *Private Security Contractors At War: Ending the Culture of Impunity*, 2008, available at [www.humanrightsfirst.org](http://www.humanrightsfirst.org).
- <sup>36</sup> 18 United States Code §7(9), as amended by the §804 of the USA PATRIOT Act, P.L. 107-56, title VIII, October 26, 2001, 115 Stat. 377.
- <sup>37</sup> Lindemann, Marc, "Civilian Contractors under Military Law", *Parameters*, Autumn 2007, pp. 88, citing Andrea Weigl, "Passaro Will Serve 8 Years for Beating," *News & Observer*, 14 February 2007, <http://www.newsobserver.com/497/story/543038.html>; see also Scott Horton, "Providing Accountability for Private Military Contractors: Testimony Before the House Judiciary Committee," 19 June 2007, <http://www.harpers.org/archive/2007/06/hbc-90000309>.
- <sup>38</sup> Rice, David, "Let's Rein In Rogue Contractors," *Miami Herald* (October 26, 2007).
- <sup>39</sup> For reports of widespread criminal misconduct, see Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues", Congressional Research Service, Order Code RL32419, Updated July 7, 2007; and Human Rights First, *Private Security Contractors At War: Ending the Culture of Impunity*, 2008, available at [www.humanrightsfirst.org](http://www.humanrightsfirst.org)
- <sup>40</sup> 10 United States Code §802(a) (10).
- <sup>41</sup> *Ibid.*, implemented through Section 552 of the National Defense Authorization Act for Fiscal Year 2007.
- <sup>42</sup> Matthews, William, "Contracting Crackdown," *Armed Forces Journal*, February 2007.
- <sup>43</sup> See 10 United States Code §101 for definition of "contingency operations".
- <sup>44</sup> Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues", Congressional Research Service, Order Code RL32419, Updated July 7, 2007, citing *United States v. Burney*, 21 C.M.R. 98 (1956).
- <sup>45</sup> See 10 United States Code §101(4) for definition of armed force.

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- <sup>46</sup> See *Reid v. Covert*, 354 U.S. 1, 35 (1957).
- <sup>47</sup> See *United States v. Burney*, 21 C.M.R. 98, 109 (1956).
- <sup>48</sup> Schreier, Fred & Caparini, Marina, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies”, *Geneva Centre for the Democratic Control of Armed Forces*, March 2005, pp. 1.
- <sup>49</sup> For an example, see Department of the Army, *Contractors Accompanying the Force*, Army Regulation 715-9, Washington GPO, November 29, 1999.
- <sup>50</sup> Department of Defense Instruction 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, Washington GPO, October 3, 2005.
- <sup>51</sup> Department of Defense, *Quadrennial Defense Review Report*, February 6, 2006.
- <sup>52</sup> Chairman, Joint Chiefs of Staff, *Focused Logistics Campaign Plan*, 2004 Edition, pp. 39.
- <sup>53</sup> Department of Defense, The Deputy Secretary of Defense Memorandum, *Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States*, Washington GPO, September 25, 2007.
- <sup>54</sup> Parks, William H., *Command Responsibility For War Crimes*, 62 *Military Law Review* 1, 1973, pp. 3.
- <sup>55</sup> Green, L. C. *Symposium: International Criminal Law: Command Responsibility in International Humanitarian Law*, *Transnational Law & Contemporary Problems*, Fall 1995, pp. 320
- <sup>56</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 27.
- <sup>57</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 *Military Law Review* 1, 1973, pp. 4.
- <sup>58</sup> *Ibid.*, pp. 4, citing II Grotius, *De Jure Bellia Ac Pacis* 523 (C.E.I.P. ed. Kelsy trans. 1925).
- <sup>59</sup> *Ibid.*, pp. 5 citing *Articles of War*, Provisional Congress of Massachusetts Bay, April 5, 1775.
- <sup>60</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 29.
- <sup>61</sup> General Order No. 100, United States War Department, 24 April 1863, See par. 71.
- <sup>62</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 31
- <sup>63</sup> Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct 18, 1907, see Article 3.
- <sup>64</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 29 - 32.
- <sup>65</sup> *Ibid.*, pp. 29 - 32.
- <sup>66</sup> Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, Geneva, Article 26, 12 July 1929.
- <sup>67</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 *Military Law Review* 155, Volume 164, 2000, pp. 172.
- <sup>68</sup> Wu, Timothy & Kang, Young-Sung, *Criminal Liability for the Actions of Subordinates – Doctrine of Command Responsibilities and its Analogous in United States Law*, 38 *Harvard International Law Journal* 274, 1997.
- <sup>69</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 *Military Law Review* 155, Volume 164, 2000, pp. 177.
- <sup>70</sup> *Ibid.*, see pp. 178, for the crimes committed by troops under Yamashita’s command.
- <sup>71</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 38 – 39, citing Decision of the United States Military Commission at Manila, Dec 7, 1945, reprinted in 2 *the Law of War: A Documentary History*, supra note 1, at 1596.
- <sup>72</sup> Landrum, Bruce D., *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 *Military Law Review* 149, 1995.
- <sup>73</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 *Military Law Review* 1, 1973, pp. 34, citing *In re Yamashita*, 327 U.S. 1, 14-15 (1945).
- <sup>74</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 53 – 54.
- <sup>75</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 *Military Law Review* 1, 1973, pp. 68, citing United Nations War Crimes Commission, IV *Law Reports of Trials of War Criminals* 87 (1948).
- <sup>76</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 *United States Air Force Academy Journal of Legal Studies* 27, 2000 / 2001, pp. 53 – 54.
- <sup>77</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 *Military Law Review* 1, 1973, pp. 68 – 69, citing United Nations War Crimes Commission, IV *Law Reports of Trials of War Criminals* 87 (1948).

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<sup>78</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 United States Air Force Academy Journal of Legal Studies 27, 2000 / 2001, pp. 54.

<sup>79</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 Military Law Review 155, Volume 164, 2000, pp. 181 – 182.

<sup>80</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 Military Law Review 1, 1973, pp. 43, citing Vol. XI Trials of War Criminals, pp. 543-544.

<sup>81</sup> Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 United States Air Force Academy Journal of Legal Studies 27, 2000 / 2001, pp. 44, citing XI Trials of War Criminals, pp. 543. For example, General Georg Karl Friedrich-Wilhelm von Kuechler was found guilty for the deportation and enslavement of the civilian population under his control as the Commanding General of Army Group North during the German army's occupation of Poland and the Soviet Union.

<sup>82</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 Military Law Review 1, 1973, pp. 59, citing XI Trials of War Criminals, pp. 1259-1260.

<sup>83</sup> See Stryszak, Michal, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 United States Air Force Academy Journal of Legal Studies 27, 2000 / 2001, pp. 53.

<sup>84</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, The American Journal of International Law, Vol. 93, No. 3., July 1999, pp. 574.

<sup>85</sup> United States Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, GPO Washington, July 1956, with Change No. 1, 15 July 1976, para. 501. See also United States Department of the Navy, NWIP 10-2, *Law of Naval Warfare*, GPO Washington September 1955.

<sup>86</sup> United States Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, GPO Washington, July 1956, with Change No. 1, 15 July 1976, par. 501.

<sup>87</sup> *United States v. Medina*, C.M. 427162 (1971).

<sup>88</sup> See Manual for Courts-Martial, United States (2005 Edition), GPO Washington, 2005, Rules of Courts-Martial (R.C.M.) 307(c)(2), [Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war]; and United States Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, Washington GPO, 1956, par. 507 [Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code].

<sup>89</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 Military Law Review 155, Volume 164, 2000, pp. 192.

<sup>90</sup> Eckhardt, William, *Command Criminal Responsibility: A Plea For A Workable Standard*, 97 Military Law Review 1, Summer 1982, pp. 14.

<sup>91</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 Military Law Review 155, Volume 164, 2000, pp. 198.

<sup>92</sup> See Manual for Courts-Martial, United States (2005 Edition), GPO Washington, 2005, Article 77.

<sup>93</sup> *Ibid.*, Article 92.

<sup>94</sup> Green, L. C. *Symposium: International Criminal Law: Command Responsibility in International Humanitarian Law*, Transnational Law & Contemporary Problems, Fall 1995, pp. 353-354.

<sup>95</sup> *Ibid.*, pp. 353-354.

<sup>96</sup> Protocol Additional To The Geneva Convention of 12 August 1949, And Relating To The Protection Of Victims of International Conflicts (Protocol I), 8 June 1977, Article 86.

<sup>97</sup> Protocol Additional To The Geneva Convention of 12 August 1949, And Relating To The Protection Of Victims of International Conflicts, 8 June 1977, Article 87.

<sup>98</sup> See *Additional Protocol I As Expressions Of Customary International Law*, Law of War Documentary Supplement, International and Operational Law Department, The United States Army Judge Advocate General's Legal Center and School, pp. 385.

<sup>99</sup> International Criminal Tribunal for the Former Yugoslavia, Article 7(3).

<sup>100</sup> Consistent with the International Criminal Tribunal for the Former Yugoslavia practice, the case is named after the town where the war crimes took place, rather than the defendant. The trial concerned war crimes committed in 1992 at the Celebici prison camp where Bosnian Croat and Muslim forces used the barracks and warehouses at Celebici to house Serbian prisoners. In describing the overall nature of Celebici, the Tribunal stated "that an atmosphere of fear and intimidation prevailed at the prison-camp, inspired by the beatings meted out indiscriminately upon the prisoners' arrest, transfer to the camp and their arrival." The Tribunal tried four defendants, Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, concurrently for atrocities committed at

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Celebici. Of the defendants, only Delic, Mucic, and Delalic were charged under the command responsibility doctrine, and only Mucic was found guilty under the superior – subordinate command responsibility. The Celebici case is best known for being the first international judgment since World War II holding a superior liable for the crimes of his subordinates.

<sup>101</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 *Military Law Review* 155, Vol. 164, 2000, pp. 208, citing *Celebici*, IT-96-21-T, par. 378.

<sup>102</sup> Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004, pp. 44, citing *Prosecutor v. Delalic*, Celebici Trial Chamber Judgment, IT-96-21-T (Nov. 16, 1998).

<sup>103</sup> Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004, pp. 44, citing *Prosecutor v. Delalic*, Appeals Judgment, IT-96-21-A (Feb. 20, 2001) at par. 241.

<sup>104</sup> Member of the armed forces of the Croatian Defense Council, including Tihomir Blaskic, were charged with committing serious violations of international humanitarian law against Bosnian Muslims in Bosnia and Herzegovina.

<sup>105</sup> Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004, pp. 45, citing *Blaskic Appeals Judgment* at par. 62-64.

<sup>106</sup> Statute of the International Criminal Tribunal for Rwanda, Article 6(3).

<sup>107</sup> Apy, Justin, “Responsibility Of Military Commanders To Protect Civilians From Attacks By Other Civilians And The State Within Commander’s Area Of Control”, *Memorandum For The Office Of The Prosecutor*, Issue 19, Spring 2003, pp. 32, citing *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-I-T, 21 May 1999, at par. 217. The defendant Kayishema was the government Prefect for a territory of Rwanda, and was accused of ordering and participating in four massacres against Tutsis civilians.

<sup>108</sup> *Ibid.*, pp. 32, citing *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-I-T, 21 May 1999, at par. 217.

<sup>109</sup> *Ibid.*, pp. 33.

<sup>110</sup> *Rome Statute of the International Criminal Court*. Article 28, Responsibility of commanders and other superiors, holds that (1) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (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.

<sup>111</sup> Elsea, Jennifer K. and Serafino, Nina A., CRS Report to Congress, “Private Security Contractors in Iraq: Background, Legal Status, and Other Issues”, Congressional Research Service, Order Code RL32419, Updated July 7, 2007, pp. 3.

<sup>112</sup> Lindemann, Marc, “Civilian Contractors under Military Law”, *Parameters*, Autumn 2007, pp. 91.

<sup>113</sup> Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004, pp. 38-39.

<sup>114</sup> Smidt, Michael, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 200 *Military Law Review* 155, Volume 164, 2000, pp. 208, citing *United States v. Medina*, C.M. 427162 (1971).

<sup>115</sup> Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004, pp. 38-39.

<sup>116</sup> Concept of the three elements contributed to See Danner, Allison M., and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *International Law Workshop Paper 3*, University of California, Berkeley, 2004.

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<sup>117</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, *The American Journal of International Law*, Vol. 93, No. 3, July 1999, pp. 584 - 587.

<sup>118</sup> White, Josh, "Abu Ghraib Officer Cleared of Detainee Abuse," *Washington Post*, August 29, 2007, pp. A05. [Army officer LTC Steven Jordan was court-martialed for numerous charges relating to Abu Ghraib, including his failure to supervise his subordinates. A military jury acquitted LTC Jordan of all charges relating to abuse of detainees. Army officers BGEN Janis Karpinski and COL Thomas Pappas received administrative discipline for their acts or omissions. BGEN Karpinski was disciplined for leadership failures and COL Pappas was disciplined for unauthorized use of interrogation techniques].

<sup>119</sup> See Title 10, United States Code. A service example is United States Navy Regulations 1990, 16 September 1990, with Revision, ALMAR, 7 November 1992, Chapter 8 (The Commanding Officer) and Chapter 10 (Precedents, Authority and Command).

<sup>120</sup> Mitchell, Andrew D., *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 *Sydney Law Review* 381, September 2000, pp. 383.

<sup>121</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, *The American Journal of International Law*, Vol. 93, No. 3, July 1999, pp. 578.

<sup>122</sup> Mitchell, Andrew D., *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 *Sydney Law Review* 381, September 2000, pp. 400.

<sup>123</sup> Bantekas, Ilias, See Bantekas pg 54-7. *The Contemporary Law of Superior Responsibility*, *The American Journal of International Law*, Vol. 93, No. 3., July 1999, pp. 580.

<sup>124</sup> Protocol Additional To The Geneva Convention of 12 August 1949, And Relating To The Protection Of Victims of International Conflicts, 8 June 1977. Article 87.

<sup>125</sup> Apry, Justin, "Responsibility Of Military Commanders To Protect Civilians From Attacks By Other Civilians And The State Within Commander's Area Of Control", *Memorandum For The Office Of The Prosecutor*, Issue 19, Spring 2003, pp. 29-38.

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<sup>127</sup> *Ibid.*, pp. 581 – 584.

<sup>128</sup> *Ibid.*, pp. 581, citing *United States v. von Weizsaecker*, 11 Trials of War Criminal Before the Nuremburg Military Tribunals Under Control. Law No. 10. (1950) [*Ministries case*].

<sup>129</sup> *Ibid.*, pp. 582.

<sup>130</sup> See *Prosecutor v. Delalic*, Judgment No. IT-96-21-T, November 16, 1998, par. 696.

<sup>131</sup> Department of Defense Instruction 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, GPO Washington, October 3, 2005, par. 6.3.3., pp. 15.

<sup>132</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, *The American Journal of International Law*, Vol. 93, No. 3, July 1999, pp. 583-584.

<sup>133</sup> Department of Defense, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, Department of Defense Instruction 3020.4, GPO Washington, October 3, 2005.

<sup>134</sup> Mitchell, Andrew D., *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 *Sydney Law Review* 381, September 2000, pp. 400, citing *Prosecutor v Delalic*, Judgment No IT-96-21-T, 16 November 1998, par. 378.

<sup>135</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, *The American Journal of International Law*, Vol. 93, No. 3., July 1999, pp. 587 citing *Prosecutor v. Delalic*, Judgment No. IT-96-21-T, November 16, 1998, para. 763.

<sup>136</sup> See United Nations War Crimes Commission, VIII Law Reports of Trials of War Criminals 34 (1948); XI Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council No. 10, 757 (1950). [Hostage Case].

<sup>137</sup> Mitchell, Andrew D., *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 *Sydney Law Review* 381, September 2000, pp. 405, citing Final Report of the Commission of Experts, Established pursuant to Security Council Resolution 780 (1992), UN SCOR, Annex, UN Doc S/1994/674 at par. 58 (27 May 1994).

<sup>138</sup> Parks, William H, *Command Responsibility for War Crimes*, 62 *Military Law Review* 1, 1973, pp. 30, citing *United States of America vs. Tomayuki Yamashita*, Special Orders 110, Headquarters United States Army Forces, Western Pacific, (1 October 1945).

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<sup>139</sup> Fainaru, Steve, & Leonnig, Carol D, “Grand Jury To Probe Shooting By Guards”, *Washington Post*, November 20, 2007, pp. 10.

<sup>140</sup> See Protocol Additional To The Geneva Convention of 12 August 1949, And Relating To The Protection Of Victims of International Conflicts, 8 June 1977 (Article 86(2)), International Criminal Tribunal for the former Yugoslavia (Article 7(3)), International Criminal Tribunal for Rwanda (Article 6(3)), and the Rome Statute of the International Criminal Court, (Article 28(1)(a)). [Under the UCMJ, commanders could be prosecuted for failure to obey an order (failure to report or investigate), and/or dereliction of duty per Article 92. If they actually participated, aided, abetted, counseled, commanded, or otherwise procured the commission of the offense, they could then be held personally accountable under Article 77].

<sup>141</sup> United States Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, GPO Washington, July 1956, with Change No. 1, 15 July 1976, para. 501, and United States Department of the Navy, Naval Warfare Publication 1-14M, *The Commanders Handbook on the Law of Naval Operations, IP 10-2*, GPO Washington October 1995, par. 6.1.3.

<sup>142</sup> Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, The American Journal of International Law, Vol. 93, No. 3., July 1999, pp. 591, citing Article 86(2) of Protocol I and Article 7(3) of the ICTY.

<sup>143</sup> See Department of Defense Directive 2311.01E, *DoD Law of War Program*, GPO Washington, 9 May 2006.

<sup>144</sup> Department of Defense Directive 2311.01E, *DoD Law of War Program*, GPO Washington, 9 May 2006. The requirement to investigate covers all armed conflicts, however such conflicts are characterized, and in all other military operations.

<sup>145</sup> *Ibid.*

<sup>146</sup> Headquarters, Department of the Army Regulation 350-1, *Army Training and Leadership Development*, 3 August 2007; United States Marine Corps Order 330.4, *Marine Corps Law of War Program*, 20 October 2003; Secretary of the Navy Instruction 3300.1B, *Law of Armed Conflict (Law of War) Program to Ensure Compliance by the Naval Establishment*, 27 December 2005; United States Navy OPNAV Instruction 3300.52, *Law of Armed Conflict (LOW) Program to ensure compliance by the U.S. Navy and Navy Reserve*, 18 March 1983; and United States Air Force Instruction 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict*, 19 July 1994.

<sup>147</sup> Davidson, Michael J, *Staff Responsibility For War Crimes*, Military Review Vol. 81, Issue 2, March – April 2001, pp. 5.

<sup>148</sup> LtCol Jeffrey R. Chessani is pending a general court-martial for violating a lawful order and willful dereliction of duty stemming from his alleged failure to accurately report and thoroughly investigate a possible, suspected or alleged violation of the law of war by Marines under his command. The specific charges are located at: <http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm>.

<sup>149</sup> Miller, Christian, T, “Officials Balked On '05 Blackwater Inquiry”, *Los Angeles Times*, 26 October 2007, no pp. attributed.

<sup>150</sup> United States Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, GPO Washington, July 1956, with Change No. 1, 15 July 1976, para. 501, and Department of Defense Directive 2311.01E, *DoD Law of War Program*, GPO Washington, 9 May 2006, par. 5.8.4.

<sup>151</sup> See Protocol Additional To The Geneva Convention of 12 August 1949, And Relating To The Protection Of Victims of International Conflicts, 8 June 1977, Article 87(3).

<sup>152</sup> See International Criminal Tribunal for the Former Yugoslavia, Article 7(3), and the International Criminal Tribunal Rwanda, Article 6(3).

<sup>153</sup> *Rome Statute of the International Criminal Court*, Article 28.

<sup>154</sup> Matthews, William, “Contractor Crackdown: Civilian Contract Employees Can Now Be Prosecuted Under The UCMJ”, *Armed Forces Journal*, June 6, 2007.

<sup>155</sup> Department of Defense, The Deputy Secretary of Defense Memorandum, *Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States*, September 25, 2007.

<sup>156</sup> Singer, Peter, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Cornell University 2003), at pp. 217.

<sup>157</sup> Scahill, Jeremy, *Blackwater: The Rise of the World's most powerful Mercenary Army*, (National Books 2006), at pp. 71- 73.

<sup>158</sup> Hunt, Steven R, “Envoy Lauds Blackwater Despite ‘Horrific’ Killings”, *Philadelphia Inquirer*, October 26, 2007.

<sup>159</sup> Two of the biggest foreign contracting firms working in Iraq under contract with the Department of Defense are the British firms Aegis Defense Services Limited and Armor Group International. See CRS Report to Congress: Private Security Contractors in Iraq: Background, Legal Status, and Other Issues. Updated July 7, 2007, pp. 8-9.

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<sup>160</sup> Department of Defense, The Deputy Secretary of Defense Memorandum, *Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States*, September 25, 2007.

<sup>161</sup> Department of Defense Directive 2311.01E, *DoD Law of War Program*, (9 May 2006), see par. 4.2.

<sup>162</sup> *Ibid.*, see par. 4.3.

<sup>163</sup> *Ibid.*, see par. 4.1.

<sup>164</sup> LTC Kurt Mieth, Office the Staff Judge Advocate, United States Central Command, interview by the author, 19 December 2007.

<sup>165</sup> The proposition of “eyes and ears” is attributed to Lindemann, Marc, “Civilian Contractors under Military Law”, *Parameters*, Autumn 2007, pp. 93.

<sup>166</sup> See Manual for Courts-Martial, United States (2005 Edition), GPO Washington, 2005, Article 92.

<sup>167</sup> U.S. Government Accountability Office, Report to Congressional Committees, *Military Operations: High-Level DOD Action Needed To Address Long-standing Problems With Management And Oversight Of Contractors Supporting Deployed Forces*, GAO 07-145, December 2006.

<sup>168</sup> A draft provision circulating within the Department of Defense would require training from specific sources (military service-run training centers or web-based training), advanced training, and reporting consistent with the DoD Law of War Program. Copy of draft provision on file.