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INDIVIDUAL RESPONSIBILITY IN WAR

EMPOWERING EVERY SOLDIER TO MINIMIZE VIOLENCE

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Abstract

This thesis investigates the development and proliferation of international legal doctrine concerning individual criminal responsibility for war crimes by exploring the viability of superior orders as a defense in international criminal court, as well as the responsibility of superiors for the actions of their subordinates. Disallowing the defense of superior orders and enforcing command responsibility holds individual soldiers responsible not only for their own actions, but also for the actions of all those around them. In this way, the international legal system has developed a reinforced system of accountability. The United States Army strives to create a command environment in which soldiers are aware of this system as well as the moral and ethical implications of their actions. The laws of war work to minimize violence in conflict, and as the nature of conflict evolves, this thesis argues that it is in the interest of justice and peace scholars to ensure the laws of war develop with it.

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Introduction

Conflict, varying in form and magnitude, has been an element in civilizations throughout history.[1] As civilizations evolve and become more complex, conflict among and within them has concurrently developed.[2] Despite efforts for nonviolent conflict resolution, these developments at times lead to brutality and violence, specifically addressed in this thesis with regard to soldiers in professional military organizations such as the United States Army. In response to flagrant acts of violence, international actors codified rules known today as international humanitarian law, the law of armed conflict or the law of war.[3] An old Roman axiom *inter armas silent leges* connotes that in war, laws are silent; however, the laws of armed conflict attempt to negate this claim by enforcing individual criminal responsibility for all soldiers.[4]

The concept of "laws of war" may appear oxymoronic[5], but even during violent conflict, laws can protect soldiers and non-combatants. David Curry, a professor of organized violence at the University of Missouri explains: "Violence[6] and the development and maintenance of law are fundamentally intertwined as social phenomena. A major function of law is the control or elimination of violence."[7] The codification of international laws to control acts of war for mitigating violence when actors have abandoned other means of conflict resolution. Laws of

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[1] Hendin 2
[2] Ibid.
[3] Ibid.
[4] Weiss 326
[5] Law has not been successful in prohibiting war. 63 nations ratified the 1928 General Treaty or the Renunciation of War (also known as the Kellogg-Briand Pact or the Pact of Paris) that "condemned resources to war as an instrument of national policy and expressly renounced it" (Biddle 205). This pact officially made aggressive action between states illegal for all signatories; however the treaty did not cause any of the ratifying states to disband their armed forces (Biddle 205, 206).
[6] Curry defines violence as "the exertion of force by an individual, group or organized aggregate to injure or abuse other individuals" (Curry 313).
[7] Curry 317

armed conflict form "a system of rules for behavior and governance that sustains a particular social order" in an attempt to minimize violence.[8]

United States Supreme Court Justice Robert H. Jackson wrote in 1941, "The fact is that under today's political and economic chaos there is actually functioning a relatively stable body of customary and conventional international law as a foundation on which the future may be built."[9] He asserted that there is a global belief in a system of higher law for armed conflict and offered the improved treatment of prisoners of war following the 1907 Hague Conventions as a testament.[10] International legal scholars hold that this belief in a system of higher law may lead states to abandon the use of force to submit to a system of general security under international law.[11] Hugo Grotius, the father of international law, considered rules "fundamental in establishing and maintaining order among states."[12] Accordingly, Grotius laid the foundations of natural law on which the law of nations, *ius gentium*, and the accompanying laws of war, *ius in bello*, could be built.[13]

Like many aspects of conflict resolution through warfare, the laws of armed conflict have matured over time for pragmatic as well as moral reasons. For example, globalization has forced the rapid growth and development of the law of armed conflict over the past fifty years. The earliest war crimes trials date back to the 1400s,[14] and since then, western civilization has guided

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[8] Curry 313; Curry notes on violence: "The perspective of law as a peacekeeping enterprise is only one step away from the quite antithetical conception of war as a means of establishing or preserving law" (Curry 318).
[9] Jackson 6
[10] Ibid.
[11] Jackson 12
[12] Weiss 324, Young "Grotius, Hugo"
[13] Young "Grotius, Hugo"
[14] Greppi; In 1439, Charles VII of France ordered: "that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and as soon as he receives any complaint complaining any such misdeed or abuse, he bring the offender to

the development and enforcement of this body of international law.[15] The first chapter of this thesis examines some of these developments as they pertain to individual criminal responsibility for soldiers. The functioning structure of the military directly corresponds to individual criminal responsibility for soldiers; thus the following two chapters address the viability of the defense of superior orders and the implications of command responsibility.

All governments based on law[16] sustain some mechanism for social control. Morris Janowitz suggests that self-control may be the best mechanism of social control for law without violence.[17] This idea requires strong communities and "necessitates informed, empowered citizens with a concern for the collective good and opportunities to actualize their own human potential."[18] International humanitarian law has encouraged self-control by increasing the level of individual responsibility for all persons involved in war. The fourth chapter examines the United States Army's approach to prevention and enforcement of war crimes through individual responsibility. Individual accountability is a primary component of minimizing violence in organized[19] armed conflict, and as the international legal system continues to develop, the principles of individual criminal responsibility must develop to encourage all soldiers to minimize violence in war.

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justice so that the said offender be punished in a manner commensurate with his office, according to these Ordinances. If he fails to do so or covers up the misdeed or delays in taking action, or if, because of his negligence or otherwise, the offender escapes investigation or punishment, the captain shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been." (Hendin 6 as cited in Louis Guillaume de Vilevault & Louis de Brequigny (eds.) Ordonances des Rois do France de la Troisieme Race (1782) cited in Leslie Greene, Command Responsibility in International Humanitarian Law (1995) 5 Transnational Law & Contemporary Problems 319 at 321)

[15] Curry 313

[16] Western governments that are participating in the cultivation of international legal development have foundations in law.

[17] Curry 321

[18] Ibid.

[19] This thesis pertains primarily to conflict between armed forces maintained by states.

Chapter 1: Individual Responsibility

> The individual is always at the center of ethical responsibility and ethical action. In this view, judgment and choice are central to ethics, and no soldier can ever abandon his obligation to act ethically to any other man without ceasing to be ethical himself or, indeed without ceasing to be somewhat less human. An individual is never justified in acquiescing to orders he judges to be immoral…As a profession, the military is dedicated to selfless service to society and the Constitution, and the military cannot simply acquiesce without dissent, without protest, and without public outcry in any order that is immoral.[20]

From Lieber's Code[21] to the more recent in the 1998 *Rome Statute* of the International Criminal Court (ICC), the international community has consistently recognized and developed the principle of individual responsibility. This principle plainly provides, "The responsibility of each participant has to be determined individually on the basis of his or her factual contribution to the crime in question."[22] However, the basis for determining responsibility and contribution to crime presents a challenge that can be broken down and analyzed from two perspectives: subordinates and commanders. The first concerns whether receipt of an illegal order can exonerate subordinates from crimes committed while carrying out that order. The second pertains to command responsibility, which can be broadly defined as the "responsibility of military commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control."[23] Both grapple with the balance between holding individuals accountable for their actions and determining whether individuals can be justly tried

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[20] Gabriel 178

[21] During the civil war, President Lincoln witnessed massive bloodshed and recognized the need for rules to protect soldiers in a document that both sides could agree upon (Rockwood 13). He turned to Dr. Francis Lieber in 1863 to draft a document containing rules and regulations to govern warfare on land (Rockwood 13). The Hague Conferences in 1899 and 1907 and a number of individual states later incorporated provisions from the resulting *General Order No. 100*, which became a founding document for international humanitarian law (Rockwood 13). In the United States, Lieber's code became the Army's still-current Field Manual 27-10, *Laws of Armed Conflict* (Rockwood 25).

[22] Ambos 11, 12

[23] Hendin 4 as cited in *X I Trials of war Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1259 (1948)*

given their relative circumstances. Militaries around the world, including that of the United States, struggle to build command structures and environments that minimize potential for war crimes.

A hierarchical, *de jure* model of command like that of the United States, can be further broken down into four stages from the decision-makers at the top to the soldiers at the bottom.[24] The decision-makers begin with a policy command; to make this command, they must have the power both to determine policy objectives and to control the armed forces of the state.[25] In the United States, the President acts as the Commander-in-Chief for the armed forces and governs this stage of decision-making. Next, the military authorities develop a strategic plan for accomplishing the policy objectives, which then must be approved by the policy authority and senior government officials prior to implementation.[26] The approved plan is then operationalized by the chain of command for execution in the field.[27] Finally, the tactical commanders and the soldiers carry out the actions.[28] In this final stage, any soldier can become responsible for command.[29] Individual responsibility in international law attempts to hold all individual soldiers at each of these levels of command responsible for their decisions and actions.

After World War I, Article 228 of the 1919 Treaty of Versailles gave the Allied Powers the right to try "persons accused of having committed acts in violation of the laws and customs of war," but it was not until after World War II that the international community began to more thoroughly develop means of prosecution for violations of the laws of armed conflict by both

[24] Bantekas 578
[25] Ibid. 578, 579
[26] Ibid. 579
[27] Ibid.
[28] Ibid.
[29] Ibid.

states and individuals.[30] The codification of individual criminal responsibility played a key role in the war crimes trials following World War II. In 1942, the Allied powers voted to establish the United Nations War Crimes Commission, which was comprised of representatives from seventeen nations interested in prosecuting Nazi officers for offenses committed during the war.[31] Later, in 1945, the "London Agreement" established the International Military Tribunal at Nuremberg as a functioning court with which to try Nazi offenders.[32]

The text of the Charter for the International Military Tribunal at Nuremberg – drafted by France, the United Kingdom, the USSR and the United States – did not define the general principle of individual responsibility; however, Articles 6, 7, 8 and 10 did clarify the declaration in Article 6 that there "shall be individual responsibility."[33] In fact, Article 6 established crimes for which individuals could be tried and included as potential defendants "leaders,[34] organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit."[35] Principle I of the Nuremberg Charter as adopted by the International

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[30] "The Versailles Treaty June 28, 1919: Part VII"
[31] Hendin 38
[32] Ibid. 41
[33] Wasserstrom 24, 25
[34] The Act of State Doctrine, championed by the United States in 1919, articulated: "This [the Act of State Doctrine] does not mean that the head of the State, whether he is called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name, and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries, a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus deny the very conception of sovereignty." (Wasserstrom 26 as cited in "Report of the Committee on Responsibilities," Carnegie Endowment for International Peace, Pamphlet No. 32 (I919), pp. 65-66.)
[35] "Charter of the International Military Tribunal"

Legal Commission (ILC) further mandated, "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."[36]

On December 11, 1946, the United Nations General Assembly unanimously adopted the Nuremberg Charter in Resolution 95(1) entitled "Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal", and in doing so, legitimized as international law not only the text of the Charter but also the findings of the trials.[37] Although the United Nations' recognition of the text and findings impacts domestic policy choices in member states, there is no international legislature to enact the laws and no court to adopt them.[38] As is the case with many international norms, "the laws of war must be reformed through the experiments of individual nations."[39] In order to try violations of the laws of war in United States courts, Congress must grant jurisdiction to the court and the court must adopt legislation codifying the violations.[40]

The United States' military justice system has three methods of adopting legislation: (a) to wait for accepted norms to develop and adopt them under Article 18 of the Uniform Code of Military Justice (UCMJ) as interpretations of the Law of War, (b) to enact a Presidential decree outlining rules under general regulation that would bind military officers as part of the Manual on Courts-Martial that contains detailed interpretations of UCMJ offenses or (c) to pass new regulations through Congress as an amendment to the UCMJ to resolve discrepancies between Article 18 and specific UCMJ provisions.[41] Method (a) hinges on the language in Article 18 of the Uniform Code of Military Justice that states, "General courts-martial…have jurisdiction to

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[36] "International Humanitarian Law - Principles Nuremberg Tribunal 1950"
[37] Greppi
[38] Command Responsibility for War Crimes 1303
[39] Ibid.
[40] Ibid. 1287
[41] Ibid. 1304

try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[42] With the inclusion of the language "law of war," Congress incorporated the laws of war into the military justice system but further defined neither offenses nor punishments.[43] The Manual on Courts-Martial limits method (b) because it can only interpret existing offenses, thus method (c) is often necessary for officially adopting new legislation into the military justice system. [44]

The *Yale Law Journal* in 1973 published criticism of Congress's "wholesale incorporation" of the laws of war in Article 18 on the grounds that "precision is an especially important virtue where legal duties transcend common notions of moral obligation and conflict with pressures for success in combat."[45] Judge-made common law has little opportunity to develop in military courts; thus, full incorporation of the laws of war allots substantial discretion for defining offenses to the trial forum.[46] As a result, United States war crimes trials routinely cite more specific provisions in the UCMJ in which command responsibility is not explicitly mentioned instead of referring to Article 18.[47]

Until recently, enforcement of individual criminal responsibility for war crimes occurred exclusively through domestic incorporation such as Article 18 of the UCMJ and ad hoc tribunals. In July 1998, the international community responded to the United States' call for a vote by approving the Charter for the International Criminal Court (ICC) known as the *Rome Statute* by a

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[42] Command Responsibility for War Crimes 1288
[43] Ibid.
[44] Ibid.
[45] Ibid.1288, 1289
[46] Ibid.1289
[47] Ibid.

vote of 120 to seven[48] with twenty-one abstentions.[49] The Nuremberg Trials acted as the forerunner for the creation of the ICC as a standing court that eliminates the need for tribunals to be set up on an ad hoc basis[50] for the signatory states.[51] The *Rome Statute* maintains that "domestic judicial systems are still the first choice for prosecution," but the ICC acts as a consistent alternative for crimes committed by nationals of signatory states and crimes committed within the territory of governments that have ratified.[52] Despite the widespread approval for the ICC, international law still lacks mechanisms for enforcement that are comparable to those of domestic law.[53] This leads many to criticize international law for allowing perpetrators to escape punishment more often.[54] Further, the immature mechanisms for enforcement cause some to question whether international law is "real" law, but evidence proves that most states, the principal subjects of international law, abide by rulings of international courts even when the ruling falls against them.[55]

The general principles in the *Rome Statute* address international norms for individual criminal responsibility as well as excludable defenses for refuting culpability.[56] Unlike the Nuremberg Charter, the *Rome Statute* codifies the principle that defendants in the ICC can only be tried for acts considered illegal by the Statute at the time of commission.[57] This principle is

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[48] The United States, China, Libya, Iraq, Israel, Qatar and Yemen all voted against the *Rome Statue* on August 20, 1998 (Scharf 68).
[49] Ambos 1
[50] Prominent examples of ad hoc tribunals include the International Criminal Tribunal for the former Yugoslavia and its sister court, the International Criminal Tribunal for Rwanda (Cotler).
[51] Ehrenfreund 173
[52] Ibid.175
[53] Weiss 323
[54] Ibid.
[55] Young "International Law"
[56] Ambos 2
[57] Ibid. 4

known non-retroactivity and is part of the *nullum crimen*[58] principle.[59] Although it is recognized in international and comparative criminal law, the International Military Tribunal at Nuremberg interpreted the law[60] much more liberally than both preceding treaties and conventions and those drafted after the trials such as the *Rome Statute*.[61]

With regard to individual criminal responsibility, Article 25(3) of the *Rome Statute* states:

> …a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the [International Criminal] Court if that person: (a) Commits a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission…[62]

Subparagraph (a) provides that the person who carries out the criminal action is held responsible without stipulations to expunge culpability on account of superior orders. However, subparagraph (b) ensures responsibility for the superior officer in a situation involving illegal orders, as well as the subordinate. In general, those persons convicted under subparagraph (b) are seen as more responsible than those under subparagraph (c).[63] This implies greater responsibility for those persons ordering the crimes than those who knowingly aid in their execution. The distinction between subparagraph (b) and (c) illustrates the discrepancy in responsibility between the person giving the orders and acting as a perpetrator by means of a

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[58] *Nullum crimen sine lege, nulla poena sine lege* translates as "no crime, no punishment without a previous penal law" and means that the crimes for which prisoners are tried must exist when the acts were committed (Biddle 205). No international legal document encodes this doctrine, but most nations, including the United States, "recognize it in their basic law" (Biddle 205).
[59] Ambos 4
[60] At Nuremberg the International Military Tribunal instead followed a "principle of justice" which holds, "[t]o assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish them, it would be unjust if his wrong were allowed to go unpunished" (Ambos 5 cited in France et al v. Goring et al. (1946) 23 IMT 1, 444).
[61] Ambos 4
[62] Ibid. 8
[63] Ibid. 9

subordinate, and those acting as an accomplices[64].[65] Article 25 not only holds commanders responsible for issuing illegal orders, but also charges subordinates with the responsibility of preventing the crimes from occurring by recognizing and refusing to carry out the illegal order. The accountability for subordinates to carry out this responsibility lies in the exclusion of the plea of superior orders as a criminal defense in international law.

[64] Previous ILC Draft Codes of the *Rome Statute* also included varying degrees of conspiracy as criminally responsible acts, but the 1998 text takes a more restrictive approach (Ambos 4).
[65] Ambos 9

Chapter 2: Defense of Superior Orders

A 1973 study indicated that 70 percent of civilians in the United States believe that "servicemen should obey orders without question," when in reality, this is not the case.[66] In fact, defense of superior orders has been rejected since 1945 by international legal doctrine to prevent soldiers from obeying orders without question. The rationale behind the widespread misconception is addressed in greater detail in the fourth chapter of this thesis. Rejection of the defense of superior orders challenges all military personnel to consider the legal and moral implications of their orders before acting. Allowing a subordinate to evade responsibility for actions due to orders from superiors would "make it practically impossible to enforce proper penalties for violations of the laws of war designed to humanize."[67] Although a few war manuals such as the United States' *Rules of Land Warfare* recognizes superior orders as a potential defense, the defense has been rejected in numerous decisions and does not exonerate the accused in practice.[68]

Prior to Nuremberg, the "ought to know" doctrine largely governed the defense of superior orders.[69] This doctrine held that if a soldier obeyed an order to perform an act later found to be illegal, the soldier could only be held responsible if "the order[70] was one which could credibly have appeared lawful when it was received."[71] The "ought to know" doctrine thus affords the defense of superior orders to soldiers who can prove that the order they received appeared lawful in the circumstances. The *Rome Statute* codifies a strict understanding of the

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[66] Cockerham 1286;
[67] Finch 445
[68] Berger 1203
[69] McCoubrey 186
[70] "If the order was such that the illegality must have appeared *manifest ab initio*, then there would be no defense although there might still be a plea in mitigation founded upon *respondeat superior*" (McCoubrey 386).
[71] McCoubrey 386

"ought to know" doctrine with "a strong presumption *against* the availability of a defense of superior orders," whereas the International Military Tribunal at Nuremberg comprehensively denied the defense.[72]

For the defendants at Nuremberg, the Director of the Centre for International Defense Law Studies at the University of Nottingham, Hilaire McCoubrey, distinguishes between "simple" soldiers and officers for allowing defense of superior orders.[73] Since the majority of defendants at Nuremberg served as political leaders of cabinet rank and senior military officers during World War II, the "ought to know" doctrine had less importance than it would for enlisted SS soldiers who received limited information regarding the purpose behind their tasks.[74] Even so, the International Military Tribunal at Nuremberg anticipated that many of the defendants would plead not guilty on the grounds that they received orders to commit the actions for which they were being tried, and failing to comply would have resulted in dire consequences.[75] Thus, the circumstances in which it was "unequivocally clear that the upper echelons of the Third Reich were all too well aware that many of their decisions and actions were made and undertaken in violation of international law" led the Nuremberg Charter to deny the defense of superior orders to a greater extent than the "ought to know" doctrine.[76] This logic brings to question whether the Nuremberg Charter "established the "ought to know" doctrine in the very particular context of the cases with which they were called upon to deal" or fundamentally altered the international legal status of the defense of superior orders.[77] The inclusion of the "ought to know" doctrine in the 1998 *Rome Statute* suggests that the complete rejection of the

[72] McCoubrey 392
[73] Ibid. 389, 390
[74] Ibid.
[75] Levie 736
[76] McCoubrey 390
[77] Ibid.

defense of superior orders in the Nuremberg Charter resulted more from circumstances of the trials than from a shift in international legal doctrine; however, the Nuremberg Charter is still often referenced as a decisive text on the subject. The complete rejection of the defense in all cases could unjustly incriminate lower level soldiers who would not be guilty under the "ought to know" doctrine, but as a rule it is preferable for holding all individuals accountable for their actions as long as the court properly investigates and considers the circumstances for mitigation of punishment in each case.

The text of the Nuremberg Charter unequivocally denied the defense in post-World War II war crimes trials, and the Statutes of the International Criminal Tribunals for former Yugoslavia and Rwanda similarly rejected the "notion that a subordinate who committed a crime could be relieved of responsibility by demonstrating that he or she acted pursuant to orders of a superior."[78] Representatives at the United Nations War Crimes Commission agreed that "a subordinate would not be able to escape liability for the commission of war crimes simply because it was in pursuance of a superior order."[79] The Tribunal defended this assertion with an interpretation of the *nullum crimen* principle in its findings:

> The rule that superior order is not a defense to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of international law.[80]

Further, the Military Tribunal at Nuremberg declared officers and soldiers liable for criminal acts committed during war "if the acts are prohibited by the conventional or customary rules of

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[78] Cotler
[79] Hendin 39
[80] Ibid. 63 as cited in United Nations War Crimes Commission. Law Reports of Trials Of War Criminals, Volume V11, 1949, case No 47, Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, Part I. P. 45

war."[81]

Article 8 of the 1945 Nuremberg Charter clearly reflects the sentiment of the United Nations War Crimes Commission stating, "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[82] The findings of the Tribunal further explained the aspect of mitigated punishment:

> Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only...It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of the crime exists, and the inferior will be protected. But the general rule is that members of the Armed Forces are bound to obey only the lawful orders of commanding officers and they cannot escape criminal liability by obeying a command, which violates international law… [83]

These findings highlight the duty of all soldiers to interpret orders before acting on them. Empowering soldiers to understand their individual mission and interpret whether their orders are lawful avoids dangers inherent in blind obedience. Enlisted soldiers and commissioned officers agree that rejection of defense of superior orders strengthens the military system.[84] The international community also recognized this when the International Legal Commission adopted the Nuremberg Charter.

In 1950, four years after the United Nations General Assembly adopted the text of Nuremberg Charter, the ILC also recognized a version of the text as "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the

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[81] Hendin 63 as cited in United Nations War Crimes Commission. Law Reports of Trials Of War Criminals, Volume V11, 1949, case No 47, Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, Part I. P. 45
[82] United Nations, Wasserstrom 24
[83] Hendin 63 as cited in United Nations War Crimes Commission. Law Reports of Trials Of War Criminals, Volume V11, 1949, case No 47, Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, Part I. P. 45
[84] Arlelean, Morningstar, Quinn, Schoch, Stanley

Tribunal".[85] The ILC modified the text of Principle IV to relieve a subordinate from guilt for situations in which the defendant did not have a moral choice[86] to refuse an illegal order.[87] Since 1950, the accepted Principle IV of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal has read, "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."[88] This principle of moral choice represents a fundamental problem involved with consideration of the superior orders doctrine and assignment of individual criminal responsibility.[89] Moral judgment requires individuals to classify actions as right or wrong, good or bad.[90] These subjective measures may be adjudged to be "variously understood by different people, different cultures, and at different times."[91]

The standard by which soldiers are expected to be able to detect the illegality of orders presents another fundamental problem. Criminal courts must distinguish between "whether the subordinate actually knew, or had reasonable grounds for knowing" that the order was illegal.[92] The level of knowledge of the defendant and the circumstances under which the order was given both provide factors for mitigation of punishment, even under the stricter doctrine from the Nuremberg Charter.

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[85] Greppi
[86] The ILC does not further define the subjective, "moral choice" for legal interpretation ("International Humanitarian Law - Principles Nuremberg Tribunal 1950").
[87] "International Humanitarian Law - Principles Nuremberg Tribunal 1950"
[88] Ibid.
[89] McCoubrey 394
[90] Axinn 517
[91] Ibid.
[92] Berger 1203, 1204

Howard Levie, a former Judge Advocate General Corps of the U.S. Army, defined the doctrine of defense of superior orders as "the claim that the accused did what he did because he was ordered to do so by a superior officer (or by his Government) and that his refusal to obey the order would have brought dire consequences upon him."[93] Defenses such as compulsion, duress and superior command can at times impel a court to dismiss charges; however, in cases of espionage[94] and war treason, "there has never been any doubt about the inadmissibility of these defenses."[95] Just as every soldier risks his or her life in combat, a spy risks being caught and punished in the line of duty; the fact that a spy acts under orders of his or her superior is assumed and does not provide cause for mitigated consequences.[96] In these cases, the court determines punishment based on the hardship wrought on the offended state.[97] Prior to Nuremberg, some courts ruled to dismiss charges based on defenses of superior command and the "ought to know" doctrine.

In the case of the *Dover Castle*, the judges at the German court convened by the Allies and Germany for implementing Articles 228, 289 and 230 of the Treaty of Versailles ruled to exonerate the accused on the basis of superior orders.[98] In 1921, Lieutenant Karl Neumann, a

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[93] Restivo 1 as cited in Levie on the Law of War, Michael N. Schmitt and Leslie C. Green eds., International Law Studies, vol.70, 1998, p. 269

[94] International norms and principles regarding the release of prisoners held for international war crimes unmistakably deny their amnesty; however, in 1999, Palestinian leaders disputed them on behalf of "political prisoners" (Cotler). They postured that prisoners acting on the orders of their superiors who had negotiated the Oslo Accords should be released (Cotler). Despite the logic of this argument politically, "the moral and legal position is as untenable juristically as it is morally offensive. For this argument in no way relieves the perpetrators who carried out these international crimes of their criminal responsibility – let alone their amnesty – a principle enshrined in international human rights and humanitarian law from Nuremberg to the present day" (Cotler).

[95] Berger 1206

[96] Ibid.1207

[97] Ibid.1206

[98] Finch 440

German submarine commander, was charged for war crimes at Leipzig.[99] Neumann admitted to sinking the *Dover Castle*, a British hospital ship, but pleaded not guilty for the crimes because "he was acting under instructions from the German Government, as the vessel was not in keeping to a special channel designation by Germany."[100] Neumann acted on the information he received that ordered him to attack the ship on the grounds that the British had voided the protective status[101] of their hospital ships by using them for troop transport.[102] The court accepted this defense, and the presiding judge stated that "all civilized nations recognize the principle that a subordinate is covered by the orders of his superiors; that the accused had carried out his orders without in any way exceeding them, and that there was nothing to prove that he had been guilty of particular cruelty as alleged."[103] The judge's decision disappointed those who believed that under Treaty of Versailles, Neumann's actions constituted a breach of international law; yet at the time, both British and United States military manuals[104] supported the Leipzig court's decision.[105]

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[99] Finch 440
100 Ibid.
101 Hospital ships are protected under 1907 Hague Convention X ("Adaptation to Maritime War of the Principles of the Geneva Convention (Hague X); October 18, 1907").
102 Hendin 25, McCoubrey 387
103 Finch 440
104 Article 443 of the 1914 British Manual of Military Law states, "Members of armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such order if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress." Article 336 of the 1914 United States Rules of Land Warfare states, "Individuals of the armed forces will not be punished for these offences in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."
[105] Finch 440, 441

United States' judicial opinion, on the other hand, did not necessarily support this decision. In 1804, in the case involving the capture of the Danish brigantine *Flying Fish*, Chief Justice Marshall issued an opinion that stated, "…the instructions cannot change the nature of the transaction, nor legalize and act which, without those instructions, would have been a plain trespass."[106] Unlike the decision in Neumann's case that accounts for the flawed intelligence Neumann received,[107] the United States Supreme Court's decision written by Justice Marshall did not allow for intelligence errors to eliminate criminal responsibility. Years later in 1827, Justice Story seemingly rejected Marshall's opinion, "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts up on which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished, without the means of resistance."[108] Justice Story's opinion did not become precedent in the United States or in international conventions.

A United States court martial[109] came to the same conclusion after the civil war, when the question of illegal orders arose with regard to the Confederate prison camp in Andersonville, Georgia where Captain Henry Wirz allegedly committed crimes against the prisoners of war from the North.[110] In response to his defense that he "merely acted as a subordinate in carrying out the orders," the Judge Advocate responded: "A superior officer cannot order a subordinate to

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[106] Finch 442, 443

[107] The uniforms of Canadian Military Medical Corp on the British ships resembled the uniforms of the British troops. German Intelligence mistook their arrival on the ships as troop transport. (McCoubrey 387)

[108] Finch 443

[109] Following the rejection of an order in the United States Army, the superior officer may choose to court martial the subordinate.[109] In this case, the subordinate need only prove that the order violated the UCMJ or was contrary to the Army Values in some way. If a subordinate elects to take action against a superior, he or she need only "appeal to the next superior, essentially just jump the chain of command."[109]

[110] Finch 444

do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it."[111] Wirz was convicted and hanged in 1865.[112]

Yoram Dinstein and Ekkehard Muller-Rappard discussed the problem of illegal orders by considering four components: (1) discipline during wartime; (2) varying domestic legal culpability for crimes committed under orders; (3) the principle that individuals are held responsible under international law; and (4) the jurisdiction of governments to try individuals from other states for war crimes.[113] Muller-Rappard highlights the scope of superior orders by explaining that the issue is "factually, legally and morally much wider than the question of punishability or not of recipients of illegal orders."[114] For example, orders that are legal under domestic law but illegal under international law "cannot be legitimized on the grounds that they were permitted or even demanded by national law."[115] The 1996 ILC Draft Code of Offences against the Peace and Security of Mankind codifies this notion in Article 1 that provides, "Offenses against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law."[116] This prevents "military necessity" or "national interest" from entering into courts as viable defenses for war criminals.[117]

The importance of individual responsibility transcends military bureaucracies, but when enlisted soldiers neglect their responsibility to humanity in their obedience to authority, the result

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[111] Finch 444
[112] Ibid. 445
[113] Fried 1089
[114] Ibid. 1089, 1090
[115] Ibid. 1090
[116] Greppi
[117] Fried 1090

can be especially inimical to a civilized, just society. Military bureaucracies must train and socialize actions that are non-normative for civilians, such as killing enemy combatants.[118] Dr. Elizabeth Stanley, an Army veteran and contractor,[119] proffers the following: "Every person in this [military] profession [should] have the utmost of personal integrity…It is different from all other professions, notably because it is legal to kill people."[120] Subordinates in bureaucratic organizations such as domestic militaries who lose some degree of this integrity may begin to replace their feeling of responsibility for their actions with a feeling of responsibility toward their superiors.[121] Milgram's experiment in which subjects were ordered to administer electric shocks and few refused to speak out against authority as voltage increased provides an example of how this desensitization can occur.[122]

Stanley Milgram set up an experiment to determine how far people will carry out instructions before refusing to comply.[123] In the experiment, the test subject is assigned the role of "teacher" in a memory experiment and is told to administer electric shocks to an actor playing the role of "learner" who he or she believes is another test subject.[124] The electric shocks are administered to be at increasing levels each time the "learner" answers a question incorrectly, and the "learner" voices mounting discomfort with each increase in voltage.[125] Not a single test subject refused to administer shocks, and the results illustrated the degree to which people

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[118] Cockerham 1275
[119] Stanley works with soldiers to train "mindfulness based mind-fitness" before deployment (Mind Fitness Training Institute). She is also a professor of government at Georgetown University.
[120] Stanley
[121] Cockerham 1273
[122] Ibid.
[123] Milgram 3
[124] Ibid. 3
[125] Ibid. 4

submit to authority.[126] Milgram noted the "enormous differences between carrying out the orders of a commanding officer during times of war and carrying out the orders of an experimenter," yet the relationship of superior and subordinate exists in both cases. The intrinsic nature of this relationship can be seen as justification for the defense of superior orders; however, the purpose of international law's rejection of the defense is to prevent soldiers from administering shocks like the participants in the experiment.

Dinstein discusses the doctrines of *respondeat superior* and absolute liability as opposing doctrines supporting either side of the above dilemma between supremacy of the superior-subordinate relationship and individual culpability regardless of superior orders.[127] The doctrine of *respondeat superior* or "let the superior answer" unconditionally and automatically exonerates soldiers committing crimes according to superior orders. [128] Dinstein rejects this doctrine for that of absolute liability with which "a soldier must examine and weigh every superior order that is given" and refuse to obey if it is illegal.[129] The doctrine of absolute liability aligns with the international legal norms, but some cite the *respondeat superior* doctrine. For example, when Nazi officer Adolf Eichman claimed, "So far as my participation is concerned, I must point out that I do not consider myself guilty from the legal point of view. I was only receiving and carrying out orders," he raised the doctrine of *respondeat superior*.[130]

In 1971, the attorneys for Lieutenant William L. Calley Jr. also cited the doctrine of *respondeat superior* in his court martial following the 1968 My Lai Massacre in South Vietnam

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[126] Milgram 4; The experiment could also be interpreted as a depiction of the extent to which people are willing to and might even enjoy the sense of power that comes from inflicting pain upon or killing others; the diminished sense of responsibility makes it easier to do without suffering from guilt (Quinn).
[127] Dinstein 8
[128] Ibid., Fried 1090
[129] Fried 1089, Dinstein 8
[130] Cockerham 1273, 1274

where 220 noncombatant Vietnamese civilians were murdered.[131] Lieutenant Calley and his infantry platoon entered My Lai village expecting to be met with armed resistance, but instead encountered only civilians.[132] Lieutenant Calley opened fire on these civilians and ordered his subordinates to do the same.[133] The two subordinates who refused to obey Lieutenant Calley's order to shoot the unarmed civilians demonstrated that subordinates can refuse to commit crimes ordered by superiors during armed conflict.[134]

The controversial trial resulted in a conviction of Lieutenant Calley for premeditated murder even though he claimed he was acting under orders to "kill every living [thing]…and under no circumstances [leave] any Vietnamese behind" from his company commander.[135] His commander, Captain Ernest Medina, denied the allegations that he issued these orders and in 1971 was acquitted[136] of all charges related to the massacre.[137] Medina's acquittal required that he prove he was not responsible under the doctrine of command responsibility addressed in the next chapter.

The principal question in Lieutenant Calley's trial revolved around whether "a reasonable man should have followed such orders had they been issued."[138] The court martial convicted

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[131] Cockerham 1274
[132] Hendin 123
[133] Ibid.
[134] Ibid. 122
[135] Cockerham 1274
[136] Captain Medina's acquittal set the precedent of "actual knowledge" for command responsibility in the United States military (Rockwood 124). The prosecution believed that although Medina did not order the killing of unresisting civilians, he did have some knowledge of what may have been occurring and did not take action to stop it (Rockwood 123, 124). Medina testified that he not only did not give the orders, but he also did not receive them from his superior, Colonel Barker (Rockwood 67). This prevented the court from trying any other superior officers.
[137] Cockerham 1274, Hendin 124 as cited in Melinski v Chief Military Prosecutor, see Kafr Qassem: A Civilian Massacre, Palestine Yearbook of International Law, Vol. 2, 1985 at p. 69
[138] Command Responsibility for War Crimes 1274

him on the grounds that with his age, rank, experience and training, he "should have known" that the order was illegal in congruence with the U.S. Army's Field Manual 27-10 *The Law of Land Warfare,* which affirms that acting under orders can be "considered in mitigation of war crimes," but not as grounds to dismissal for trial as a war crime.[139] The conviction is supported by Field Manual 71-100, which firmly asserts, "The commander is responsible for everything his unit does or fails to do."[140] Field Manual 22-100, supra, paragraph 22 similarly states, "The military commander has complete and overall responsibility for all activities within his unit. He alone is responsible for everything his unit does or does not do," but the Army Field Manual does not extend these responsibilities to individual criminal responsibility.[141] In accordance with the Nuremberg Principles, "a soldier is not an automaton but a reasoning agent who is under a duty to make appropriate moral judgments" and as such must disobey orders to commit war crimes.[142] The court martial's decision by the presiding military Judge in Lieutenant Calley's trial, Colonel Reid Kennedy, reiterates this sentiment:

> Soldiers are trained to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of the soldier is not the obedience of an automaton. A soldier is a reasoning agent, not a machine, but a person. The law takes these factors into account in assessing criminal responsibility for acts only in compliance with illegal orders…Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order to be unlawful...(T)he standard is that of a man of ordinary sense[143] and understanding under the circumstances.[144]

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[139] Cockerham 1274
[140] Rockwood 67
[141] Linder
[142] Cockerham 1274
[143] Another Chief Judge in Lieutenant Calley's case argued for this reason that the 'ought to know' doctrine should be applied not for the "man of ordinary sense," but rather for "the unsophisticated solder and those of somewhat limited intellect who nonetheless are doing the best to perform their duty" (Hendin 129 as cited in U s V Kinder, 14 C.M.R. 742 (1954), USAF Board of Review and U.S. V Schreiber, 16 C.M.R. 639 (1954), USAF Board of Review. 544).
[144] Hendin 125, 127 as cited in Melinski v Chief Military Prosecutor, see Kafr Qassem: A Civilian Massacre, Palestine Yearbook of International Law, Vol. 2, 1985 at p. 542

Colonel Kennedy's decision in Lieutenant Calley's case, Supreme Court rulings, opinions of legal scholars, the Nuremberg Charter and the "ought to know" doctrine all reject superior orders as an exculpating defense against war crimes allegations. Each interprets the degree to which superior orders should mitigate punishment and how to determine the knowledge of the accused differently, but the attitude toward the importance of individual responsibility is pervasive. As the international legal system evolves, the discrepancies between courts, scholar and legal doctrines must align to form a united authority to which every soldier will be held accountable.

Chapter 3: Command Responsibility

Section 501 of the United States Army Field Manual 27-10 states:

> *In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. 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.*

The doctrine of command responsibility can be broadly defined as military and international law's term for individual leadership accountability.[145] The above quotation provides a concise representation of how the United States Army defines and prosecutes this doctrine. Just as subordinates must be held responsible for their actions in situations where they receive orders to commit war crimes, superior officers must be held accountable for both the orders they give and the actions of their subordinates. This accountability minimizes violence by creating a command environment based on foundations in legal norms. For a superior to be held liable for allegations of command responsibility, a superior-subordinate relationship must exist, the superior must have had knowledge or reason to know of the crime before it occurred and the superior must have "failed to take necessary and reasonable measures to prevent the crime or punish the perpetrator."[146] At Nuremberg, for example, the Tribunal began investigating whether the highest-ranking officials in the Nazi regime could be held responsible for "the

[145] Damaska 455
[146] "Getting Away with Torture? | Human Rights Watch."

execution of a program of plunder and spoliation."[147] This investigation hinged on determining whether the officers *could* influence the decisions of those carrying out the unlawful acts.[148]

Neither international nor domestic legal systems customarily hold individuals responsible for the actions of others, but command responsibility is a longstanding exception.[149] Because the doctrine punishes omission instead of action, it is distinct from most criminal legal systems that punish "unlawful positive conduct."[150] This is unique and allows for the prosecution of commanders who may have been uninvolved in the commission of crimes. The doctrine has been codified by international legal documents concerning individual criminal responsibility since the 1907 Hague Conventions, which reinforces accountability for commanders for the actions of their subordinates if the laws of war are violated.[151] These documents include Article 86 of the 1977 Geneva Protocol I, Article 6 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, Article 7(3) of the Statute for the International Criminal Tribunal for Yugoslavia (ICTY), Article 6(3) of the Statute for the International Criminal Tribunal for Rwanda (ICTR) and Article 28(2) of the ICC Statute.[152] Post-World War II, neither the Charter for the International Military Tribunal at Nuremberg nor the International Tribunal for the Far East Charter specifically addressed command responsibility and crimes by omission; however, since then all military tribunals have maintained the doctrine.[153]

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[147] Bantekas 581
[148] Ibid.
[149] Damaska 455
[150] Bantekas 575
[151] Ibid.
[152] *Rome Statute*
[153] Bantekas 576

If individuals accused of war crimes were allowed to avoid recrimination by passing responsibility for their actions up to their superiors, then trials for war criminals who are not heads of state would have little purpose.[154] Rejection of the defense of superior orders in military tribunals broadens the scope of individual responsibility for subordinates while the doctrine of command responsibility provides a tool for international tribunals to convict visible individuals at all levels of the command hierarchy, even those in positions of power. This spreads the message that leadership positions do not provide asylum from individual criminal responsibility.[155] The United States Department of Defense draft instructions that provide guidance for military commissions provides, "A person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility."[156] The draft instructions then continue to detail the definition of command responsibility as provided in the quotation at the beginning of the chapter.[157] Although both international and United States documentation recognize the importance of command responsibility for holding commanders accountable for the actions of their units and clearly outline the doctrine, the documents have varying standards for accountability.

If a superior officer issues an illegal command, "he [or she] would then incur direct and not command responsibility."[158] Illegal orders that travel down the chain of command, however, only incur direct responsibility for the distributer if the person either had knowledge of the

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[154] Berger 1203
[155] Damaska 476; This message is referred to as *urbi et orbi* in international legal rhetoric. (Damaska 476).
[156] "Getting Away with Torture? | Human Rights Watch."
[157] Ibid.
[158] Bantekas 583

illegality or neglected to seek out information about their origin.[159] The level of knowledge or "awareness as to the existence of a circumstance or awareness of it occurring" may be ascertained through either circumstantial or direct evident according to Article 7(3) of the ICTY Statute.[160]

Article 7 of the ICTY Statute outlines a range of circumstances in which superiors are liable under the doctrine of command responsibility.[161] Article 7(1), for example, delineates that to "plan investigate, order, commit, or otherwise aid and abet" international war crimes all constitute offenses,[162] and Article 7(3) extends the obligation of superiors to take "necessary and reasonable" steps to prevent their subordinates from committing international crimes.[163] For Article 7(3) to be enforced, the prosecution has the burden of proving that the commander had knowledge or "reasons to know" of the intentions of his or her subordinates.[164] Article 7 also includes language to ensure that neither Heads of State or Government nor persons acting under orders by the government are excused by virtue of their position.[165]

The gravity of international crimes led statutes like that of the ICTY to hold commanders responsible not only for what they know, but also for "inadvertent negligence."[166] This implies that commander has a responsibility for knowing whether his or her subordinates are committing war crimes as well as a "duty to intervene" in situations where war crimes are committed.

The ICTY Statute, United States Military Tribunal and the Geneva Protocol I (1977) distinguish among "must have known," "should have known" and "had reason to know"

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[159] Bantekas 583
[160] Ibid. 587
[161] Damaska 458
[162] It does not distinguish between the actions in terms of severity (Damaska 458).
[163] Damaska 458, 461
[164] Ibid. 461, 462
[165] Hendin 184
[166] Damaska 463

circumstances for applying varying standards of command responsibility. The final standard, "had reason to know," often begets the most practical significance and controversy in part because it diverges the most from domestic law.[167] This new language expanded the obligation of command responsibility to include superiors at all levels instead of only those in the higher positions of command.[168]

In 1998, the *Rome Statute* maintained the bulk of previously codified command responsibility law and removed liability for negligence, limiting the responsibility of prevention to circumstances in which a superior demonstrates "conscious disregard."[169] This interpretation of command responsibility appears most similar to the "should have known" concept that holds commanders responsible for crimes committed by their subordinates in cases where he or she should have had knowledge about the crimes because of the situation or his or her position.

Article 28 of the *Rome Statute* codifies the principle of command responsibility from the 1907 Hague Conventions with a distinction between civilian and military superiors.[170] The original text generally held superiors who "fail to prevent or punish their subordinates' illegal acts" liable under command responsibility, but this provision directly addresses the proposal of the United States to "introduce distinct, subjective thresholds for military and civilian responsibility."[171] The proposed thresholds distinguished between a superior's knowledge and negligence of a crime and would have held military superiors responsible not only for allowing crimes about which they had prior knowledge, but also those about which they "should have

[167] Damaska 462, 463
[168] Bantekas 580
[169] Damaska 494
[170] Ambos 17
[171] Bantekas 573, 574; Ambos 17

known" – while civilian superiors would only be held liable for prior knowledge of the crime.[172] Ultimately, the *Rome Statute* does hold the civilian leaders responsible for negligence, but limits the definition to situations in which superiors "consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes."[173] This outcome, often referred to as the "willful blindness" standard, represents a significant change in the law of command responsibility for civilian superiors and increases the burden of proof for prosecutors.[174]

The *Yale Law Journal* considers four basic elements in the structure of command responsibility: (1) status; (2) mental standard; (3) mental object; and (4) the duty to intervene.[175] The first, status, refers to the superior-subordinate relationship, which must be proven for the superior to be held liable.[176] A "mere capacity to influence" is not sufficient to establish this relationship; the superior must possess "actual and effective subordination as a result of the exercise of [his or her] influence over persons."[177] The mental standard refers to the commander's obligation to have knowledge of their subordinates' intentions to commit war crimes, and the mental object denotes "the event or prospect against which a commander is obligated to intervene... [by taking] the necessary and reasonable steps to insure compliance with the law of war."[178] The duty to intervene generally takes one of three principal forms. A commander is obligated to take action if he or she: (1) has requisite knowledge of a specific crime planned by subordinates; (2) has requisite knowledge of a criminal policy or routine

[172] Ambos 17
[173] Ibid. 18
[174] Ibid.
[175] Command Responsibility for War Crimes 1276
[176] Ibid.; Bantekas 582
[177] Bantekas 582
[178] Command Responsibility for War Crimes 1276, 1277

enacted by subordinates; or (3) believes that subordinates are likely to commit crimes in the future.[179]

The "duty to intervene" is only one of a number of duties included under command responsibility. Commanders have duties to intervene, prevent, punish and control their subordinates. Superiors can have a "duty to prevent" their subordinates from committing crimes and can be held responsible "if they fail to take into account factors such as the age, training or similar elements that point to obvious conclusions regarding the likelihood that such crimes would be committed" according to Article 86(2) of the Geneva Protocol I and Article 7(3) of the ICTY Statute.[180] Article 86(2) specifies:

> "The fact the breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which would have enabled them to conclude in the circumstances at the time, that he was committing or was about to commit such a breach and if they did not take all feasible measures within their power to prevent or repressed such a breach."[181]

Command responsibility requires that superior officers treat the actions of their subordinates as their own actions with regard to war crimes, which encourages a command climate based on legal and moral criteria. Article 87 of the 1977 Geneva Protocol I redefined the boundaries of command responsibility by broadening the definition of subordinates from "troops under [a commander's] command" to include "other persons under [a superior's] control."[182] This applies command responsibility to all instances where a superior-subordinate relationship can be proven.

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[179] Command Responsibility for War Crimes 1280
[180] Bantekas 591
[181] Hendin 36 as cited in Protocol Additional to the Geneva Convention's That of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, Article 86, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977)
[182] Bantekas 580

If subordinates succeed in committing a crime, the superior has a "duty to punish" after the offense has occurred in theory to prevent future offences.[183] The "duty to punish" attempts to remove the temptation for superiors to ignore the criminal actions of their subordinates in an effort to avoid calling attention to their failure to prevent the crimes from occurring.[184]

Bantekas asserts that international law entrusts superiors with a "duty to control."[185] He concludes that, "The interplay between humanitarian and criminal law at the international level suggests that the best approach to the doctrine of command responsibility should be through the concept of control."[186] Defendants charged with command responsibility have argued that military tasks leave officers with "no time or energy remaining to control [their] subordinates," but this defense has been unsuccessful.[187] In fact, officers "typically have more opportunity for deliberation and reflection than their subordinates" and have the authority to delegate duties when necessary.[188]

Command responsibility encompasses a number of duties for commanders with regard to their personal responsibility for the actions of their subordinates. By charging commanders with responsibility not only for their own actions, but also for the actions of others, the international legal system has made each member of the command structure responsible both as an individual and as a part of a the whole. This reinforced accountability prevents one actor at the policy level from enacting an illegal or immoral policy that all subordinate members of the chain of command must uphold. Each subordinate in the chain of command is empowered to reject the order and use appropriate channels to prosecute the originator of the command. Lieutenant

[183] Bantekas 592
[184] Damaska 474, 475
[185] Bantekas 593
[186] Ibid. 594
[187] Command Responsibility for War Crimes 1287
[188] Damaska 455

Colonel James Kelly Morningstar, a professor of military science and leadership for the Georgetown University Reserve Officers Training Corps (ROTC), clarified the weight of this reinforcing structure with an example. He explained that if soldiers implicitly obeyed orders and commanders were not responsible for their subordinates, top tier commanders could mobilize the United States military to take over the country in a matter of hours; the orders could simply be passed down through the ranks.[189] The performance of armed forces depends largely on intangible elements discussed in the next chapter to limit situations in which individual responsibility breaks down.

[189] Morningstar

Chapter 4: Military Command Culture and Enforcement

In 1976, researchers administered a survey designed to learn about American combat soldiers' attitudes toward "compliance with immoral and illegal orders in battle."[190] They collected data from nearly 800 U.S. Army paratroopers on active duty, with a survey questionnaire comprised of three principal statements ranging from relatively general to fairly specific and varying in terms of illegality and immorality.[191]

1. A soldier should not be required to go into combat if he feels the war is unjust.
2. A soldier should have the right to disobey any order that he feels is immoral, even in a combat situation.
3. Any soldier in a combat zone who intentionally kills innocent civilians should be treated as a criminal.[192]

Paratroopers were chosen as subjects because they were among the first wave of soldiers deployed when combat situations arose.[193] The respondents could answer according to a five-part Likert scale: Strongly Agree, Agree, Undecided, Disagree and Strongly Disagree.[194] The study revealed that as the legal and moral dilemma became less abstract[195], a greater percentage of respondents agreed with the importance of moral conduct in combat.[196] The data also illustrated that the soldiers who are most committed to the military system and environment are most likely to reject illegal orders, but will comply with immoral orders as long as they are legal.[197] Logically, the laws of armed conflict attempt to codify restrictions on immoral action; thus in many cases, immoral orders are also illegal. Unfortunately, this is not always the case.

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[190] Cockerham 1272
[191] Ibid. 1277
[192] Ibid.
[193] Ibid.
[194] Ibid. 1278
[195] The first statement refers to a legal action considered immoral by the soldier, the second statement refers to an action that could be legal or illegal depending on the circumstances, and the third action would be illegal under any circumstances (Cockerham 1277).
[196] Cockerham 1284
[197] Ibid. 1272

For example, many people believe it is immoral to kill, but military officers issue this order when deemed necessary in the field. Military institutions must seek to nurture an environment in which soldiers are challenged to make informed, moral decisions regarding their conduct individually and as a unit.

Intangible elements such as morale contribute to the espirit de corps and cohesion of an army unit. Espirit de corps and cohesion differ in that cohesion refers to the comradeship between individuals in a unit whereas espirit de corps refers to the greater commitment of all soldiers to the military establishment and to principles in the Constitution.[198] Army officers must develop moral competence as well as bureaucratic skill as they foster both cohesion and espirit de corps to "shape a soldier's willingness to fight/perform their mission."[199] The espirit de corps or "commitment and pride soldiers take in their military establishment and its effectiveness" influences the accountability of individuals in armed forces.[200] Many elements can influence the espirit de corps including the recruitment strategy and the connection between the government and the armed forces.

Modern military institutions like that in the United States are organized and funded through the state, ostensibly for the purposes of defense and domestic order.[201] These institutions have evolved into professional organizations in which "the professional ethos rests on beliefs about effective leadership."[202] The word "soldier" implies more than a profession; "it is a complete style of life."[203] Professionals who deal with issues of life and death such as

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[198] Burk 453
[199] Ibid. 451, 453
[200] Ibid. 447
[201] Ibid. 448
[202] Ibid. 451
[203] Janowitz 175

doctors, policemen and priests often make similar claims.[204] McCoubrey explains: "When a soldier obeys a credibly lawful order he or she not only does that which is demanded by elementary training and discipline but also what is professionally essential."[205] Understanding the military as a profession "means that the conduct of warfare is given over to men who have committed themselves to a career of service, men who are recognized for their 'expertise' in the means of warfare."[206]

After the Revolutionary War, many colonists feared professional, standing armies in peacetime because of the abuses they endured from the British army during the colonial period.[207] The 18th century Constitutional framers wrote specific provisions in the Constitution to constrain armed forces.[208] One example of these provisions is the Third Amendment, which provides, "No soldier shall, in time of peace be quartered in any house, without consent of the owner, nor in time or war, but in a manner to be prescribed by law."[209] In this way, the framers ensured military subordination to civil authority.

At the conclusion of the Revolutionary War, General Washington affirmed this subordination, proving he was not like his British counterpart.[210] Lieutenant Colonel Morningstar opined, "It surprised everyone in Europe when Washington told his army to go home."[211] Upon defeating the opposing forces, Washington's army wanted to secure compensation for their endeavors by seizing public lands in the west.[212] Washington rejected the

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[204] Janowitz 175
[205] McCoubrey 391
[206] Janowitz 6
[207] Viotti 124
[208] Ibid. 125
[209] Ibid. 124
[210] Ibid. 125
[211] Morningstar
[212] Viotti 125

idea and told the soldiers, "If you have any regard for yourself or posterity, or respect for me, to banish these thoughts from your mind, and never communicate, as from yourself or anyone else, a sentiment of the like nature."[213] In this action, Washington reaffirmed the subordination of the troops to the government.

The current manual for the Basic Officer Leader Course required for ROTC cadets defines leadership as "the process of influencing people by providing them with purpose, direction and motivation while you are operating to accomplish a mission and improve the organization."[214] Leaders enable their subordinates to understand the rationale behind a mission when they provide the purpose.[215] If the military required unquestioning obedience from subordinate soldiers, this type of motivation would be unnecessary. Instead, officers must motivate their subordinates by providing a "reason to act in order to achieve a desired outcome."[216] Lieutenant Colonel Morningstar explained that there are only three forms of motivation available to officers: rewards, punishments and inspiration.[217] The purpose behind the mission can act as any of the three depending on the circumstances.

As noted at in chapter three, Lieutenant Colonel Morningstar observed that the United States military has the capacity to overthrow the government at any time, but all members of the armed forces are empowered to prevent such hostile action.[218] When soldiers accept a commission in the United States Army, they all must recite the Soldier's Creed:

> I am an American Soldier. I am a warrior and a member of a team. I serve the people of the United States and live the Army Values. I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade. I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills. I always maintain my arms,

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[213] Viotti 125
[214] *Introduction to Leadership: MSL* 4
[215] Ibid.
[216] Ibid.
[217] Morningstar
[218] Ibid.

> my equipment, and myself. I am an expert and I am a professional. I stand ready to deploy, engage, and destroy enemies of the United States of America in close combat. I am a guardian of freedom and the American way of life. I am an American Soldier.[219]

The military science and leadership text explains that the intent of the creed is to connect "commitment to selfless service to the goal of every other American Soldier—*victory with honor.*"[220] The creed ties soldiers to a common foundation from which they are compelled to live by the seven Army Values.

Over the last fifty years, the United States Army has refined its values down to seven core traits represented by the acronym LDRSHIP: Loyalty, Duty, Respect, Selfless Service, Honor, Integrity and Personal Courage.[221] Lieutenant Colonel Morningstar explained that these values form the "bedrock" upon which the institution rests, and each soldier has a "duty to continually grow and develop these values."[222] Alan Ardelean, a veteran who founded the Georgetown University Military Association, reiterated this idea saying, "They are really cheesy, but I guess if you really come down to it; they are important, huge."[223] The Army Values bind together soldiers under common ideals irrespective of background, race and gender. The resulting group cohesion or "emotional bond of shared identity and camaraderie" creates an environment in which individual discipline is supported by group discipline.[224] Although military culture is "no more homogeneous than war itself," the culture can be examined through four distinct elements: discipline, professional ethos, ceremonies and etiquette.[225] Each of these elements attempts to dispel some of the uncertainty inherent in war and of them, military

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[219] *Introduction to Leadership: MSL* 4
[220] Ibid. 113
[221] Morningstar, *Introduction to Leadership: MSL* 5
[222] Morningstar
[223] Ardelean
[224] Burk 447, 449
[225] Ibid. 448

discipline has the greatest impact on how the institution addresses individual responsibility for war crimes.

Military discipline involves repetitive drilling to perfect desired tasks as habitual behavior to minimize errors and confusion on the battlefield.[226] The strict discipline of the military often leads people to believe that "the military is an institution that requires uncritical and instant obedience to orders."[227] Dispelling this belief in soldiers is of the utmost importance for preserving an atmosphere of individual responsibility and accountability for actions in war. Military discipline also "ritualizes the violence of war…[by] defining when and how they (and not others) are 'authorized' to violate the usual taboos against killing."[228] These taboos are often overcome by drilling the idea of fighting for "some higher good...waging war not for its own sake but for the sake of their country."[229] Nationalism has proven to be one of the most powerful ideational forces behind political movements.[230] Even though nationalism can include "seeds of intolerance that encourage aggression, as in the case of Nazi Germany," Van Evera argues that it causes conflict and war "only under conditions that are no longer present in most developed democracies."[231] Ardelean agreed, "We know we can't [commit war crimes] because we want to be treated to a certain level…that stuff is a thing of the past."[232]

Ardelean's comment, while highlighting the importance of reciprocity as a mechanism for control, represents an excessively[233] optimistic view of war crimes. As long as human

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[226] Burk 448
[227] Ibid.
[228] Ibid. 449
[229] Ibid. 451
[230] Young "Aggression, Conflict and War"
[231] Ibid.
[232] Ardelean
[233] Ardelean's optimistic viewpoint is unfortunately disproved by recent events including a court martial for five soldiers in Afghanistan on charges for killing "Afghan civilians for sport,

interaction involves violent conflict, the laws of armed conflict will be integral for both prevention and prosecution of war crimes. Karl Kiley Schoch, a fourth year Cadet at West Point said that from his military experience, he believes that "most of the time [soldiers] won't receive orders that violate the laws of war."[234] Officers are taught that they "can't expect blind obedience." Schoch said, "We are encouraged to be creative thinkers, and part of that means to analyze what you are doing and not just follow if you are given an order."[235] When asked about whether this training is practical in the field, Schoch responded, "From what I've seen, [soldiers] would be very much encouraged to disobey" if they did receive such an order.[236] William Quinn and Lester Plotner both echoed this sentiment.

William Quinn enlisted in the United States Army in 2001 and has since served in Korea and Iraq as an interrogator. During his time in Iraq, Quinn applied and was accepted to Georgetown where he decided to join the ROTC unit on campus. Quinn is now stationed in Arizona where he reflected on his experiences as pertain to individual responsibility in international law. Quinn knew the defense of superior orders as the "Eichman Defense" and said that it is often discussed in the army, especially by enlisted men.[237] He differentiated between how enlisted men and officers experience different structural pressures on a day-to-day basis. Quinn explained:

> "If a Second Lieutenant[238] is in a position where he's been given what he believes may be an illegal order, he's under a great deal more pressure to ignore it's illegality and carry it out because his career may be adversely affected if he fails to do what his superior officer wants. An NCO doesn't usually have to worry as much about his career being adversely affected as long as he

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planting weapons near them to fake combat situations, collecting their body parts and taking photographs posing with their corpses (Calvin Gibbs).

[234] Schoch

[235] Ibid.

[236] Ibid.

[237] Quinn

[238] A Second Lieutenant is the lowest rank for an officer.

retains the respect of other NCOs."[239]

Officers experience greater pressure to obey their superiors because of their opportunity for advancement within the command structure. Enlisted soldiers have similar potential for upward mobility, but it takes place within a separate structure. Quinn said that the training "focus as an officer is not what to do if I'm given an illegal order, it is what do I do[240] if my subordinates do something illegal."[241] The concept of individual responsibility for war crimes logically divides between commanders and subordinates, and Quinn's explanation clarifies how this division exists in United States Army. The different focuses for commanders and subordinates pertaining to individual responsibility present a hazard in that the underlying concept for minimizing violence is accountability for *all* individuals. The importance of each soldier interpreting the authority for and legality of orders took center stage for Quinn during his time at Abu Ghraib.

Quinn's unit arrived at Abu Ghraib in 2005, over a year after the prisoner abuse scandal broke in 2004. He said the pre-deployment training focused on the initiative of every soldier to refuse and report any orders "to conduct an interrogation with any illegal techniques."[242] Quinn explained that it is an officer's duty to create an environment that does not reach a point as which war crimes are considered, and the crimes at Abu Ghraib did not occur because of one or two officers issuing illegal orders; the environment at the prison broke down and affected everyone.[243] He admitted, "If I had not been held accountable, I think there could have been

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[239] Quinn; NCO stands for non-commissioned officer. Non-commissioned officers are enlisted soldiers in leadership positions of Corporal and higher.
[240] It is usually the commanding officer who decides to convene a court martial, but a commanding officer is sometimes deterred from convening a courts-martial on the grounds of command responsibility for fear that his or her own actions may be called into question.[240]
[241] Quinn
[242] Ibid.
[243] Ibid.

cases that I would have behaved in a brutal manner."[244] For example, when sitting in an interrogation room with a man who became well known for dragging a woman into a public square to rape and behead her, a professional, rule-oriented environment helps an interrogator remain rational. Quinn explained, "It's not just about the rules or the way that accountability is taught, the military actually fosters an environment in which your worth, your value as a soldier, as a person, as an American is attached to how you perform in war."[245] By connecting personal worth to actions as a soldier, the United States military cultivates another form of pressure to act morally.

Lester Plotner enlisted in 2008 and is now a Specialist (E-4) in his the Army Reserves in Billings, Montana. He was taught in his military training:[246] "If someone commands you to do something and you think it is unjust or inhumane or whatever, then you are legally obligated not to go for it because not only are you liable, but the officer is liable as well…refuse an order if it is against rules or regulations."[247] Plotner did not remember his training differentiating between immorality and illegality, but he understood that the Army Values are meant to be applied to decision-making at all times, even if it means deciding to disobey a direct order.[248] He concluded, "If something is against standard operating procedures, [enlisted soldiers] don't do it…As enlisted soldiers, we entrust our lives to our officers…[but] everyone should be held liable for what they do."[249] Plotner knew of Nuremberg only as "a word from history class" in high school, but his training as an enlisted soldier taught him the foundational importance of

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[244] Quinn
[245] Ibid.
[246] Plotner trained as Infantry in Fort Benning, Georgia and completed Supply School in Fort Lee, Virginia (Plotner).
[247] Plotner
[248] Ibid.
[249] Ibid.

individual responsibility in armed conflict.

One fundamental difference between the soldiers of United States Army and Hitler's officers tried at Nuremberg lies in the allegiance of the soldiers. Hitler instated the Fuehrerzip or Fuehrer Principle that instilled complete authority in the Fuehrer and required all soldiers to take an oath to him.[250] The principle intended for "his personality [to embody] the idea which sustains all and whose spirit and will therefore animate the entire community."[251] In this type of system, officers and enlisted soldiers are not meant to evaluate orders on a standard of values, but rather against the goals of the Fuehrer, whatever they may be. Conversely, soldiers in the United States Army swear to uphold the Constitution of the United States.[252] Although allegiance to an agreed upon document carries much less inherent risk than allegiance to a person, Elizabeth Stanley pointed out, "If the ultimate goal is peace across the world than swearing allegiance to a Constitution instead of humanity is a step short."[253] She explained that in general, the more totalitarian a state's government, the more likely the armed forces have to swear allegiance to a leader,[254] and the more advanced the state, the more likely the armed forces have to swear to an enshrined legal document.[255] However, no states have yet met the "ultimate goal where [armed forces] swear not to particular nations, but to the world as a whole."[256] If armed forces of all nations swore to the global community instead of their local or regional powers, they would be swearing to humanity.

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[250] "Means Used by the Nazi Conspirators in Gaining Control of the German State (Part 4 of 55)"
[251] Ibid.
[252] Morningstar
[253] Stanley
[254] The British Armies allegiance to the Queen is an evident exception.
[255] Stanley
[256] Ibid.

Conclusion

The international community and the United States military have codified rules and regulations to limit violence through treaties, conventions and ad hoc enforcement mechanisms that promote individual responsibility for conduct during war. While these efforts are unable to eliminate violence from conflict, they do constrain its extent. By enforcing individual accountability, the denial of superior orders as a defense and the doctrine of command responsibility empower all soldiers to serve in a manner that respects the enemy as fellow humanity.

Western powers have been developing individual responsibility as an element of the laws of armed conflict since Grotius wrote the foundation for the laws of war. This naturally has resulted in an *international* legal system primarily based on the government, culture, values and legal system of developed, western nations. Milgram's experiment proved that the superior-subordinate relationship presents a perilous obstacle for western cultures, but this may not necessarily hold true for all global cultures. As technology continues to unify the globe, international doctrine concerning individual responsibility will require input from developing states around the world to ensure just representation of disparate cultures, systems of government and judiciaries. Variances in military command structures also must be accounted for by international legal doctrine.

As long as subordinates understand the common goal and the purpose of the short-term mission, they will have tools to evaluate the lawfulness and authority of the superior for particular orders. Ensuring that all soldiers have access to this information is integral to rejecting the defense of superior orders in war crimes trials. All the defendants at Nuremberg had the tools necessary for evaluating the commands they received as immoral and illegal, thus the

Nuremberg Charter rejected the defense of superior orders entirely. Although the "ought to know" doctrine has been reinstated as the international norm, if all soldiers have adequate knowledge, they will also have the capacity to recognize the legitimacy of orders and be held responsible for committing war crimes under the current norms.

Command responsibility applies not only to military officers, but also to all members of the military bureaucracy and in some cases to civilians.[257] Authoritative relationships of superiority and subordination exist in all human societies and are structured on the premise that efficiency requires "willing obedience".[258] These relationships require the subordinate to comply with commands of his or her superior, using "the formal criterion of the receipt of a command or signal as his basis of choice."[259] This system relies on the assumption that the authority of the superior is legitimate and "whose practices further the collective interests," and in theory improves the coordination of individual efforts toward a common goal.[260]

The United States military strives to create a professional environment entrenched in core values and a common creed for all soldiers to coordinate individual efforts of its armed forces. The philosophical underpinnings of the United States Army uphold international legal doctrine by creating an environment in which "military honor is both a means and an end."[261] By emphasizing moral and legal training for conduct during warfare, the Army strives to prevent incidents in the future similar to My Lai and Abu Ghraib.[262]

The prominence of individual responsibility already has a limiting effect on the use of violence by soldiers in armed conflict. By supporting environments that foster accountability,

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[257] Command Responsibility for War Crimes 1277
[258] Cockerham 1272, 1275
[259] Ibid. 1273
[260] Ibid.
[261] Janowitz 215
[262] Cockerham 1286

professional armies can continue to limit the pervasive use of violence in conflict situations, thereby diminishing violence in military confrontations. Although the importance of non-violent conflict resolution cannot be overstated, those working to minimize violence also must consider the laws of armed conflict, international enforcement mechanisms and the operational environments within armed forces. To do otherwise is to invite greater international suffering and to lessen the possibility of bringing about a more peaceful, productive international community.

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