

WAR CRIMES AND COMMAND RESPONSIBILITY

I. OBJECTIVES

- A. Understand the history of the law of war as it pertains to war crimes and war crimes prosecutions, focusing on enforcement mechanisms.
- B. Understand the definition of “war crimes.”
- C. Understand the doctrine of command responsibility.
- D. Understand the jurisdictions and forums in which war crimes may be prosecuted.

II. HISTORY AND DEVELOPMENT OF WAR CRIMES AND WAR CRIMES PROSECUTIONS

- A. General. Although war is not a compassionate trade, rules regarding its conduct and trials of individuals for specific violations of the laws or customs of war have a long history.
- B. American War of Independence. The most frequently punished violations were those committed by forces of the two armies against the persons and property of civilian inhabitants. Trials consisted of courts-martial convened by commanders of the offenders.¹
- C. American Civil War. In 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia, prisoner of war camp, was convicted and sentenced to death by a federal military tribunal for “having ordered, and permitted the torture, maltreatment, and death of Union Prisoners of War in his custody.”²
- D. Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usages of war.³

¹ See George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 173-81 (1978).

² W. Hays Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, at 7 (1973), citing *The Trial of Captain Henry Wirz*, 8 American State Trials 666, as cited in *THE LAW OF WAR: A DOCUMENTARY HISTORY* 783 (L. Friedman ed. 1972). See J. MCELROY, *ANDERSONVILLE* (1879); W.B. HESSELTINE, *CIVIL WAR PRISONS* (1930); *1 LAW OF WAR: A DOCUMENTARY HISTORY* 783–98 (Leon Friedman, ed. 1972).

³ See *THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905* (1933).

- E. Counter-insurgency operations in the Philippines. Brigadier General Jacob H. Smith, U.S. Army, was tried and convicted by court-martial for inciting, ordering, and permitting subordinates to commit war crimes.⁴
- F. World War I. Because of German resistance to extradition—under the 1919 Versailles peace treaty—of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the Supreme Court of Leipzig, Germany. The accused were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt. The perceived failures of the Leipzig trials galvanized the international community to find a way to prosecute war criminals outside of national courts.
- G. World War II. Victorious allied nations undertook an aggressive program for the punishment of war criminals. The post war effort included the joint trial of 24 senior German leaders (in Nuremberg) and the joint trial of 28 senior Japanese leaders (in Tokyo) before specially created International Military Tribunals; twelve subsequent trials of other German leaders and organizations in Nuremberg under international authority and before panels of civilian judges; and thousands of trials conducted in various national courts, many of these by British military courts and U.S. military commissions.⁵
- H. 1949 Geneva Conventions. Codified specific international rules pertaining to the trial and punishment of those committing “grave breaches” of the Conventions.⁶
- I. Vietnam: U.S. Soldiers committing war crimes in Vietnam were tried by U.S. courts-martial under analogous provisions of the UCMJ.⁷
- J. Panama. In a much-publicized case arising in the 82d Airborne Division, a First Sergeant charged, under UCMJ, art. 118, with murdering a Panamanian prisoner, was acquitted by a general court-martial.⁸
- K. Persian Gulf War. Although the United Nations Security Council (UNSC) invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the post-conflict resolutions were silent on criminal responsibility.⁹

⁴ See L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 326 (1995); S. Doc. 213, 57th Cong. 2nd Session, p. 5.

⁵ NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 4-8 (1986).

⁶ See GC I Commentary 357-60.

⁷ See MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 76-77 (1975); W. Hays Parks, *Crimes in Hostilities*, MARINE CORPS GAZETTE, Aug. 1976, at 16-22.

⁸ See U.S. v. Bryan, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990) [on file with the Office of the SJA, 82d Airborne Div.].

- L. Former Yugoslavia. On Feb. 22, 1993, the UNSC established the first international war crimes tribunal since the Nuremberg and Far East trials after World War II.¹⁰ On May 25, 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings, and other matters.¹¹
- M. Rwanda. On Nov. 8, 1994, the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda.¹² Art. 14 of the Statute for Rwanda provides that the rules of procedure and evidence adopted for the Former Yugoslavia shall apply to the Rwanda Tribunal, with changes as deemed necessary.
- N. Sierra Leone. On Aug. 14, 2000, the UNSC adopted Resolution 1315, which authorized the Secretary General to enter into an agreement with Sierra Leone and thereby establish the Special Court for Sierra Leone (agreement signed Jan. 16, 2002). The court is a hybrid international-domestic Court to prosecute those allegedly responsible for atrocities in Sierra Leone.
- O. International Criminal Court. The treaty entered into force on July 1, 2002. At the time of this writing, 123 States have ratified the Rome Statute of the International Criminal Court.¹³ Although the U.S. is in favor of international support for the prosecution of war crimes, the U.S. is not a party to the Statute of the ICC. The United States signed the Rome Treaty on Dec. 31, 2000. However, based on numerous concerns, President George W. Bush directed, on May 6, 2002, that notification be sent to the Secretary General of the United Nations, as the depositary of the Rome Statute, that the United States does not intend to become a party to the treaty and has no legal obligations arising from its previous signature. Although the United States is still not a party, the United States has been participating in ICC proceedings in an Observer status since 2009.¹⁴ In recent years, the United States Armed Forces have assisted the ICC in the arrest of ICC fugitives.
- P. Military Commissions. In October 2006, President Bush signed the Military Commissions Act (MCA) of 2006, significantly amending the original military commissions order issued in 2001. In November 2009, Congress amended the Military Commissions Act, and in 2010, the Secretary of Defense approved the 2010

⁹ See S.C. Res. 692, U.N. SCOR, 2987th mtg., U.N. Doc. S/RES/692 (1991), reprinted in 30 I.L.M. 864 (1991); see also Theodore Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS, Summer 1993, at 125.

¹⁰ S.C. Res. 808, U.N. SCOR, U.N. Doc. S/RES/808 (1993).

¹¹ S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (1993).

¹² S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

¹³ Reprinted in the Documentary Supplement, as amended following the 2010 Kampala amendments. As of this writing, only four States have ratified the Kampala amendments to the Rome Statute for the crime of aggression.

¹⁴ See, Stephen J. Rapp, Ambassador-at-Large For War Crimes Issues, United States Department of States, Address to the Assembly of States Parties (Nov. 19, 2009), available at <http://www.state.gov/j/gcj/icc/index.htm>

Manual for Military Commissions, implementing the 2009 Military Commissions Act. In July 2010, prosecutions under the 2009 Military Commissions Act began.

III. WAR CRIMES

- A. Definition of “War Crime.” The lack of a clear definition for this term stems from the fact that both “war” and “crime” themselves have multiple definitions. Some scholars assert that “war crime” means any violation of international law that is subject to punishment. It appears, however, that there must be a nexus between the act and some type of armed conflict.
1. “In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.”¹⁵
 2. “Crimes committed by countries in violation of the international laws governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried.”¹⁶
 3. “The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. **Every violation of the law of war is a war crime.**”¹⁷
 4. As with other crimes, there are *Actus Reus* and *Mens Rea* elements.
 5. Recurring problems with prosecution of war crimes:
 - a. Partiality.
 - i. War crimes prosecutions are subject to criticism as “victor’s justice” vice truly principled prosecution. A primary focus must be on a fundamentally fair system of justice with consistent application of the laws applied to all parties.

¹⁵ L. OPPENHEIM, 2 INTERNATIONAL LAW 251 (7th ed., H. Lauterpacht, 1955); accord TELFORD TAYLOR, NUREMBERG AND VIETNAM 19-20 (1970).

¹⁶ Black’s Law Dictionary 1583 (6th ed. 1990); cf. FM 27-10, para. 498 (defining a broader category of “crimes under international law” of which “war crimes” form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).

¹⁷ FM 27-10, para. 499 (emphasis added).

- ii. In the trial of Admiral Dönitz, in part for the crime of not coming to the aid of enemy survivors of submarine attacks, he argued the point that this was the same policy used by U.S. forces in the Pacific under Admiral Nimitz.¹⁸
 - iii. Influence of *Realpolitik* impacts prosecutions.
 - A. In Re Yamashita. Appearance of expedited trial, using novel theories of superior liability, with sentence (death) announced on Dec. 7, 1945. Justice Rutledge stated in his dissent that the trial embodied “the uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander.”¹⁹
 - B. War crimes prosecutions not pursued post-conflict. In the Korean Conflict, 23 cases were ready for trial against POWs in U.S. custody, yet they were released under terms of the armistice. Prosecution was not mentioned in the First Gulf War Ceasefire agreement.
- b. Legality.
- i. Ongoing issues with respect to *nullum crimen sine lege* and *ex post facto* laws, and balancing gravity of offenses with no statute of limitations against reliability of evidence/witness testimony.
 - ii. Lack of a coherent system to define and enforce this criminal system presupposes a moral order superior to the States involved. This legally positivistic system requires a shared ethic that may or may not exist and is certainly disputed.
 - iii. Status of individuals under international law is relatively new, although arguably has now crystallized into a customary international law principle. Historically, States were held responsible as such; however, beginning with the Treaty of Versailles, and certainly after World War II, individuals were held responsible as actors for the State.

B. Customary International Law War Crimes.

¹⁸ 22 I.M.T. 559 (1949).

¹⁹ 327 U.S. 1, 41 (1946).

1. General. There are many rules, both conventional and customary, imposing requirements and prohibitions on combatants in war. For example, HR, art. 23(d) prohibits declarations that no quarter shall be given. However, art. 23(d) provides no consequences for a violation of the provision. As a matter of custom, the violation has been termed a “war crime.” (compare this with the Geneva Convention scheme, discussed below).

2. Definitions.
 - a. FM 27-10, para. 504, includes the following categories of customary war crimes: Making use of poisoned or otherwise forbidden arms or ammunition; Treacherous request for quarter; Maltreatment of dead bodies; Firing on localities which are undefended and without military significance; Abuse of or firing on the flag of truce; Misuse of the Red Cross emblem; Use of civilian clothing by troops to conceal their military character during battle; Improper use of privileged buildings for military purposes; Poisoning of wells or streams; Pillage or purposeless destruction; Compelling prisoners of war or civilians to perform prohibited labor; Killing without trial spies or other persons who have committed hostile acts; Violation of surrender terms.

 - b. The Rome Statute of the International Criminal Court, contains a similar, though more expansive list, under the heading of “other serious violations of laws and customs applicable in international armed conflict.”²⁰

3. It is not clear the extent to which universal jurisdiction applies to customary war crimes. Those prosecutions which have occurred based solely on the customary right to try war criminals have involved States which were the victims of the crimes; there have been few, if any, cases where an unconnected third State attempts a prosecution. The effect of the lack of clarity has diminished, however, with the advent of special tribunals and the International Criminal Court, both discussed below, which specifically grant jurisdiction to themselves for these types of crimes.

- C. The Geneva Categories. The 1949 Geneva Conventions were written to protect the various non-combatant victims of international armed conflict, namely the wounded and sick, shipwrecked, prisoners of war, and civilians, with a Convention devoted to each. Each Convention set forth various positive and negative duties toward those persons protected by its provisions; for example, GC I, art. 12, states that the wounded and sick shall be treated humanely, and that they shall be respected (i.e., not targeted). Failure of either of these types of duties is a breach of the Convention, and potentially a war crime, though there is a significant qualitative difference between, for example, murdering a POW (GC III, art. 13) and failing to post a copy of the

²⁰ Rome Statute, art. 8.2.(b)

Convention in the POW's language (GC III, art. 41). To provide greater guidance, the Conventions characterize certain breaches as "grave," and mandate particular State action.

1. Grave Breaches.

a. Each Convention has an article enumerating the applicable grave breaches. The articles are similar, though not exactly the same, and appear at different places in each Convention, so they cannot be considered "common" in the same sense as Common Article 2 or 3.

i. GC I: Article 50.

ii. GC II: Article 51.

iii. GC III: Article 130.

iv. GC IV: Article 147.

Common among these is the inclusion of murder, torture, causing great suffering or injury, and medical experiments. Compelling a protected person to serve in his enemy's armed forces, excessive destruction of property, and deprivation of a fair trial are also included as they are applicable to a particular type of victim.

b. With regard to grave breaches, each State has a duty to prosecute or extradite.²¹ Specifically, each State must:

i. Enact penal laws criminalizing grave breaches.

ii. Bring persons alleged to have committed grave breaches before its courts, regardless of the person's nationality. This is the basis for "universal jurisdiction" over grave breaches.

iii. Alternatively, hand the person over to another Party willing to prosecute.

c. Additional Protocol I contains additional acts that constitute grave breaches, (AP I, arts. 11(4) and 85). Some of these relate to targeting

²¹ GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

decisions, while others are restatements, or extensions, of the Geneva Convention grave breaches.

- d. Grave breaches are only possible in an international armed conflict as defined by Common Article 2. In the *Tadic* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the trial court found the defendant Not Guilty of charged grave breaches of the Geneva Conventions solely because, in its view, the conflict was not international (i.e., not a Common Article 2 conflict). The Appellate Chamber reversed, ruling that the conflict was international.

2. Other, or Simple Breaches.

- a. The Conventions do not provide a term for breaches “other” than grave breaches; “simple” breaches is the term often used. In short, anything that is not a grave breach is a simple breach.
- b. With regard to simple breaches, the State’s duty is to “take measures necessary for the suppression of such acts.”²² These measures may include prosecution, but might also be nothing more severe than additional training, depending on the breach. By the terms of the Conventions, there is no universal jurisdiction over simple breaches.

3. Non-International Armed Conflict. Common Article 3 provides minimum standards that Parties to a conflict are bound to apply, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties. Nothing in Common Article 3, however, discusses individual criminal liability for violation of those standards. Nevertheless, other instruments may make explicit reference to the standards of Common Article 3 in defining war crimes under that instrument:

1. The Rome Statute for the International Criminal Court, discussed below, specifically provides for prosecution of violations of Common Article 3. (Rome Statute, article 8(c))
2. The War Crimes Act of 1996 permits prosecutions for violations of Common Article 3 in the U.S. Federal Court System.²³

D. Genocide. The Genocide Convention²⁴ defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic,

²² GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

²³ 18 U.S.C. § 2441

racial, or religious group, “whether committed in time of peace or in time of war.” (Genocide Convention, art. 1). Although the Genocide Convention defines the crime, it contemplates trial before “a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.” (Genocide Convention, art. 6).

E. International Criminal Court. The ICC has jurisdiction over the following crimes:

1. Genocide. The definition (Rome Statute, art. 6) is consistent with that of the Genocide Convention.
2. Crimes against Humanity. “For the purpose of this Statute, “crimes against humanity” means ... acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...” (Rome Statute, art. 7). This includes acts such as murder, extermination, enslavement, deportation or forcible transfer, imprisonment or severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group based on political, racial, national ethnic, cultural, religious, gender, enforced disappearance, apartheid, and other inhumane acts.
 - a. Although arguably customary international law no longer requires it, traditionally, there had to be a link between crimes against humanity and an armed conflict; the ICC Statute does not specifically require such a nexus.
 - b. However, jurisdiction exists only where the “attacks” are “widespread or systematic.” This language suggests that there must be something akin to an armed conflict or at least large-scale governmental abuse.
3. War Crimes. For the purposes of the ICC (Rome Statute, art. 8), war crimes means:
 - a. In the case of an International Armed Conflict:
 - i. Grave Breaches of the Geneva Conventions.
 - ii. Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute lists what are considered to be serious violations.

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The U.S. ratified the Genocide Convention in 1988, and provided for domestic implementation by 18 U.S.C. § 1091.

- b. In the case of an Non-International Armed Conflict:
 - i. Violations of Common Article 3.
 - ii. Other violations of the laws and customs of war “applicable ... within the established framework of international law.”
 - A. The Statute provides a list of these crimes, drawn from various treaties.
 - B. It also criminalizes the attack of personnel, equipment, installations, or vehicles involved with a UN peacekeeping or humanitarian mission.
 - C. The Statute recognizes that it does not apply to situations of mere internal disturbances and tensions that do not rise to the level of a Common Article 3 armed conflict.
 - c. Rome Statute, art. 9, contemplated the publication of elements to each of the crimes discussed above, in a manner similar to the way UCMJ offenses are broken down into constituent elements in the Manual for Courts-Martial. The elements were adopted for use in 2002.²⁵
4. Crime of Aggression. The Rome Statute of 1998 contained the crime of aggression, but the definition of aggression and the conditions for exercising jurisdiction were left for future negotiations. In 2010, in Kampala, Uganda, the Assembly of States Parties negotiated the final terms for prosecution of the crime of aggression in the ICC. The court may exercise jurisdiction over the crime of aggression once thirty states have ratified the amendment and after a majority decision by the states party to the statute to takes place after 1 January 2017.²⁶

F. Specialized Tribunals.

²⁵ See The International Criminal Court, *Elements of Crimes*, at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>. See also KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (2003), for an analysis of each of the crimes and their respective elements.

²⁶ The Rome Statute, including the Kampala amendments, is reproduced in the documentary supplement. Twenty three states have ratified the Kampala amendments as of May 2015.

1. Nuremberg Tribunals. The Charter of the International Military Tribunal defined the following crimes²⁷ as falling within the Tribunal's jurisdiction:
 - a. Crimes Against Peace. Planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or war otherwise in violation of international treaties, agreements, or assurances. This was a charge intended to be leveled against high-level policy planners, not generally at ground commanders.
 - b. Crimes Against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war.
 - c. Violation of the Laws and Customs of War. The traditional violations of the laws or customs of war; for example, targeting non-combatants.

2. International Criminal Tribunal for the Former Yugoslavia.
 - a. Crimes against Peace or Crime of Aggression are not among listed offenses to be tried.
 - b. Violations of the Laws or Customs of War (War Crimes).
 - i. Traditional offenses such as murder, wanton destruction of cities, towns or villages or devastation not justified by military necessity, firing on civilians, plunder of public or private property and taking of hostages.
 - ii. The Opinion & Judgment in the *Tadic* case set forth elements of proof required for finding that the Law of War had been violated:
 - A. An infringement of a rule of international humanitarian law (Hague, Geneva, other);
 - B. Rule must be customary law or treaty law;
 - C. Violation is serious; grave consequences to victim or breach of law that protects important values;

²⁷ See Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, reprinted in 1 *Trials of War Criminals* 9-16. See generally Oppenheim, *supra* note 15, at 257 (noting that only one accused was found guilty solely of crimes against peace and two guilty solely of crimes against humanity).

- D. Must entail individual criminal responsibility; and
 - E. May occur in international or internal armed conflict.
- c. Crimes Against Humanity. Those inhumane acts that affront the entire international community and humanity at large. Crimes when committed as part of a widespread or systematic attack on civilian population.
- i. Charged in the indictments as murder, rape, torture, and persecution on political, racial, and religious grounds, extermination, and deportation.
 - ii. In the *Tadic* Judgment, the Court cited elements as:
 - A. A serious inhumane act as listed in the Statute;
 - B. Act committed in international or internal armed conflict;
 - C. At the time accused acted there were ongoing widespread or systematic attacks directed against civilian population;
 - D. Accused knew or had reason to know he/she was participating in widespread or systematic attack on a population (actual knowledge);
 - E. Act was discriminatory in nature; and
 - F. Act had nexus to the conflict.
 - iii. Crimes against humanity also act as a gap filler to the crime of Genocide, because a crime against humanity may exist where a political group becomes the target. (as opposed to a religious, racial, or ethnic group).
- d. Grave Breaches. As defined by the Geneva Conventions, may occur only in the context of an international armed conflict.
- e. Genocide. Any of the listed acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.
3. International Criminal Tribunal for Rwanda.

- a. Genocide. Same definition as above. Charged in all indictments for acts such as torturing or killing of Tutsis.
 - b. Crimes against Humanity. Crimes when committed as part of widespread or systematic attack against any civil population on national, political, ethnic, racial or religious grounds. Charged in all indictments for acts such as extermination of all Tutsis in a village, murder, torture or rape of ethnic group (Tutsi) or liberal political supporters.
 - c. Violations of Common Article 3 and AP II. These are war crimes committed in the context of an internal armed conflict and traditionally left to domestic prosecution, but made subject to international prosecution pursuant to the Rwanda Statute.
4. Special Court for Sierra Leone. Categories of crimes include:
- a. Crimes Against Humanity.
 - b. Violations of Common Article 3 and Additional Protocol II.
 - c. Other Serious Violations of International Humanitarian Law.
 - d. Certain Crimes under Sierra Leonean Law, to include offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act (1926) and offenses relating to the wanton destruction of property under the Malicious Damage Act (1861).
- G. Defenses in a War Crimes Prosecution. Defenses are not well-settled based upon the competing interests of criminal law principles and the seriousness of protecting victims from war crimes, crimes against humanity, etc. Defenses available will be specifically established in the court's constituting documents (although an argument from customary international law is always open as a possibility for a zealous defense counsel). The following defenses are often discussed:
1. Official Capacity or Head of State Immunity. Historically, this was thought a complete defense rooted in sovereign immunity. The Charter for the International Military Tribunal explicitly rejected the defense, stating, "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."²⁸ The Rome Statute for the International Criminal Court contains a similar provision.²⁹ However, in the

²⁸ Charter of the I.M.T., art. 7.

²⁹ Rome Statute, art. 27.

absence of a specific treaty or like provision which disposes of the defense, it appears that the defense of official capacity exists in customary international law. The International Court of Justice so held when it directed Belgium to quash an indictment of a sitting foreign minister of the Congo alleged to have committed war crimes, including grave breaches of the Geneva Conventions, even though the conduct was committed prior to the charged person's tenure as foreign minister.³⁰ Insofar as the Court opined that Belgium could reinstate their warrant after the person had ceased to be foreign minister, the case could be limited to the proposition that, absent a conventional source which provides otherwise, the immunity of officials is absolute, but temporary.

2. Superior Orders. Generally, it is only a possible defense if the defendant was required to obey the order, the defendant did not know it was unlawful, and the order was not manifestly unlawful.
3. Duress. May be available as a defense; however, it may also only be taken into account as a mitigating factor depending on the specific law governing the court. For example, the ICTY and ICTR only allow duress to be considered as a mitigating factor and not as a full defense. In general, duress requires that the act charged was done under an immediate threat of severe and irreparable harm to life or limb, there was no adequate means to avert the act, the act/crime committed was not disproportionate to the evil threatened (crime committed is the lesser of two evils), and the situation must not have been brought on voluntarily by the defendant (i.e., did not join a unit known to commit such crimes routinely).
4. Lack of Mental Responsibility. Not clearly defined in customary international law. Possibly available if the defendant, due to mental disease or defect, did not know the nature and quality of the criminal act or was unable to control his/her conduct.

IV. COMMAND RESPONSIBILITY FOR THE CRIMINAL ACTS OF SUBORDINATES

- A. Commanders may be held liable for the criminal acts of their subordinates, even if the commander did not personally participate in the underlying offenses, if certain criteria are met. Where the doctrine is applicable, the commander is accountable as if he or she was a principal.
- B. Customary International Law Treatment of Command Responsibility.

³⁰ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3 (Feb. 14).

1. As with other customary international law theories of criminal liability, the doctrine dates back almost to the beginning of organized professional armies. In his classical military treatise, Sun Tzu explained that the failure of troops in the field cannot be linked to “natural causes,” but rather to poor leadership. International recognition of the concept of holding commanders liable for the criminal acts of their subordinates occurred as early as 1474 with the trial of Peter of Hagenbach.³¹
2. A commander is not strictly liable for all offenses committed by subordinates. The commander’s personal dereliction must have contributed to or failed to prevent the offense. Japanese Army General Tomoyuki Yamashita was convicted and sentenced to hang for war crimes committed by his soldiers in the Philippines. Although there was no evidence of his direct participation in the crimes, the Military Tribunal determined that the violations were so widespread in terms of time and area, that the General either must have secretly ordered their commission or failed in his duty to discover and control them. Most commentators have concluded that *Yamashita* stands for the proposition that where a commander *knew or should have known* that his subordinates were involved in war crimes, the commander may be liable if he or she did not take reasonable and necessary action to prevent the crimes.³²
3. Two cases prosecuted in Germany after WWII further helped to define the doctrine of command responsibility.
 - a. In the *High Command* case, the prosecution tried to argue a strict liability standard. The court rejected this standard stating: “Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.”

³¹ See W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1 (1973).

³² U.S. v. Tomoyuki Yamashita, Military Commission Appointed by Paragraph 24 , Special Orders 110, Headquarters United States Army Forces Western Pacific, Oct. 1, 1945, *available at*, http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf.

- b. The court in the *Hostage Case* found that knowledge might be presumed where reports of criminal activity are generated for the relevant commander and received by that commander's headquarters.
- C. AP I, art. 86. Represents the first attempt to codify the customary doctrine of command responsibility. The *mens rea* requirement for command responsibility is "knew, or had information which should have enabled them to conclude" that war crimes were being committed and "did not take all feasible measures within their power to prevent or repress the breach."
- D. The International Criminal Tribunals for the Former Yugoslavia and Rwanda.
 - 1. "Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof."³³
 - 2. In the ICTR, the doctrine of superior responsibility was used in numerous indictments; for example, those against Theoneste Bagosora (assumed official and *de facto* control of military and political affairs in Rwanda during the 1994 genocide) and Jean Paul Akayesu (bourgmestre (mayor), responsible for executive functions and maintenance of public order within his commune).
 - 3. In the ICTY, the doctrine of command responsibility was used in numerous indictments, to include those against Slobodan Milosevic (President of the FRY), Radovan Karadzic (as founding member and President of the Serbian Democratic Party) and Gen. Ratko Mladic (Commander of the JNA Bosnian Serb Army).
- E. The International Criminal Court establishes its definition of the requirements for the responsibility of Commanders and other superiors in Article 28 of the Rome Statute. Note that the responsibility of military commanders and those functioning as such addressed in subparagraph (a) differs from other superiors, i.e., civilian leaders (subparagraph (b)), in that only military commanders are responsible for information they *should* have known.
 - 1. Art. 28(a) states: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective

³³ ICTY Statute, art. 7(3); ICTR Statute, art. 6(3)(emphasis added).

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

- a. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- b. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

2. Art. 28(b) states: “With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- a. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- b. The crimes concerned activities that were within the effective responsibility and control of the superior; and
- c. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

F. Prosecution of command responsibility cases in the U.S. Military.

1. It is U.S. Army policy that soldiers be tried in courts-martial rather than international forums.³⁴
2. No separate crime of command responsibility or theory of liability exists, such as conspiracy, for command responsibility in the UCMJ.³⁵
3. UCMJ, art. 77, Principals.

³⁴ FM 27-10, para. 507.

³⁵ For a discussion of this and some proposed changes, see Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

- a. For a person to be held liable for the criminal acts of others, the non-participant must share in the perpetrator's purpose of design, and "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist...." Where a person has a duty to act, such as a security guard, inaction alone may create liability. However, Art. 77 suggests that *actual knowledge*, not a lack of knowledge due to negligence, is required.
- b. At the court-martial of Captain Medina for his alleged participation in the My Lai incident in Vietnam, the military judge instructed the panel that they would have to find that Medina, the company commander, had actual knowledge in order to hold him criminally liable for the massacre. There was not enough evidence to convict Captain Medina under the standard and he was acquitted of the charges.³⁶ Accordingly, it appears that in courts-martial, a prosecutor must establish actual knowledge on the part of the accused.

V. FORUMS FOR THE PROSECUTION OF WAR CRIMES

A. International v. Domestic Crimes.

1. Built on the concept of national sovereignty, jurisdiction traditionally follows territoriality or nationality.
2. Universal international jurisdiction first appeared in piracy cases where the goal was to protect trade and commerce on the high seas, an area generally believed to be without jurisdiction.
3. Universal jurisdiction in war crimes only first came into being in the days of chivalry where the warrior class asserted its right to punish knights that had violated the honor of the profession of arms, irrespective of nationality or location. The principle purpose of the law of war eventually became humanitarianism. The international community argued that crimes against "God and man" transcended the notion of sovereignty.

B. Current International Jurisdictional Basis.

1. Grave Breaches of the Geneva Conventions
 - a. As discussed above, the Geneva Conventions establishes universal jurisdiction over those offenses which it defines as grave breaches. "Each

³⁶ See U.S. v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973); U.S. v. Medina, C.M. 427162 (A.C.M.R. 1971).

High Contracting Party . . . shall bring [persons alleged to have committed grave breaches], regardless of their nationality, before its own courts.”³⁷

- b. There is no comparable provision granting universal jurisdiction over simple breaches.
2. Violation of the Laws and Customs of War. It is not clear the extent to which customary international law vests universal jurisdiction in States for serious violations of the law of war other than Geneva Conventions grave breaches. Most prosecutions have been sponsored by States intimately affected by the violations (e.g., Nuremburg, Tokyo) or been sanctioned by UN Security Council action. Some States, notably Belgium and Spain, have been active in charging alleged war criminals around the world. Spain has limited itself to cases where there has been a connection with Spain, generally cases where Spanish citizens have been among the victims. Belgium, in a 1993 law, passed a true universal jurisdiction law, which required no connection between the charged conduct and Belgium. Due to international concerns regarding sovereignty and practical difficulties, Belgium revised the law in 2003 to limit charges to those alleged offenses with a direct link to Belgium.
3. International Criminal Court.
 - a. The ICC has personal jurisdiction over:
 - i. State parties;
 - ii. Nationals of State parties;
 - iii. Conduct occurring within the territory of State parties;
 - iv. Non-party States acceding to jurisdiction
 - b. Recently, the ICC has been granted personal jurisdiction over nationals of non-signatory States through a UNSCR establishing jurisdiction. *See* UNSCR 1593 (referring charges to the ICC against sitting Sudanese President Omar el-Bashir for war crimes).
4. Ad hoc tribunals under the authority of UN Security Council (ICTY or ICTR) or separate treaty (Sierra Leone). Established via a UNSCR.

³⁷ GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

- C. Domestic Jurisdictional Bases. Each nation provides its own jurisdiction. The following is the current U.S. structure.
1. General Courts-Martial.
 - a. U.S. service members are subject to court-martial jurisdiction under UCMJ, art 2(a)(1).
 - b. UCMJ, art. 18, also grants general court-martial jurisdiction over “any person who by the law of war is subject to trial by military tribunal.”
 - c. In 2006, Congress amended UCMJ, art. 2(a)(10), to provide court-martial jurisdiction over civilians accompanying U.S. forces not only during a declared war³⁸ but also during “contingency operations,” which would include OIF, OEF and ISAF
 2. War Crimes Act of 1996. (18 U.S.C. § 2441) (amended in 1997 and 2006). Authorizes the prosecution of individuals in federal court if the victim or the perpetrator is a U.S. national (as defined in the Immigration and Nationality Act) or member of the armed forces of the U.S., whether inside or outside the U.S.. Jurisdiction attaches if the accused commits:
 - a. A Grave Breach of the 1949 Geneva Conventions.
 - b. Violations of certain listed articles of the Hague Conventions.
 - c. Some violations of Common Article 3 of the Geneva Conventions.
 - d. Violations of Amended Protocol II to the Conventional Weapons Treaty.
- D. The Military Extraterritorial Jurisdiction Act of 2000 may also serve as a basis for prosecution for war crimes. DoD issued implementing instructions in DoD Instruction 5525.11 on Mar. 3, 2005.
- E. Military Commissions.
1. Military commissions, tribunals, or provost courts may try individuals for violations of the law of war. (UCMJ, art. 21). This jurisdiction is concurrent with that of general courts-martial.

³⁸ Previous case law had strictly interpreted the “time of declared war” language. U.S. v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

2. Historical use can be traced back to Gustavus Adolphus and his use of a board of officers to hear law of war violations and make recommendations on their resolution. The British frequently used military tribunals throughout history, which was incorporated into the U.S. Military from its beginning. The continental army used military commissions to try Major John Andre for spying in conjunction with General Benedict Arnold. Military commissions were used by then General Andrew Jackson after the Battle for New Orleans in 1815, and again during the Seminole War and the Mexican-American War. The American Civil War saw extensive use of military tribunals to deal with people hostile to Union forces in “occupied” territories. Tribunal use continued in subsequent conflicts and culminated in World War II where military commissions prosecuted war crimes both in the United States and extensively overseas. Such use places the legitimacy of military commissions to try persons for war crimes firmly in customary international law.

3. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court called into question the President’s unilateral power to convene military commissions, a power which had earlier been recognized in *Ex parte Quirin*, 317 U.S. 1 (1942). Congress responded with Military Commissions Act of 2006.³⁹ The Act was revised and amended by the Military Commissions Act of 2009.⁴⁰ Among its most important provisions:
 - a. Jurisdiction is established over an alien who is also an “unprivileged enemy belligerent,” defined as an individual other than a privileged belligerent (i.e., one who qualifies for POW protection under GC III, art. 4) who:
 - i. Has engaged in hostilities against the United States or its coalition partners;
 - ii. Has purposefully and materially supported hostilities against the United States or its coalition partners; or
 - iii. Was a part of al Qaeda at the time of the alleged offense.⁴¹

 - b. Sets forth in detail procedures to be followed in such commissions, which generally follow those of general courts-martial, with the exception of:
 - i. Speedy trial;

³⁹ Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006), *codified at* 10 U.S.C. §§ 948a *et seq.*

⁴⁰ Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.

⁴¹ 10 U.S.C. § 948a.

- ii. Rules related to compulsory self-incrimination; and
 - iii. The requirement for pre-trial investigations (i.e., Article 32, UCMJ investigations).⁴²
- c. Specifically excludes from evidence any statements obtained through torture or other cruel, inhuman, or degrading treatment. Other statements are admissible if probative and voluntary.⁴³
 - d. Defines the specific crimes amenable to trial by military commission.⁴⁴ The crimes are generally consistent with “classic” war crimes, though a new offense of “terrorism” is included.⁴⁵

FOR FURTHER READING

- A. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS (1947) (42 volumes).
- B. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (15 volumes).
- C. INTERNATIONAL JAPANESE WAR CRIMES TRIALS IN THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (209 volumes).
- D. UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (15 volumes).
- E. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).
- F. Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993); further amended in U.N. Security Council Resolutions 1166 (13 May 1998), 1329 (30 Nov 2000) and 1411 (17 May 2002).
- G. Rules of Procedure & Evidence, International Criminal Tribunal for the Former Yugoslavia Since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 22 (Dec. 13, 2001).
- H. S.C. Res. 955, U.N. SCOR, U.N. DOC. S/RES/955(1994), *reprinted in* 33 I.L.M. 1598, Nov. 8, 1994 [Statute for the International Criminal Tribunal for Rwanda].
- I. YORAM DINSTEIN & MALA TABROY, WAR CRIMES IN INTERNATIONAL LAW (1996).

⁴² 10 U.S.C. § 948b. Sub-chapters III – VII contain the detailed procedures, from Pre-Trial through Post-Trial matters.

⁴³ 10 U.S.C. § 948r.

⁴⁴ 10 U.S.C. § 950t.

⁴⁵ 10 U.S.C. § 950t(24).